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Clayton Cramer



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## STATE COURT STANDARDS OF REVIEW FOR THE RIGHT TO KEEP AND BEAR ARMS

David B. Kopel\* & Clayton Cramer\*\*

After the United States Supreme Court's decision in *District of Columbia v. Heller*,<sup>1</sup> federal courts must consider which standard of review and other analytical tools to evaluate claims about the Second Amendment right to keep and bear arms. The Court in *McDonald v. City of Chicago*,<sup>2</sup> argued March 2, 2010, may use the Fourteenth Amendment to require that state and local governments respect the Second Amendment right. If this occurs, many more cases

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1. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).
2. *McDonald v. City of Chicago*, 130 S. Ct. 1037 (2009).

may be expected in federal courts. While federal courts have relatively little experience in Second Amendment cases, nearly two centuries of state court cases interpreting state right to arms guarantees provide useful guidance. Starting with the 1822 Kentucky case of *Bliss v. Commonwealth*,<sup>3</sup> state courts have used a variety of analytical techniques to decide whether a particular law or practice violates the right. These decisions vary greatly in both analysis and result. Some are flatly contrary to the standards set by the *Heller* Court, and are of no use to a court in deciding a Second Amendment case. Other state cases, however, can be quite helpful.

In this article, we survey state constitution right-to-arms cases from 1822 to the present, and explicate some analytical techniques for federal courts addressing Second Amendment cases. Of course, the courts of prior generations did not write in precisely the same constitutional idiom as we do today, but while the terms of art may have been different, many of the analytical tools are the same.

As we will show, the most important tool has been what today we call “categoricalism.” That is, the court decides whether something is inside or outside the right.<sup>4</sup> If it is inside, it may not be prohibited; if it is outside, it may be banned. In twenty-first century constitutional law, we are most familiar with categoricalism in a First Amendment context. For example, the works of William Shakespeare, as well as anonymous political leaflets, are “inside” the First Amendment and may not ordinarily be banned.<sup>5</sup> Meanwhile, obscenity, libel, and conspiracies in the restraint of trade are

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3. *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822).

4. Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 381–83 (2009).

5. See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341 (1995) (holding that banning anonymous election pamphleteering is unconstitutional); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 516, 518 (4th Cir. 2002) (“[T]he plain language of the restrictions prohibits on licensed premises any entertainment that ‘simulates’ sexual behavior, even if performers are fully clothed or covered, and even if the conduct is integral to the production—for example, a political satire, a Shakespeare play depicting young love, or a drama depicting the horrors of rape. . . . In fact, in recent years, the Supreme Court has strongly reaffirmed its refusal to allow even a most compelling state interest—protecting children from pornography—to justify broadly drawn regulations that sweep beyond their legitimate reach to restrict the availability of art that adults have a constitutional right to view.”).

“outside,” and may be prohibited.<sup>6</sup>

State courts have long used a similar type of categoricalism in right to arms analyses to decide whether a particular type of arm (e.g., handguns or bowie knives), person (e.g., a free black or a legal alien), or activity (e.g., carrying a concealed handgun) is inside or outside the right.<sup>7</sup> Similarly, the *Heller* Court applied categoricalism: possession of handguns within the home; self-defense with rifles, shotguns, or handguns; and the carrying of guns within one’s home are all “inside” the Second Amendment, and therefore could not be banned.<sup>8</sup>

The results of the categorical cases vary from state to state, due in part to differences in the texts of the state constitutional guarantees. We do not necessarily expect that twenty-first century cases on the Second Amendment would always reach the same results as the earlier state categoricalism cases. First of all, the Second Amendment text differs from most of the state texts. Some state constitutional guarantees articulate only a “common defence” purpose for the right to arms, and the courts of some of those states narrowly construed the arms right as including only arms that were useful for militia purposes.<sup>9</sup> Under *Heller*, however, the right of personal self-defense lies at the core of the Second Amendment.<sup>10</sup>

Second, *Heller* provides a restrictive standard for what types of arms may be banned—only those “not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”<sup>11</sup> Many state court decisions have been consistent with the *Heller* standard, but as this article will detail, some have not.

Several scholars have suggested that the well-developed analytic tools originally created for the First Amendment can

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6. Various boundary-setting rules help ensure that obscenity or libel laws apply only to hard-core obscenity or libel. The boundary rules aim to ensure that other, protected, speech is not harmed by laws against libel or obscenity. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Miller v. California*, 413 U.S. 15 (1973).

7. See, e.g., *infra* text accompanying notes 63–99, 118–30, 134–35.

8. *Heller*, 128 S. Ct. at 2817–18. See generally Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009).

9. See *infra* text accompanying notes 91–96.

10. *Heller*, 128 S. Ct. at 2801.

11. *Id.* at 2815–16.

also be applied to the Second Amendment.<sup>12</sup> State courts have applied various techniques of strict scrutiny to the right to arms, including “narrow tailoring,” “overbreadth,” and “less restrictive alternative.”<sup>13</sup>

Courts also use narrow construction as another technique of constitutional adjudication, in order to avoid potential constitutional conflicts.<sup>14</sup> This is a venerable technique for state right-to-arms cases. For example, one court construed a common law crime of gun carrying narrowly, so as to prohibit only carrying for nefarious purposes.<sup>15</sup> Another court avoided constitutional conflict when it held that possessing a gun in the glove compartment of a car did not constitute “carrying” under a Florida statute that outlawed concealed carrying.<sup>16</sup>

Some state cases are unhelpful to rigorous modern federal courts. For example, some courts have analyzed gun laws in vague terms such as “reasonable” or “balancing test,” without providing any standards for what makes something reasonable, or how to balance.<sup>17</sup> Likewise, a few state courts have asserted that a gun control law is constitutional if it is within the “police power,” which these courts interpreted broadly to mean that the legislative body sought to protect public safety.<sup>18</sup>

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12. See generally Gary E. Barnett, Note, *Reasonable Regulation of the Right to Keep and Bear Arms*, 6 GEO. J. L. & PUB. POL’Y 607, 622–28 (2008); Christopher Chrisman, *Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms*, 43 ARIZ. L. REV. 439, 448–49 (2001); Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. REV. 195, 235–37 (2009); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923 (2009). Cf. Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037, 1049–67 (2009) (“The right to bear arms and the freedom of the press presented the exact same type of question for the Framers: can there ever be a natural right to a man-made device? In the case of arms and presses, the Framers believed so.”). The Lee article demonstrates that the Founders and the early U.S. constitutions considered firearms and presses to be very similar, constitutionally speaking—and that both rights had a similar historical development, and that *Heller* relies on First Amendment analogies).

13. See, e.g., cases discussed at notes 265–66, 450–55, 483, 523–30.

14. E.g., *Citizens United v. FEC*, 130 S. Ct. 876, 917–18 (2010) (noting “our willingness to construe ambiguous statutes to avoid constitutional problems”).

15. See *infra* note 119 and accompanying text.

16. *Watson v. Stone*, 4 So. 2d 700, 702–03 (Fla. 1941). The case is discussed in detail *infra*.

17. See *infra* notes 214, 315, 326.

18. See, e.g., text accompanying notes 506–22, 546–55.

If this seems like a plausible argument, then apply the same reasoning to a city ordinance banning adult bookstores in the interest of reducing rape. In the same way that legislators might genuinely, but mistakenly, believe that sales of sexually oriented material cause a small fraction of lustful customers to commit rape, legislators might genuinely but mistakenly believe that sales of firearms lead a small fraction of buyers to commit murder. Such beliefs might qualify as having a rational basis without being statistically valid. Yet few judges would consider a sincere legislative belief sufficient reason for an adult bookstore ban—and, as we will see later,<sup>19</sup> more than a few judges have concluded that sincere (or even purported) legislative belief alone is sufficient to justify certain gun control laws.

Lastly, one court stated in dicta that gun control laws were constitutional so long as the right to arms was not destroyed.<sup>20</sup> Some extreme cases from the Southern and border states during the Jim Crow era came close to destroying the right to own and carry handguns.

We know from *Heller* that these deferential standards of review are not applicable to the Second Amendment. The *Heller* majority specifically rejected the “interest balancing” approach that Justice Breyer proposed in his dissent.<sup>21</sup> Justice Breyer’s interest balancing test is more rigorous than mere “reasonableness,” but the *Heller* majority found interest balancing to be inappropriate for the core of the Second Amendment right because such balancing is inappropriate for the core of any enumerated right.<sup>22</sup>

Further, the District of Columbia’s handgun ban was within the “police power” of the D.C. City Council; the ban was supported by formal findings of fact about the purported

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19. See, e.g., *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994).

20. See notes 100–04 and accompanying text.

21. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008).

22. Justice Scalia wrote for the majority:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.

*Id.* (emphasis omitted).

public safety dangers of handguns.<sup>23</sup> But merely being within the police power did not make the handgun ban constitutional. Handguns constitute about a third of the total American gun supply,<sup>24</sup> so a ban on handguns does not obliterate the right to arms. Yet a handgun ban was still invalid.

Hundreds of state courts cases have interpreted and constructed the right to arms.<sup>25</sup> This article does not attempt to discuss them all; it includes the cases in which a law was held unconstitutional because such cases are necessarily among the most important, and because those cases are the ones in which a court is especially likely to produce an opinion explaining how to determine which kind of gun control laws are constitutional and which are not.

Because no law review has ever published an in-depth analysis of the full scope of state cases, this article fills some of the gap. Part II studies the antebellum cases, Part III the post-bellum nineteenth century cases, Part IV the early twentieth century cases, and Part V the cases since World War II. But first, in Part I, we offer some broad analysis of standards of review, and discuss Adam Winkler's *Michigan*

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23. *Id.* at 2860 (Breyer, J., dissenting).

24. See GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* (1997).

25. For an analysis of almost all cases from the Founding to the late twentieth century, see CLAYTON CRAMER, *FOR THE DEFENSE OF THEMSELVES AND THE STATE* (Greenwood Publishing 1994).

Interpretation is determining the linguistic meaning of terms. Determining whether the Second Amendment protects the people, or only militias, is a matter of "interpretation." In a more trivial sense, so is determining that Second Amendment "arms" means "some, but not all, weapons" rather than "limbs." In contrast, "construction" involves judicial creation of rules to implement a constitutional provision. Interpretation of the Fourth Amendment tells us that individuals have a right not to be searched except when certain conditions are satisfied. The Exclusionary Rule is the product of constitutional "construction," through which courts determined that barring certain evidence from court is an appropriate means to effectuate that right.

In the First Amendment context, interpretation tells us that people have a right to speak and assemble. Construction tells us that "time, place, and manner" regulations for speech/assembly in public places are not a violation of those rights. In the Second Amendment context, construction is needed to determine what constitutes an infringement. *Heller's* list of permissible gun controls is most plausibly understood as a form of constitutional construction—that is, something which is not the result of "interpretation" of original meaning or understanding, but rather as part of a necessarily continuous, on-going process of detailing the legal content of the Constitution. See Solum, *supra* note 12, at 973.



*Law Review* article that proposed “reasonableness” as the Second Amendment standard of review.

# I. *HELLER*, STRICT SCRUTINY, AND THE END OF ADAM WINKLER’S “REASONABLENESS” THEORY

Before *Heller*, Adam Winkler penned an influential *Michigan Law Review* article which urged the application of “reasonableness,” the weakest standard of review from state cases, to Second Amendment cases.<sup>26</sup> Winkler and Erwin Chemerinsky wrote an amicus brief to the same effect in *Heller*.<sup>27</sup> In *McDonald v. Chicago*, the amicus brief for the Brady Center (America’s leading anti-gun organization) likewise extolled the weakest state cases, and urged that their minimalist approach be adopted.<sup>28</sup> *Heller* rejected mere reasonableness and other weak standards.<sup>29</sup> Thus, unless the Supreme Court modifies *Heller*, the approach simply is not viable in Second Amendment cases.

Winkler wrote that “[n]o state’s courts apply strict scrutiny or any other type of heightened review to gun laws.”<sup>30</sup> This claim is incorrect. As we will detail, some state courts have used narrow tailoring, overbreadth, and the “less restrictive alternative” test to evaluate gun control laws.<sup>31</sup> As Winkler acknowledged, these are the tools of strict scrutiny.<sup>32</sup>

Winkler also argued that “[u]nder the standard uniformly applied by the states, any law that is a ‘reasonable regulation’ of the arms right is constitutionally permissible.”<sup>33</sup> This too is not accurate. As this article will detail, there are indeed many cases that follow the approach Winkler described—but there are also many that do not. There is a long record of cases in which courts ponder whether a particular activity (e.g., a certain method of carrying arms) or a particular item

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26. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 683 (2007).

27. Brief of Law Professors Erwin Chemerinsky and Adam Winkler, as Amici Curiae in Support of Petitioner, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 157186.

28. Brief for Amici Curiae Brady Center to Prevent Gun Violence, et al. in Support of Neither Party, *McDonald v. City of Chicago*, No. 08-1521, 2009 WL 4099514 (7th Cir. Nov. 23, 2009).

29. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 (2008).

30. Winkler, *supra* note 26, at 686–87.

31. *See infra* Part V.J.

32. Winkler, *supra* note 26, at 728.

33. *Id.* at 687.

(e.g., a handgun or bowie knife) is within the scope of the right to arms; if it is within the scope, then the restriction or ban is unconstitutional—period. These courts conducted no further analysis of “reasonableness,” and did not apply a “balancing test.”<sup>34</sup>

After *Heller*, we know that at least one state constitutional case was “wrongly” decided, in the sense that it stands for the opposite of *Heller*. In the 1984 case *Kalodimos v. Morton Grove*,<sup>35</sup> a divided Illinois Supreme Court upheld a suburb’s handgun ban. The *Kalodimos* court was interpreting the Illinois Constitution, not the federal Second Amendment. But to the extent that state constitution cases can provide guidance for Second Amendment interpretation, *Kalodimos* is a perfect case—perfect in that had it been a Second Amendment case, we know that it would be exactly wrong. *Kalodimos* says that handgun bans are permissible,<sup>36</sup> and *Heller* says that they are not.

We can look at *Kalodimos* and study precisely the kind of reasoning *Heller* shows to be incorrect as applied to the Second Amendment. As we will detail *infra*,<sup>37</sup> *Kalodimos* makes two central mistakes. First, it says that any gun control law is valid if enacted pursuant to the “police power.” Under *Kalodimos* and its progeny in other states, this simply means that the legislature or city council said that the law would reduce crime.

Second, *Kalodimos* declared (to Winkler’s apparent approval) that the right to arms could be subject to “substantial infringement” so long as it was not eliminated.<sup>38</sup> Since Morton Grove residents could still own rifles or shotguns, the right was not eliminated and handguns could be outlawed.

*Heller* teaches that *Kalodimos* and every case employing similar reasoning (that invocation of the police power is sufficient justification, or that the right may be infringed as long as it is not destroyed) are incorrect as Second

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34. See *infra* text accompanying notes 63–99, 118–30, 134–35, 252–57, 431–33, 467–500.

35. *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266 (Ill. 1984).

36. *Id.* at 273.

37. See *infra* note 506 and accompanying text.

38. Winkler, *supra* note 26, at 718–19 (citing *Kalodimos*, 470 N.E.2d at 278).

Amendment guides. Indeed, *Heller* teaches the opposite of *Kalodimos* and similar cases; under *Heller*, merely writing the magic words “police power” is not enough to justify gun control.<sup>39</sup> Rights infringements may be invalid even if the right is not destroyed.

Winkler cited many cases, but when one removes those that, post-*Heller*, are plainly invalid as Second Amendment guides, the support for his “reasonableness” standard begins to look thin.<sup>40</sup>

Even pre-*Heller*, Winkler’s thesis was somewhat overstated. For example, he wrote that in the early nineteenth century, “Georgia and Tennessee criminalized the sale of certain weapons that were easily concealed.”<sup>41</sup> He does not appear to be aware that the Georgia law, which banned most handguns, was declared unconstitutional as a violation of the Second Amendment in *Nunn v. State*.<sup>42</sup> More significantly, Winkler overlooked the fact that *Lakewood v. Pillow*, a leading Colorado case that has been followed in several other states, explicitly uses the tools of strict scrutiny: narrow tailoring, overbreadth, and less-restrictive alternative.<sup>43</sup>

Before and after *Heller*, scholars have written useful articles detailing how a meaningful standard of review might be adopted for the Second Amendment. Calvin Massey proposes “semi-strict scrutiny.”<sup>44</sup> A comment by Andrew Gould, which Larry Solum’s “Legal Theory Blog” lauded as “[a] very interesting student note” suggests that “deferential strict scrutiny” is the implicit standard in *Heller*.<sup>45</sup> A key

39. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821–22 (2008).

40. The invalid cases include not only *Kalodimos v. Morton Grove*, which upheld a handgun ban, but also every other case that fits Winkler’s paradigm of using “reasonable” to mean that any law which does not destroy the right will be upheld, if the law can pass a rational basis test.

41. Winkler, *supra* note 26, at 710.

42. See *infra* text accompanying notes 125–30.

43. See Winkler, *supra* note 26, at 724 (recognizing “broadness” as part of the “reasonable regulation” standard); see also *infra* text accompanying notes 449–51.

44. Calvin Massey, *Guns, Extremism, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1133 (2000).

45. Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within District of Columbia v. Heller*, 62 VAND. L. REV. 1535 (2009). The note argues that *Heller*’s implicit standard of review is not conventional strict scrutiny, because *Heller*’s list of “presumptively” valid gun controls would not pass the test. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817–18

element of deferential strict scrutiny is that the court does not blindly accept a legislative assertion that a law is necessary to protect public safety.<sup>46</sup> Rather, the court may review empirical evidence to see if the law really is narrowly tailored.<sup>47</sup> Other writers have proposed applying strict scrutiny for certain gun controls (especially bans on firearms), while applying intermediate scrutiny for others.<sup>48</sup> One of the reasons that strict scrutiny has been applied to racial classifications is the significant possibility that they may have “invidious” motives.”<sup>49</sup> Certainly, there is a similar risk for many extant anti—gun laws. Groups that are openly determined to eradicate the right recognized in *Heller*, such as the National Coalition to Ban Handguns, have lobbied for and influenced these laws.<sup>50</sup>

Furthermore, six states have no right to arms in their constitution,<sup>51</sup> and in two others the right was judicially nullified.<sup>52</sup> In these eight states, it is possible legislators may have enacted gun control laws without paying the slightest attention to whether those laws infringed the right to keep

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(2008). Nor is intermediate scrutiny the standard, because intermediate scrutiny does not apply to fundamental rights, and *Heller* strongly suggests that the Second Amendment is fundamental. *Id.* at 2798. Therefore, Gould concludes that the implicit standard of *Heller* is “deferential strict scrutiny,” which the majority used in *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), and what Justices Scalia and Thomas endorsed in a dissent in a different case. Gould, *supra* note 45, at 1570–73.

46. Gould, *supra* note 45, at 1570–73.

47. *Id.*

48. Barnett, *supra* note 12, at 623; Klukowski, *supra* note 12, at 235–36.

49. See *Johnson v. California*, 543 U.S. 499, 505–06 (2005); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); cf. Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 453–54 (1996) (arguing that First Amendment strict scrutiny is also used to search for invidious motives).

50. In 1989, the group changed its name to the Coalition to Stop Gun Violence. “Assault weapon” prohibition had become a major national issue, and the group became involved in public campaign to ban some rifles and shotguns, as well as all handguns.

51. The six states are California, Iowa, Maryland, Minnesota, New Jersey, and New York.

52. Kansas and Massachusetts have judicially nullified the right to arms. For Kansas, see *infra* text accompanying notes 259–65, which also point out that the nullification was partially undone in 1979. For Massachusetts, see *Commonwealth v. Davis*, 343 N.E.2d 847 (Mass. 1976). For a critique of the nullification cases, see David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99.

and bear arms. If the Supreme Court in *McDonald* applies the Second Amendment to the states, courts should be particularly vigilant in their review of Second Amendment claims because there is no reason to believe these laws were intended to be consistent with Second Amendment rights.

Winkler suggested that gun control laws are never invidious because their motive “is to enhance public safety.”<sup>53</sup> But Winkler could not have known the motivations of the tens of thousands of legislators over many decades who have voted for the thousands of gun controls in force today. The mere declaration that a statute is enacted for the purpose of public safety is hardly proof that there was no invidious motive. Racial classification laws provide an analogy. These laws—from Virginia’s 1680,<sup>54</sup> 1723,<sup>55</sup> and 1738<sup>56</sup> statutes barring free blacks from possessing firearms, through Jim Crow and up to the present—have usually been accompanied by claims that the racist laws protect public safety or serve some other public purpose.<sup>57</sup>

Courts employing heightened scrutiny can and often *do* examine the motivations behind a particular statute, and sometimes courts employing rational basis scrutiny also examine motives carefully.<sup>58</sup> Legislators have sometimes

53. Winkler, *supra* note 26, at 701.

54. 2 WILLIAM WALLER HENING, THE STATUTES AT LARGE 481–82 (University Press of Virginia 1969) (1619).

55. 4 WILLIAM WALLER HENING, THE STATUTES AT LARGE 131 (University Press of Virginia 1969) (1619).

56. 5 WILLIAM WALLER HENING, THE STATUTES AT LARGE 17 (University Press of Virginia 1969). A complete collection of racially and religiously discriminatory colonial gun control statutes may be found at Primary History Sources. See Primary History Sources, <http://www.claytoncramer.com/primary/primary.html#RaceGunControlStatutes> (last visited Mar. 28, 2010).

57. See, e.g., *New Firearms Law Effective on August 7*, S.F. CHRON., July 15, 1923, at 3 (featuring an advisor to California Governor Richardson, who argues that while the ban on resident aliens owning handguns might be constitutionally problematic, if the law were sustained by the courts, it would have “salutary effect in checking tong wars among the Chinese and vendettas among our people who are of latin descent”). Parts of this statute remain in effect today, as California’s discretionary concealed weapon permit issuance law. See *id.*

58. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 56–57 (1985) (using *Lemon* to examine whether law regarding school prayer had a secular purpose); *Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (finding that a state constitutional amendment barring laws against discrimination on the basis of sexual orientation did not have a rational relation to its states objectives, and therefore must have been motivated by animus); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (rational basis review found that government decision was

frankly stated in official records of debates that their objective was to suppress gun ownership or gun culture, or to prevent people from using or carrying firearms for self-defense.<sup>59</sup> To recognize that some gun control laws have invidious purposes is not to say that all or even most of them do. Heightened scrutiny is the right tool for identifying the ones that are invidious.

There is no reason to believe that Winkler has any animus towards gun owners. But it would be fair to say that his argument for weak scrutiny is not founded on strong respect for Second Amendment rights. In support of weak scrutiny, he analogized legislators enacting gun control laws to prison administrators controlling the inmates.<sup>60</sup> With all due respect, free citizens cannot be analogized to prison inmates, and legislators cannot be analogized to prison wardens.

## II. ANTEBELLUM CASES

Before the Civil War, gun control was primarily a Southern phenomenon, at least in terms of laws strict enough to provoke a judicial test. The only non-Southern state to produce an antebellum case was Indiana, and even Indiana

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based on "irrational prejudice").

59. See, e.g., *Nordyke v. King*, 563 F.3d 439, 443 (9th Cir. 2009), *reh'g en banc granted* 575 F.3d 890 (9th Cir. 2009) (sponsor of county ordinance against gun shows complained about "spineless people hiding behind the constitution," and said that gun shows "provide a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism."); Daniel Greene, *The Case for Owning a Gun*, THE WASHINGTONIAN, Mar. 1985 (David Clarke, the chairman of the D.C. City Council committee that created the District's handgun ban, stated: "I don't intend to run this government around the moment of survival,").

60. In *Turner v. Safley*, the Supreme Court wrote that "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." Winkler, *supra* note 26, at 714 (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)). After this quote, Winkler wrote:

Substitute 'legislators' for 'prison officials' and 'gun safety' for 'prison administration,' and the logic of *Turner's* deference retains its persuasive force. Weapons require some degree of regulation, but the problems of gun violence and crime have proven enormously difficult to solve even with legislative flexibility and room to experiment. Second Amendment heightened review, if applied aggressively, could make finding those solutions even more difficult.

*Id.* at 714.

had, in its southern portion, a notable border state character.<sup>61</sup> By far the leading controversy during the antebellum era involved laws prohibiting concealed carrying of weapons. Historical analysis suggests these laws were considered essential to the suppression of dueling.<sup>62</sup>

#### A. Kentucky (1822)

The first antebellum state decision, *Bliss v. Commonwealth*,<sup>63</sup> was a categorical one. The Kentucky Constitution stated: "That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned."<sup>64</sup> The defendant in *Bliss* had been carrying a sword-cane, a small sword which fit into the hollow space inside a walking stick.<sup>65</sup> He thus violated a legislative ban on the carrying of concealed weapons and was fined.<sup>66</sup> The Kentucky Supreme Court held that the law was invalid because the right pre-dated the Constitution: "The right existed at the adoption of the constitution; it had then no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but in the liberty of the citizens to bear arms."<sup>67</sup>

The court reasoned that there was "no difference between a law prohibiting the wearing of concealed arms, and a law forbidding the wearing such as are exposed."<sup>68</sup> Since the latter is obviously within the scope of the right "to bear arms" for "defence of themselves" (this would include self-defense), then the former is equally protected.<sup>69</sup>

#### B. Indiana (1833)

In *State v. Mitchell*, the Indiana Supreme Court upheld

61. See, e.g., KEVIN P. PHILLIPS, *THE COUSINS' WARS: RELIGION, POLITICS, AND THE TRIUMPH OF ANGLO-AMERICA* 367 (1999) (stating that as of 1860, "the southern portions of Ohio, Indiana, and Illinois were border state in character").

62. See CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM* 139–40 (Greenwood Publishing 1999).

63. *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822).

64. KY. CONST. of 1792, art. X, cl. 23 (amended 1799) (adding "That" in 1799).

65. *Bliss*, 12 Ky. (2 Litt.) 90.

66. *Id.* at 90.

67. *Id.* at 92.

68. *Id.*

69. *Id.* at 90.

an 1831 ban on the concealed carrying of deadly weapons, but articulated no theory whatsoever.<sup>70</sup> The entire decision—really, just a refusal to hear an appeal—reads: “It was *held* in this case, that the statute of 1831, prohibiting all persons, except travelers, from wearing or carrying concealed weapons, is not unconstitutional.”<sup>71</sup> The decision contains no rationale at all, yet other state courts repeatedly cited this decision as precedent.

Given the absence of reasoning, *Mitchell* is not much use to modern courts. For legal history purposes, however, it does foreshadow later nineteenth century cases that used categoricalism to place the concealed carry outside the scope of the right to bear arms.

### C. *Tennessee (1833–1840)*

In an 1833 Tennessee case, the court employed what is known today as “overbreadth” to find a common law crime unconstitutional.<sup>72</sup> An 1840 case used categoricalism to exclude certain arms from the state constitutional right, to allow restrictions on carrying, and to affirm an “absolute” right to “keep” weapons that were within the scope of the arms right.<sup>73</sup>

In 1833, the Tennessee Constitution stated: “That the freemen of this State have a right to Keep and to bear Arms for their common defence.”<sup>74</sup> This is a common formulation of early American state constitutions. Some courts have read the “common defense” language restrictively, in order to allow bans on some arms and restrictions on carrying arms.<sup>75</sup> While the right was for “the common defense,” the right belonged to all citizens, not only to militiamen.<sup>76</sup>

An old English statute restricted going armed in public.<sup>77</sup>

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70. *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833).

71. *Id.* This decision was so brief that it was necessary to find even the language of the challenged statute from a later decision, *State v. Reid*, *infra*.

72. For a discussion of modern overbreadth doctrine, see John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53 (2004).

73. See text accompanying notes 86 & 90.

74. TENN. CONST. of 1796, art. XI, § 26.

75. See *infra* text accompanying note 94.

76. See *infra* text accompanying notes 77, 86 & 90. One 1842 Arkansas judge, however, viewed the language as negating an individual right; the 1976 Supreme Judicial Court of Massachusetts found the same. *State v. Buzzard*, 4 Ark. 18 (1842); *Commonwealth v. Davis*, 343 N.E.2d 847 (Mass. 1976).

77. “[T]he statute of the 2d Edward III, which enacts, that no man, great



As construed by the English courts, the statute applied only to arms carrying with the specific intent of terrorizing the public.<sup>78</sup> A related but separate criminal charge was affray, which occurs when two persons fight in a public place “to the terror of his majesty’s subjects.”<sup>79</sup> The 1833 Tennessee Supreme Court, in *Simpson v. State*, dismissed an indictment charging the common law crime of affray.<sup>80</sup> As expressed in the indictment, the terms of the offense were potentially broad enough to criminalize gun carrying for innocent purposes.<sup>81</sup> Therefore, the offense violated the constitutional right to bear arms.<sup>82</sup>

Five years later, the Tennessee legislature enacted a statute to ban carrying Bowie knives and Arkansas toothpicks<sup>83</sup>—two particularly large and deadly knives said to

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nor small, of what condition soever he be, except the king’s servants, etc., shall go or ride armed by night or by day, etc.” *Simpson v. State*, 13 Tenn. (5 Yer.) 356, 356 (1833).

78. Sir John Knight’s Case (1686), 87 Eng. Rep. 75 (K.B.); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 104–05 (1994) (explaining that the result in *Knight’s Case* comported with previous standards of enforcement, until the time of James II, who was deposed in the Glorious Revolution partly because of his attempts to limit gun rights). William Blackstone’s *Commentaries* articulates (but does not clarify) that to “go about with unusual weapons or attendance, to the terror of the people” is a public wrong. WILLIAM BLACKSTONE, *COMMENTARIES* \*254.

79. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*144–45.

80. *Simpson*, 13 Tenn. (5 Yer.) at 357.

81. The indictment stated:

[W]ith force and arms . . . being arrayed in a warlike manner, then and there in a certain public street and highway situate, unlawfully, and to the great terror and disturbance of divers good citizens of the said state, then and there being, an affray did make, in contempt of the laws of the land, to the evil example of all others in the like case offending, and against the peace and dignity of the state.

*Id.* at 356.

82. The indictment further stated:

By this clause of the constitution, an express power is given and secured to all the free citizens of the state to keep and bear arms for their defence, without any qualification whatever as to their kind or nature; and it is conceived, that it would be going much too far, to impair by construction or abridgment a constitutional privilege which is so declared; neither, after so solemn an instrument hath said the people may carry arms, can we be permitted to impute to the acts thus licensed such a necessarily consequent operation as terror to the people to be incurred thereby; we must attribute to the framers of it the absence of such a view.

*Id.* at 359–60.

83. ACTS PASSED AT THE FIRST SESSION OF THE TWENTY-SECOND GENERAL ASSEMBLY OF THE STATE OF TENNESSEE: 1837–8, at 200–01 (1838).

be used mainly by ruffians and brawlers. The state constitutional arms provision was narrowed in 1834 (following Nat Turner's Rebellion, an 1831 slave uprising in Virginia) to limit it to "free white men;"<sup>84</sup> it was one of a very few state provisions which defined the right as belonging to "men."<sup>85</sup> From the start, the Tennessee provision had specified only one purpose: "common defence."

*Aymette v. State*, decided in 1840, was one of the most influential state cases; it held that the right "to bear arms for their common defence" meant only bearing arms in a militia.<sup>86</sup> Its militia-centric holding cannot be transposed to the Second Amendment. The Second Amendment protects "the people," not just "free white men."<sup>87</sup> Further, the U.S. Senate rejected a proposal to revise the Second Amendment to limit it to "the common defence."<sup>88</sup> *Heller*, of course, held that the Second Amendment right is not connected to service in a well-regulated militia.<sup>89</sup>

While *Aymette*'s holdings concerning the purpose of the right to bear arms are not useful for interpreting the Second Amendment in the twenty-first century, the *Aymette* decision's categoricalism is useful. The facts of the case are as follows:

*Aymette*, during the sitting of the circuit court in June 1839, at Pulaski, Giles county, had fallen out with one

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Some experts argue that the terms "Bowie knife" and "Arkansas toothpick" are too vague to be legally enforceable. They derive from a famous 1827 melee in which Jim Bowie participated, but historians are still uncertain as to what his knife looked like. See *AKTI Approved Knife Definitions*, NEWS & UPDATE (Am. Knife & Tool Inst., Cody, Wyo.), 2005, at 3, available at <http://www.akti.org/PDFS/AKTIDefinitions.pdf>.

84. "That the free white men of this State have a right to keep and to bear arms for their common defence." TENN. CONST. of 1834, art. I, § 26. The 1796 Tennessee provision said "freemen," but this term was perhaps easier to construe inclusively for both sexes (just as "mankind" includes males and females) than was "free white men."

For a thoughtful analysis of the Tennessee constitutional right to arms, see generally Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution*, 61 TENN. L. REV. 647 (1994).

85. From 1836–1838, the Arkansas right was for "free white men," as was the Florida right from 1838–1865. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. L. REV. & POL. 191, 195 (2006).

86. *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840).

87. U.S. CONST. amend. II.

88. JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 77 (1820).

89. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2814 (2008).

Hamilton, and at about ten o'clock, p.m., he went in search of him to a hotel, swearing he would have his heart's blood. He had a bowie-knife concealed under his vest and suspended to the waistband of his breeches, which he took out occasionally and brandished in his hand. He was put out of the hotel, and proceeded from place to place in search of Hamilton, and occasionally exhibited his knife.<sup>90</sup>

Today, Aymette might be indicted for brandishing a deadly weapon. Criminalizing Aymette's conduct would not violate the Second Amendment. The Tennessee Supreme Court, though, had to decide whether he could be punished for violating a simple ban on concealed carry of Bowie knives. The answer was "yes."

First, the Tennessee court held that the right "to bear arms for their common defence" meant only bearing arms in a militia.<sup>91</sup> To carry or wear guns for other purposes, such as hunting, was not to "bear."<sup>92</sup> This was not an absurd interpretation of the Tennessee provision, considering the provision's particular language.

The "civilized warfare" test, a rule first articulated in *Aymette*, became popular in some (especially Southern) state courts in the nineteenth century. Under the test, only those types of arms that would be useful in a militia were included in the right to arms.<sup>93</sup> Rifles and swords were included, while Bowie knives and Arkansas toothpicks were not. The test did not state that only militiamen could have guns, but it did state that the right to own weapons was only for militia-type weapons.<sup>94</sup>

According to the Tennessee court, citizens had an "unqualified" right to *keep* militia type arms:

The citizens have the unqualified right to keep the weapon, it being of the character before described as being intended by this provision. But the right to bear arms is not of that unqualified character. The citizens may bear them for the common defence; but it does not follow that they may be borne by an individual, merely to terrify the people or for purposes of private assassination.<sup>95</sup>

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90. *Aymette*, 21 Tenn. (2 Hum.) at 155.

91. *Id.* at 158.

92. *Id.*

93. *Id.* at 158–59.

94. *Id.* at 159–60.

95. *Id.* at 160.

Although *Aymette* spoke broadly about the meaning of “bear,” the preceding quote suggests that the right to bear simply excluded carrying “to terrify the people or for purposes of private assassinations.”<sup>96</sup> By 1871, the Tennessee court would more explicitly state that the right to bear included the right to carry for ordinary, peaceful purposes.<sup>97</sup>

Like the previous state decisions, *Aymette*’s civilized warfare test is inapplicable to the modern Second Amendment. Otherwise, the M-16 automatic rifle would be at the core of the Second Amendment. *Heller* plainly indicates the contrary.<sup>98</sup> Accordingly, the modern test of which arms are protected is whether such arms are in common use for self-defense and other lawful purposes.<sup>99</sup> *Aymette* is useful for modern courts not because of its particular results, but because it demonstrates categoricalism.

#### *D. Alabama (1840)*

*State v. Reid* is the first case to admit that special circumstances might dictate differing levels of regulation of the right to bear arms.<sup>100</sup> In *Reid*, a sheriff challenged the state’s ban on carrying concealed weapons.<sup>101</sup> The Alabama Supreme Court wrote that the state’s constitutional language “in defence of himself and the State” necessarily implied legislative “authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals.”<sup>102</sup>

The court then stated that regulation would be impermissible if it destroyed the right to carry arms for self-defense: “A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.”<sup>103</sup> Put another way, the right may be regulated up to the point that

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96. *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 160 (1840).

97. *See Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871).

98. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008).

99. *Id.* at 2818.

100. *State v. Reid*, 1 Ala. 612 (1840).

101. *Id.* at 621.

102. *Id.* at 616.

103. *Id.* at 616–17.

the ability to exercise the right was not destroyed or rendered useless. So long as people could carry guns for self-defense, the legislature could ban one method of carrying. The result is the same as in *Nunn v. State*, discussed *infra*,<sup>104</sup> but the rationale is entirely different. Under *Nunn*, concealed carry is categorically not part of the right; in *Reid*, all forms of carry are within the right, but one form of carrying can be outlawed.<sup>105</sup>

The fact that the defendant in *Reid* was the Sheriff of Montgomery County probably influenced the court's decision. The court pointed out factual reasons why the Sheriff in particular had no need for concealed carry.<sup>106</sup> The court left itself open to persuasion should a different person actually need to carry concealed rather than openly.<sup>107</sup>

#### *E. Arkansas (1842)*

In *State v. Buzzard*, the Arkansas Supreme Court produced a 1–1–1 split decision,<sup>108</sup> with a concurring opinion that said the right was militia-only.<sup>109</sup> This eccentric theory did not appear again in Arkansas decisions, nor in any other case in the nineteenth century.<sup>110</sup> The dissenting opinion, however, argued that the Arkansas concealed carry ban violated the state constitution right to arms.<sup>111</sup>

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104. *Nunn v. State*, 1 Ga. 243, 251 (1846); see *infra* text accompanying notes 125–30.

105. *Nunn*, 1 Ga. at 251; *Reid*, 1 Ala. at 616–17.

106. The court noted the defendant's official authority as Sheriff, which included his ability to apprehend and commit to prison all lawbreakers, his responsibility for the custody and safekeeping of the county jail, and his ability to invoke "posse comitatus," or power of the county. *Reid*, 1 Ala. at 621 (1840).

107. The court stated:

We will not undertake to say, that if in any case it should appear to be indispensable to the right of defense that arms should be carried concealed about the person, the act "to suppress the evil practice of carrying weapons secretly," should be so construed, as to operate a prohibition in such case. But in the present case, no such necessity seems to have existed; and we cannot conceive of its existence under any supposable circumstances.

*Id.* at 622.

108. *State v. Buzzard*, 4 Ark. 18 (1842).

109. *Id.* at 32–33 (Dickinson, J., concurring.)

110. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1424–25. The militia-only theory began to gain judicial respect following the Kansas Supreme Court's 1905 decision in *Salina v. Blaksley*. See *infra* text accompanying notes 259–63.

111. *Buzzard*, 4 Ark. at 40–41 (Lacy, J., dissenting).

The holding of the court, to the extent there was a clear one, was written by Chief Justice Ringo. He argued that the very nature of a social compact is that rights are not absolute, but are subject to some regulations that are "necessary" to prevent harm to the rights of others or to the community.<sup>112</sup> Chief Justice Ringo's general principle is in the mainstream today, but is contrary to the view of some eminent jurists (such as Justice Hugo Black) who argue that constitutional rights are absolute.<sup>113</sup>

In support of the theory that the right to arms is not absolute, Ringo pointed out that individuals who are accused of a crime—but still presumed innocent, and not yet convicted—are disarmed.<sup>114</sup> Today, the federal Gun Control

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112. Chief Justice Ringo wrote:

Among the objects for which all free governments are instituted, may be enumerated the increase of security afforded to the individual members thereof for the enjoyment of their private rights, the preservation of peace and domestic tranquility, the administration of justice by public authority, and the advancement of the general interests or welfare of the whole community. In addition to which, it is designed that adequate security shall be provided by law for the most perfect enjoyment of these blessings.

.... Also, the natural right of speech must remain without restraint, if it were not surrendered and subjected to legal control upon the institution of government; yet every one is aware that such limitations as have been found necessary to protect the character and secure the rights of others, as well as to preserve good order and the public peace, have been imposed upon it by law, without any question as to the power of the government to enforce such restrictions. So the liberty of the press, which is based upon the right of speech, is to the like extent subject to legal control. So the right of migration and transmigration, or of every individual to pass from place to place, according to his own free will and pleasure, when and where he chose, acknowledged no restraint until surrendered upon the institution of government, when it became subject to such regulations as might be found necessary to prevent its exercise from operating prejudicially upon the private rights of others, or to the general interests of the community.

*Id.* at 19–21.

113. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 873, 874 (1960) ("Although the Supreme Court has held [the Second] Amendment to include only arms necessary to a well-regulated militia, as so construed, its prohibition is absolute. . . . Neither as offered nor as adopted is the language of this [First] Amendment anything less than absolute.").

114. Chief Justice Ringo stated:

Suppose the constitutional existence of such immunity in favor of the right to keep and bear arms as is urged by the appellee be admitted. By what legal right can a person accused of crime be

Act of 1968 prohibits arms sales to persons under felony indictment, but does not forbid them from possessing firearms already owned.<sup>115</sup>

Ringo also argued that “arms” would include large quantities of gunpowder stored at home, and could even include quantities so large as to be hazardous to the neighbors; hence, the right to arms must not be absolute, but only relative to the rights of others.<sup>116</sup> Likewise, Ringo reasoned that because speech can constitute the criminal offense of treason, the right of free speech is not absolute.<sup>117</sup>

The above analysis is fine, but proving that a particular right is not absolute is merely the first step in determining whether a particular regulation of that right is permissible. As the dissent pointed out, Ringo’s opinion never took this necessary step. The fact that some speech can be punished as treason does not prove that the works of Shakespeare can be outlawed. Accordingly, *Buzzard* is of no use to modern courts in evaluating gun control laws.

#### *F. North Carolina (1843–1844)*

Like the Tennessee Supreme Court in *Simpson*, the North Carolina Supreme Court had to decide whether a common law crime was contrary to the state constitutional right to bear arms. The court used narrow construction to prevent the common law from conflicting with the constitution.<sup>118</sup>

The crime was “riding or going armed with unusual and dangerous weapons to the terror of the people.”<sup>119</sup> The court

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disarmed? Does the simple accusation, while the law regards the accused as innocent, operate as a forfeiture of the right? If so, what law attaches to it this consequence? Persons accused of crime, upon their arrest, have constantly been divested of their arms, without the legality of the act having ever been questioned. Yet, upon the hypothesis assumed in the argument for the appellee, the act of disarming them must have been illegal, and those concerned in it trespassers, the Constitution not limiting the right to such only as are free from such accusation. Nor could the argument of necessity or expediency justify one person in depriving another of the full enjoyment of a right reserved and secured to him by the Constitution.

*Buzzard*, 4 Ark. at 21.

115. 18 U.S.C. § 922(d)(1), (g) (2006).

116. *Buzzard*, 4 Ark. at 22.

117. *Id.* at 20.

118. *State v. Huntly*, 25 N.C. (3 Ired.) 418 (1843)

119. *Id.* For analysis of the North Carolina right, see generally Stephen P.

construed the crime narrowly, so that it applied only to someone whose specific purpose was to terrify the public:

[I]t is to be remembered that the carrying of a gun *per se* constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun. It is the wicked purpose—and the mischievous result—which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.<sup>120</sup>

A North Carolina statute at issue in *State v. Newsom* required free blacks, but not whites, to obtain a license to carry a shotgun.<sup>121</sup> There, the North Carolina Supreme Court acknowledged that the license would be unconstitutional for whites, but upheld licensing for blacks on the grounds of originalism. The court's version of originalism was, however, a mere conjecture about what the North Carolina framers must have meant,<sup>122</sup> and did not recognize that sentiment concerning the issue of race had become much more anti-black in the half-century between the constitution's adoption and this decision.<sup>123</sup>

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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) and Carl W. Thurman, III, Note, *State v. Fennell: The North Carolina Tradition of Reasonable Regulation of the Right to Bear Arms*, 68 N.C. L. REV. 1078 (1990).

120. *Huntly*, 25 N.C. (3 Ired.) at 422–23.

121. *State v. Newsom*, 27 N.C. (5 Ired.) 250 (1844).

122. The court wrote:

Self preservation is the first law of nations, as it is of individuals. And, while we acknowledge the solemn obligations to obey the constitution, as well in spirit as in letter, we at the same time hold, that nothing should be interpolated into that instrument, which the people did not will. We are not at liberty to give an artificial and constrained interpretation to the language used, beyond its ordinary, popular and obvious meaning. Before, and at the time our constitution was framed, there was among us this class of people, and they were subjected to various disabilities, from which the white population was exempt. It is impossible to suppose, that the framers of the Bill of Rights did not have an eye to the existing state of things, and did not act with a full knowledge of the mixed population, for whom they were legislating. They must have felt the absolute necessity of the existence of a power somewhere, to adopt such rules and regulations, as the safety of the community might, from time to time, require.

*Id.* at 254.

123. See CLAYTON E. CRAMER, *BLACK DEMOGRAPHIC DATA, 1790–1860: A SOURCEBOOK* 28–29 (Greenwood Publishing 1997).



*G. Georgia (1846)*

An 1837 Georgia statute banned the possession and carrying of most handguns, as well as Arkansas toothpicks and Bowie knives.<sup>124</sup> While the Georgia Constitution provided no right to arms, *Nunn v. State* held that the bans violated the Second Amendment.<sup>125</sup> *Nunn* was part of a contingent of state supreme court decisions that viewed *Barron v. Baltimore* as merely constraining federal courts from applying the Bill of Rights to the states.<sup>126</sup> The *Nunn* opinion echoed Justice Chase's opinion in *Calder v. Bull*, which held that certain laws could not be enacted by a free government, even if the constitution contained no specific prohibition on such laws.<sup>127</sup>

Chief Justice Lumpkin's oft-quoted opinion for the unanimous Georgia court was categorical: the concealed carry ban was constitutional because concealed carry was not protected as a Second Amendment right.<sup>128</sup> The possession and open carry of handguns were within the right, and whatever was within the right could not be infringed in the

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124. ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA PASSED IN MILLEDGEVILLE AT AN ANNUAL SESSION IN NOVEMBER AND DECEMBER, 1837, 90–91 (1838).

125. *Nunn v. State*, 1 Ga. 243 (1846).

126. See AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 145–56 (1998); Jason Mazzone, *The Bill of Rights in Early State Courts*, 92 MINN. L. REV. 1, 24–25 (2007) (observing that post-*Barron*, many state courts still felt free to apply the Bill of Rights to state laws, and several did with the Second Amendment).

127. Justice Chase wrote:

There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded.

*Calder v. Bull*, 3 U.S. 386, 388 (1798). For a modern analysis suggesting that gun ownership would be protected as an unenumerated right, even if there were no Second Amendment, see generally Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992).

128. *Nunn*, 1 Ga. at 251.

smallest degree.<sup>129</sup>

Chief Justice Lumpkin proclaimed:

The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all of this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*, originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, reestablished by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta*!<sup>130</sup>

#### *H. Louisiana (1850–1856)*

The Louisiana Supreme Court in *State v. Chandler* also relied on the Second Amendment, because a right to arms did not exist in the state constitution.<sup>131</sup> Similar to *State v. Reid* in Alabama, *Chandler* treated concealed carry as part of the right to arms, but stated that it can be banned because concealed carry was so harmful, and open carry was still allowed:

This law became absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons. It interfered with no man's right to carry arms (to use its own words), "in full open view," which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassination.<sup>132</sup> Unlike in *Reid*, the court did not include dicta suggesting that expansive regulation was

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129. *Id.*

130. *Id.*

131. *State v. Chandler*, 5 La. Ann. 489 (1850).

132. *Id.* at 489–90.

permissible as a general rule. Two subsequent Louisiana decisions affirmed the Second Amendment's applicability to state law, but did not provide significant new reasoning.<sup>133</sup>

### I. Texas (1859)

The last of the antebellum decisions, *Cockrum v. State*, also took a categorical view of the right. In 1859, the Texas Supreme Court affirmed a sentence enhancement for use of a Bowie knife, while still acknowledging that the Texas Constitution's arms guarantee—and apparently the Second Amendment—protected a right to carry such a weapon.<sup>134</sup> The sentence enhancement was justified based on the exceptional deadliness of the Bowie knife.<sup>135</sup> The right to arms, obviously, did not include the use of arms in violent crimes.

## III. POSTBELLUM CASES

As in the antebellum period, postbellum gun control remained primarily a Southern practice. Almost as soon as slavery was abolished, Southern states began re-enacting the antebellum Slave Codes as Black Codes, to keep former slaves in a condition of servitude. Among the features of the Black Codes were special restrictions on firearms possession or carrying by the freedmen.<sup>136</sup>

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133. *State v. Jumel*, 13 La. Ann. 399 (1858); *Smith v. State*, 11 La. Ann. 633, 634 (1856).

134. "The right to carry a bowie-knife for lawful defence is secured, and must be admitted." *Cockrum v. State*, 24 Tex. 394, 402 (1859). For analysis of all the right to arms cases in Texas, see generally Stephen Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bill of Rights*, 41 BAYLOR L. REV. 629 (1989).

135. The court wrote:

It is an exceeding destructive weapon. It is difficult to defend against it, by any degree of bravery, or any amount of skill. The gun or pistol may miss its aim, and when discharged, its dangerous character is lost, or diminished at least. The sword may be parried. With these weapons men fight for the sake of the combat, to satisfy the laws of honor, not necessarily with the intention to kill, or with a certainty of killing, when the intention exists. The bowie-knife differs from these in its device and design; it is the instrument of almost certain death. He who carries such a weapon, for lawful defence, as he may, makes himself more dangerous to the rights of others, considering the frailties of human nature, than if he carried a less dangerous weapon.

*Cockrum*, 24 Tex. at 402–03.

136. See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth*

Outraged, Congress responded with the Freedmen's Bureau Bill, the Civil Rights Act of 1866, the Fourteenth Amendment, and the Civil Rights Act of 1870—every one of them aimed at racial subordination in general, and racist gun control laws in particular.<sup>137</sup> In effect, the South abandoned explicitly racial laws and replaced them with facially neutral laws designed to disarm freedmen. Some laws prohibited inexpensive firearms, while protecting more expensive military guns owned by the ex-Confederate soldiers.<sup>138</sup> Meanwhile, other laws imposed licensing systems or carry restrictions. As a Florida Supreme Court Justice later acknowledged, these laws were “never intended to be applied to the white population.”<sup>139</sup>

Southern courts generally upheld the laws. While these decisions have not been formally overruled, they are a core element of Jim Crow jurisprudence, and played a substantial role in maintaining racial supremacy through unofficial, government-tolerated violence against free blacks. Accordingly, one might question their precedential value in a twenty-first century regime of legal equality—many of the gun controls to which the Southern courts showed such deference were racist, hostile to constitutional rights, and invidious.<sup>140</sup>

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*Amendment*, 103 YALE L.J. 57 (1993); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 344–47 (1991); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17 (1995); Clayton E. Cramer, Nicholas J. Johnson & George Mocsary, “*This Right is Not Allowed by Governments That Are Afraid of the People*”: *The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 GEO. MASON L. REV. 823, 853–54 (2010); Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 598–99 (1995); Stephen P. Halbrook, *Personal Security, Personal Liberty, and “The Constitutional Right to Bear Arms”: Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341, 347–54 (1995).

137. See *supra* note 136.

138. See *infra* text accompanying notes 152, 173, 178.

139. *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941).

140. See generally Robert J. Cottrol & Raymond T. Diamond, “*Never Intended to Be Applied to the White Population*”: *Firearms Regulation And Racial Disparity—the Redeemed South’s Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995). See also Cottrol & Diamond, *supra* note 136; cf. Leroy G. Schultz, *Why the Negro Carries Weapons*, 53 J. CRIM. L. & CRIMINOLOGY 476, 480 (1962) (“The generalized mistrust, suspicion, and exaggerated ideas of personal rights of the Negro are very well documented in the literature.”); Editorial Comment, *Carrying Concealed Weapons*, 15 VA. L.

A. *Tennessee (1866–1881)*

The Confederate government of Tennessee passed a law that authorized the Governor to seize firearms from the public, for use by the Confederate military. A victim of the gun confiscation sued and won in trial court. The year after the war ended, the Tennessee Supreme Court observed that the state's constitutional right to arms "was utterly disregarded" by the confiscation act, which was "the first attempt, in the history of the Anglo-Saxon race, of which we are apprised, to disarm the people by legislation."<sup>141</sup> Since the post-war state constitutional convention had repudiated the act as unconstitutional and void *ab initio* all acts of the Confederate state government, the seizure of the gun was illegal and the official who had seized the gun was personally liable for trespass.<sup>142</sup>

In 1870, the Tennessee Legislature prohibited the carrying of "a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver," either openly or concealed.<sup>143</sup> According to the Tennessee Supreme Court in *Andrews v. State*, the law could not constitutionally be applied to some handguns: "[T]he pistol known as the repeater is a soldier's weapon—skill in the use of which will add to the efficiency of the soldier. If such is the character of the weapon here designated, then the prohibition of the statute is too broad to be allowed to stand . . . ."<sup>144</sup>

The *Andrews* Court added that people had a right to buy guns and ammunition, to take guns to gunsmiths, and to carry guns and ammunition for purposes of sale and repair.<sup>145</sup>

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REG. 391, 391–92 (1909) (complaining that Negroes with whiskey and handguns inevitably get into fights on trains).

141. *Smith v. Ishenhour*, 43 Tenn. (3 Cold.) 214, 217 (1866).

142. *Id.*

143. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 171 (1871).

144. *Id.* at 187.

145. The court wrote:

The right and use are guaranteed to the citizen, to be exercised and enjoyed in time of peace, in subordination to the general ends of civil society; but, as a right, to be maintained in all its fulness.

The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this

The First Amendment includes the right to buy books in bookstores, and the right to use repair or improvement services for First Amendment equipment, such as restoration services for old books, and typewriter and computer repair services.<sup>146</sup> The right to arms necessarily includes parallel rights.<sup>147</sup> The Tennessee court stated that the carrying of arms on one's own property was an absolute right.<sup>148</sup> However, carrying in public of some types of arms could be regulated for the general safety of the public.<sup>149</sup>

After the *Andrews* decision, the legislature prohibited—with the acquiescence of the Tennessee Supreme Court—the carrying of any handgun “other than an army pistol, or such as are commonly carried and used in the United States army, and in no case shall it be lawful for any person to carry such

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clause of the Constitution.

*Id.* at 178.

146. *Id.* at 187.

147. *Id.*

148. The court wrote:

So we may say, with reference to such arms, as we have held, he may keep and use in the ordinary mode known to the country, no law can punish him for so doing, while he uses such arms at home or on his own premises; he may do with his own as he will, while doing no wrong to others.

*Id.* at 185–86.

149. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 178–79 (1871) (acknowledging the right to use arms “for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace”). The court noted:

It is insisted by the Attorney General, as we understand his argument, that this clause confers power on the Legislature to prohibit absolutely the wearing of all and every kind of arms, under all circumstances. To this we can not give our assent. The power to regulate, does not fairly mean the power to prohibit; on the contrary, to regulate, necessarily involves the existence of the thing or act to be regulated. . . . Adopt the view of the Attorney General, and the Legislature may, if it chooses, arbitrarily prohibit the carrying of all manner of arms, and then, there be no act of the citizen to regulate.

*Id.* at 180–81. The Tennessee Attorney General, Joseph B. Heiskell, was also the reporter for Tennessee Supreme Court decisions; Heiskell took advantage of this opportunity to get the last word by footnoting this portion of the opinion and asserting that this was *not* his argument:

Yet, when he carries his property abroad, goes among the people to public assemblages where others are to be affected by his conduct, then brings himself within the pale of public regulation, and must submit to such restrictions on the mode of using or carrying his property as the people through their Legislature, shall see fit to impose for the general good.

*Id.* at 185–86.

army pistol publicly or privately about his person in any other manner than openly in his hands.”<sup>150</sup>

The law was absurd. Read literally, it violated *Andrews*’s affirmation of the right to buy any type of handgun in a store and carry it home. The law still allowed any model of handgun to be taken home, but the buyer would have to put the gun in a cart or wagon, rather than carry it. While the law allowed the carrying (for any purpose, and in public) of army model handguns, the requirement that the gun be carried “in his hands” was likely to provoke fear and almost certain to cause accidents. In effect, the law went as far as possible to outlaw all handgun carrying, while maintaining a pretense of not obliterating the right to bear arms. Demonstrating the repressive spirit of the time, the Tennessee court upheld the ban and at no point asked whether the law exceeded the *Andrews* standard.<sup>151</sup>

In 1879, the legislature banned the sale of all handguns “except army or navy pistols.” The Tennessee Supreme Court upheld the prohibition on the grounds that “[t]he law under consideration is in aid of the law prohibiting the wearing of pistols. The latter has repeatedly been holden by this court to be constitutional.”<sup>152</sup> Racism aside, one legitimate reason for the Tennessee courts’ extraordinary deference is the particular language of the state constitution. Tennessee is one of the few states in which “the common defence” was the only expressed reason for the right. As noted *supra*,<sup>153</sup> the U.S. Senate rejected a proposal to add “for the common defence” to the Second Amendment.<sup>154</sup> Thus, the Tennessee cases, while important for American history, are of little value in interpreting the Second Amendment.

#### *B. Arkansas (1876–1882)*

Arkansas followed the same path as Tennessee; its early decisions upheld broad gun controls while still respecting core rights, but later Arkansas degenerated into near-nullification.

The Arkansas constitutional arms guarantee, like that of Tennessee, referred only to “common defence.” In 1876, the

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150. *State v. Wilburn*, 66 Tenn. 57, 61 (1872).

151. *Id.* at 62–63.

152. *State v. Burgoyne*, 75 Tenn. 173 (1881).

153. See *supra* text accompanying note 88.

154. See *supra* text accompanying note 88.

Arkansas Supreme Court in *Fife v. State* held that a ban on open or concealed carry of pistols was too broad.<sup>155</sup> The *Fife* Court relied on the Tennessee Supreme Court's opinion in *Andrews v. State*, and held that only militia-type arms were protected. While the right belonged to all people (not just militiamen), the right protected:

Not every thing that may be useful for offense or defense, but what may properly be included or understood under the title of "arms," taken in connection with the fact that the citizen is to keep them, as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we hold that the rifle, of all descriptions, the shot gun, the musket and repeater, are such arms, and that, under the Constitution, the right to keep such arms cannot be infringed or forbidden by the legislature.<sup>156</sup>

The *Fife* Court recognized that large handguns ("repeaters") were protected, but it held that the "arms" in the state constitution "did not mean pocket revolver."<sup>157</sup> This was because the pocket revolver was not "effective as a weapon of war."<sup>158</sup>

Thus, *Fife* is a categorical decision. "[T]he rifle, of all descriptions, the shot gun, the musket and repeater" are within the right, while the "pocket revolver" is not.<sup>159</sup> *Fife*'s pocket pistol was not a repeater (in the sense that the Arkansas court used the term), so he had no constitutional right to carry it concealed.<sup>160</sup>

By 1876, multishot, high-powered repeating rifles were common for both military and civil uses.<sup>161</sup> These were among "the rifle, of all descriptions" that *Fife* found to be

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155. *Fife v. State*, 31 Ark. 455 (1876).

156. *Id.* at 460.

157. *Id.* at 460-61.

158. *Id.* at 461.

159. *Id.* at 460.

160. *Id.* at 462.

161. David B. Kopel, Clayton E. Cramer & Scott G. Hatrup, *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177, 1207 (1995).



constitutionally protected. Repeating pistols had been common since the 1830s, when Samuel Colt introduced them.<sup>162</sup> *Fife* therefore fits comfortably into the “civilized warfare” standard of nineteenth century state cases.<sup>163</sup> That test, however, is not valid for the Second Amendment post-*Heller*, because *Heller* appears to exclude the standard military arms (machine guns) and *Heller*’s definition of protected arms encompasses all arms commonly used for legitimate civil purposes.<sup>164</sup> *Fife*’s pocket pistol was not a repeater (in the sense that the Arkansas court used the term), so he had no constitutional right to carry it concealed.<sup>165</sup>

Two subsequent decisions by the Arkansas Supreme Court, *Wilson v. State*<sup>166</sup> and *Holland v. State*,<sup>167</sup> applied *Fife* and struck down convictions for carrying army pistols—both cases involved concealed carrying. *Wilson* was the more detailed of the decisions, and makes it clear that carrying handguns in the course of one’s daily activities, in public places, was a constitutional right.<sup>168</sup>

The *Wilson* Court recognized something like *Heller*’s “sensitive places” rule: “No doubt in time of peace, persons might be prohibited from wearing war arms to places of public worship, or elections, etc.”<sup>169</sup> A general ban on carrying guns, though, was unconstitutional:

But to prohibit the citizen from wearing or carrying a war arm, except upon his own premises or when on a

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162. See MARK Q. SUTTON AND BROOKE S. ARKUSH, *ARCHAEOLOGICAL LABORATORY METHODS: AN INTRODUCTION* 171–72 (2002); David B. Kopel, *Samuel Colt*, in 1 *GREAT LIVES FROM HISTORY: INVENTORS & INVENTIONS* 213 (Alvin K. Benson ed., 2010) (discussing the invention of the Colt revolvers).

163. See *supra* text accompanying notes 90–96 for a discussion of the civilized warfare test.

164. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 (2008).

165. *Fife v. State*, 31 Ark. 455, 456 (1876). The statute made it illegal to “wear or carry any pistol of any kind whatever.” *Id.* The court did not address the statute broadly, but simply upheld it as applied to *Fife*. *Id.* at 461–62. That *Fife* was a bully, threatening people with a pocket pistol, perhaps explains the eagerness of the court to uphold the conviction, and to avoid discussing the problem with the underlying statute.

166. *Wilson v. State*, 33 Ark. 557 (1878).

167. *Holland v. State*, 33 Ark. 560 (1878).

168. *Wilson*, 33 Ark. at 560.

169. *Id.* (citing *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871)). *Heller* noted that the Second Amendment does not bar “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” *Heller*, 128 S. Ct. at 2817.

journey traveling through the country with baggage, or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms.

If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege.<sup>170</sup>

Pursuant to *Wilson*, *Holland* reversed a conviction for carrying a concealed army pistol.<sup>171</sup> Taking a leaf from Tennessee, the 1881 Arkansas legislature prohibited "the carrying of army pistols except uncovered and in the hand."<sup>172</sup>

In *Haile v. State*, Haile was convicted of carrying "uncovered, and buckled around his waist . . . a large revolving pistol, known as the Colts army pistol, and such as is used in the army and navy of the United States."<sup>173</sup> The Arkansas Supreme Court stated that the legislature could reasonably regulate the right but not "nullify" it, or "materially embarrass its exercise."<sup>174</sup>

After explaining that the arms guarantee in question (which the state constitution said was "for the common defense") was not for "private broils" but to restrain tyrannical government tendencies, the *Haile* Court wrote that the constitution did not protect carrying guns for self-defense:

It would be a perversion of its object, to make it a protection to the citizen, in going, with convenience to himself, and after his own fashion, prepared at all times to inflict death upon his fellow-citizens, upon the occasion of any real or imaginary wrong. The "common defense" of the citizens does not require that. The consequent terror to timid citizens, with the counter violence which would be incited amongst the more fearless, would be worse than the evil intended to be remedied.<sup>175</sup>

The court acknowledged that the purpose of the "in the hand" requirement was to discourage people from carrying

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170. *Wilson*, 33 Ark. at 560.

171. *Holland*, 33 Ark. at 561.

172. ACTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS 192 (1881).

173. *Haile v. State*, 38 Ark. 564 (1882).

174. *Id.* at 565-66.

175. *Id.* at 566.

guns.<sup>176</sup> If the wearing of holstered guns supposedly terrorized “timid citizens,” how would requiring those guns to be carried in the hand reduce the fear? The law was apparently intended to make the carrying of guns for defensive purposes so inconvenient, and so likely to provoke an accidental shooting, as to make it impractical to carry a gun.<sup>177</sup>

*Haile* marked an abrupt shift in Arkansas jurisprudence, and was contrary to the three cases decided just a few years before. In essence, the court had now agreed with the legislature that the right to bear arms was a bad idea. Rather than force the legislature to seek a constitutional amendment, the court accepted the legislature’s practical nullification of the right to bear arms by requiring that bearing be done in the most inconvenient and dangerous manner possible.

Another 1881 statute prohibited the sale of any pistol other than those “used in the army or navy of the United States and known as the navy pistol.”<sup>178</sup> The Arkansas Supreme Court upheld the ban in *Dabbs v. State*.<sup>179</sup> Dabbs’s attorney pointed to *Nunn v. State*, the 1846 Georgia case that had found a similar ban violated the Second Amendment.<sup>180</sup> He attempted to distinguish *Fife v. State*, arguing that *State v. Buzzard*<sup>181</sup> and *Wilson v. State*<sup>182</sup> supported his client.<sup>183</sup>

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176. The court wrote:

The Legislature, by the law in question, has sought to steer between such a condition of things, and an infringement of constitutional rights, by conceding the right to keep such arms, and to bear or use them at will, upon one’s own premises, and restricting the right to wear them elsewhere in public, unless they be carried uncovered in the hand. It must be confessed that this is a very inconvenient mode of carrying them habitually, but the habitual carrying of them does not seem essential to “common defense.” The inconvenience is a slight matter compared with the danger to the whole community, which would result from the common practice of going about with pistols in a belt, ready to be used on every outbreak of ungovernable passion. It is a police regulation, adjusted as wisely as the Legislature thought possible, with all essential constitutional rights.

*Id.*

177. *See id.*

178. *See supra* note 157 and accompanying text.

179. *Dabbs v. State*, 39 Ark. 353 (1882).

180. *See supra* text accompanying notes 125–30.

181. *See supra* text accompanying notes 108–17.

182. *See supra* text accompanying notes 168–70.

183. *Dabbs*, 39 Ark. at 354.

Attorney General Moore, defending the law, claimed, “[t]he right to ‘keep and bear arms’ may be absolutely prohibited,” and pointed to *Buzzard* and *Fife* as precedents.<sup>184</sup> While this accurately described the concurrence in *Buzzard*, *Fife* said no such thing. The Arkansas Supreme Court nonetheless relied on *Fife* (holding militia-type arms, including “the repeater” handgun are protected while “the pocket pistol” is not) to uphold the ban. Since handguns other than the Army and Navy models were not “useful in warfare,” they could be outlawed.<sup>185</sup>

### C. Texas (1872–1878)

The first of the postbellum Texas Supreme Court decisions took place in a time of political turmoil and violence. In *English v. State*, the court upheld a near-complete ban on the carrying of handguns (openly or concealed).<sup>186</sup> *English* was not an impressive decision; it repeatedly mis-cited the 1859 Texas *Cockrum* decision as *Cochrane*.<sup>187</sup> Astonishingly, the court denigrated the Texas Constitution’s right to keep and bear arms because it supposedly derived from Spanish rather than Anglo-American law:

A portion of our system of laws, as well as our public morality, is derived from a people the most peculiar perhaps of any other in the history and derivation of its own system. Spain, at different periods of the world, was dominated over by the Carthaginians, the Romans, the Vandals, the Snovi, the Allani, the Visigoths, and Arabs; and to this day there are found in the Spanish codes traces of the laws and customs of each of these nations blended together in a system by no means to be compared with the sound philosophy and pure morality of the common law.<sup>188</sup>

The court’s assertion was bizarre. It is true that the

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184. *Id.* at 355.

185. The Arkansas Supreme Court wrote:

The law was enacted as a measure of precaution for the prevention of crimes and calamities. It is leveled at the pernicious habit of wearing such dangerous or deadly weapons as are easily concealed about the person. It does not abridge the constitutional right of citizens to keep and bear arms for the common defense; for it in no wise restrains the use or sale of such arms as are useful in warfare.

*Id.* at 356–57 (citing *Fife v. State*, 31 Ark. 455 (1876)).

186. *English v. State*, 35 Tex. 473 (1872).

187. *Id.* at 476.

188. *Id.* at 480.

Romans, Visigoths, Arabs, and Spanish recognized the right of self-defense and a right to use arms for self-defense.<sup>189</sup> Mexico's 1857 Constitution also recognized these rights.<sup>190</sup> But the Republic of Texas's 1836 Constitution recognized a right to arms nearly identical to the right in Alabama's 1819 Constitution and Connecticut's 1818 Constitution.<sup>191</sup> The 1824 Constitution of Mexico did not guarantee a right to arms. The source of the Texas constitutional right is obviously the American legal tradition, not the Spanish one.

The postbellum Texas constitutional right to arms declared: "Every person shall have the right to keep and bear arms in the lawful defense of himself or the state, under such regulations as the legislature may prescribe."<sup>192</sup> Yet the *English* Court asserted that only arms "such as are useful and proper to an armed militia" were protected.<sup>193</sup> Such a claim was plausible for state constitutions in which "the common defense" or a similar term was the *only* explicit reason for the right. In Texas, however, the right included "lawful defense of himself." Because self-defense was equal to common defense under the Texas constitution, the *English* Court could not offer any good reason why only militia-type arms should be protected. The *English* Court upheld the statute for reasons unclear.

Three years later, the Texas Supreme Court provided a bit more guidance, acknowledging that shotguns, rifles, "and such pistols at least as are not adapted to being carried concealed" were protected arms.<sup>194</sup> The court also found that because the statute "respected the right to carry a pistol openly when needed for self-defense or in the public service, and the right to have one at the home or place of business,"

189. David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 *BYU J. PUB. L.* 43, 108–19, 122–24 (2008).

190. Article 10 of the Mexico Constitution of 1857 guaranteed all men a right "to possess and carry arms for their security and self-defense." WILFRID HARDY CALLCOTT, *CHURCH AND STATE IN MEXICO: 1822–1857*, at 287 (Octagon Books 1965) (1926).

191. 6 FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 3543 (Government Printing Office 1909).

192. *English*, 35 *Tex.* at 478.

193. *Id.* at 474.

194. *State v. Duke*, 42 *Tex.* 455, 458–59 (1875).

the regulation had not exceeded the state's power.<sup>195</sup> The problem with the self-defense exception in the statute is that it applied only when the carrying was for actual, imminent self-defense. The exception, therefore, would be of use to someone who knew about a specific threat (e.g., a stalker) but not to someone who wanted to carry for general protection.

Another three years later, in 1878, the intermediate court of appeals ruled that it was unconstitutional to require forfeiture of a firearm for the misdemeanor of concealed carry:

The Legislature has the power by law to regulate the wearing of arms, with a view to prevent crime, but it has not the power to enact a law the violation of which will work a forfeiture of defendant's arms. While it has the power to regulate the wearing of arms, it has not the power by legislation to take a citizen's arms away from him. One of his most sacred rights is that of having arms for his own defence and that of the State. This right is one of the surest safeguards of liberty and self-preservation.<sup>196</sup>

Still, in 1912, an intermediate court upheld a fifty percent gross receipts tax on the sale of handguns. The court reasoned that handguns, like alcohol, are socially harmful and therefore may be taxed severely. The court added that prohibiting the sale of handguns would not violate the state constitution.<sup>197</sup>

To the twenty-first century reader, the notion that the Texas legislature would enact a huge tax to discourage handgun ownership, or that a Texas court would suggest that handguns could be banned, may seem astounding. But the late nineteenth and early twentieth centuries were the nadir for many American rights, including the First Amendment,<sup>198</sup> and of course, Equal Protection.

#### *D. Georgia (1874)*

In *Nunn v. State*, the George Supreme Court had relied on the Second Amendment to strike laws that outlawed most

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195. *Id.* at 459.

196. *Jennings v. State*, 5 Tex. Ct. App. 298, 300-01 (1878).

197. *Caswell & Smith v. State*, 148 S.W. 1159, 1160-61 (Tex. Civ. App., 1912).

198. See generally DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920* (1999).

handguns (except for large “horse pistols”) or banned the carrying of handguns.<sup>199</sup> Like all the defeated Confederate states, Georgia was forced to draft a new constitution to better protect human rights. The 1868 Georgia Constitution declared: “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; but the general assembly shall have power to prescribe the manner in which arms may be borne.”<sup>200</sup>

Shortly thereafter, Miles Hill was indicted for carrying a pistol to a court of justice.<sup>201</sup> Upholding the indictment, the Georgia Supreme Court created an antecedent of *Heller’s* “sensitive places” rule.<sup>202</sup> Justice McCay explained that gun carrying in courthouses could be barred because such carrying might interfere with the right of free access to the courts.<sup>203</sup>

The rest of the opinion offered dicta stating that the right to bear arms “must include the right to load them and shoot them and use them as such things are ordinarily used.”<sup>204</sup> The legislature could use its power to prescribe how arms are borne to impose time and place restrictions, or to require that carry be concealed or unconcealed. Manner restrictions could probably even specify the exact mode of carry, such as “borne strapped or fastened upon the back.”<sup>205</sup>

199. *Nunn v. State*, 1 Ga. 243, 251 (1846).

200. GA. CONST. of 1868 art. I, § 14.

201. *Hill v. State*, 53 Ga. 472 (1874).

202. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008). For an explanation of *Heller’s* “sensitive places” rule, see *supra* text accompanying note 169.

203. Justice McCay wrote:

One guarantee is not to swallow up all others, but each is to be construed reasonably in reference to its plain intent, and other rights guaranteed to the people. The right to go into a court-house and peacefully and safely seek its privileges, is just as sacred as the right to carry arms, and if the temple of justice is turned into a barracks, and a visitor to it is compelled to mingle in a crowd of men loaded down with pistols and Bowie-knives, or bristling with guns and bayonets, his right of free access to the courts is just as much restricted as is the right to bear arms infringed by prohibiting the practice before courts of justice.

*Hill*, 53 Ga. at 477–78.

204. *Id.* at 480.

205. The court wrote:

The right to “tote” them, as our colored people say, would be a bootless privilege, fitting one, perhaps, for playing soldier upon a drill ground, but offering no aid in that knowledge which makes an effective, to-wit:

*E. Pennsylvania (1875)*

The Supreme Court of Pennsylvania's decision in *Wright v. Commonwealth* was an odd one. Defendant Jonathan Wright was charged under a county ordinance with carrying a concealed pistol "with intent, with the pistol aforesaid, unlawfully and maliciously, to do bodily harm to some other person, to the inquest unknown."<sup>206</sup> The jury rendered a verdict of "[n]ot guilty, the defendant to pay the costs."<sup>207</sup> Wright appealed, arguing that he could not be charged court costs because he was found not guilty. He also challenged the constitutionality of the concealed weapon ordinance.<sup>208</sup>

The court asserted that *concealed* carry of a pistol was not protected by the state constitution: "Such an unlawful act and malicious intent as this has no protection under the 21st section of the Bill of Rights, saving the right of the citizens to bear arms in defense of themselves and the state."<sup>209</sup> Nothing in the decision, however, explained the court's reasoning,

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a shooting soldier. To acquire this skill and this familiarity, the words "bear arms" must include the right to load them and shoot them and use them as such things are ordinarily used, so that the "people" will be fitted for defending the state when its needs demand; and when the constitution grants to the general assembly the right to prescribe the manner in which arms may be borne, it grants the power to regulate the whole subject of using arms, provided the regulation does not infringe that use of them which is necessary to fit the owner of them for a ready and skillful use of them as a militiaman. Any restriction which interferes with this is void, whether it relates to the carrying of them about the person, or to the place or time of bearing them.

The manner of bearing arms includes not only the particular way they may be carried upon the person, that is openly or secretly, on the shoulder or in the hand, loaded or unloaded, cocked or uncocked, capped or uncapped, but it includes, also, the time when, and the place where, they may be borne. It is no reply to this view of the subject to say that if the legislature may do this, they may, in effect, prohibit the carrying them altogether. The same reply may be made to the admitted right to prescribe the manner of carrying arms upon the person. If the legislature were to say arms shall not be borne on the shoulder, nor in the hands, or on the arms, but they shall only be borne strapped or fastened upon the back, this would be prescribing only the manner, and yet, it would, in effect, be a denial of the right to bear arms altogether. The main clause and the limitation to it are both to be construed reasonably, and in view of the declared object of the provision.

*Id.* at 479–81.

206. *Wright v. Commonwealth*, 77 Pa. 470, 470 (1875).

207. *Id.*

208. *Id.*

209. *Id.* at 471.



other than an unexplained assumption that concealed carry was in itself malicious.

Debates at the 1873 Pennsylvania Constitutional Convention strongly suggested that existing laws prohibiting concealed carry required evidence of criminal intent—and that carrying concealed weapons for self-defense was lawful.<sup>210</sup>

#### *F. Illinois, Massachusetts, and Missouri: Armed Parades*

##### *1. Illinois (1879)*

*Dunne v. Illinois* was an astonishing case that challenged the right to hold mass armed parades.<sup>211</sup> The case theoretically addressed a refusal to perform jury duty, but really involved the struggle between corporation and labor unionists in Chicago, where union members paraded armed through the streets.

The Illinois Supreme Court fiercely rejected the assertion that the Second Amendment included a right to mass armed parades.<sup>212</sup> The court opined that “[w]hether bodies of men, with military organizations or otherwise, under no discipline or command by the United States or the State, shall be permitted to ‘parade with arms’ in populous communities, is a matter within the regulation and subject to the police power of the state.”<sup>213</sup> For good measure, *Dunne* added an ode to the state’s police power.<sup>214</sup> It could be said that Dunne and his

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210. 7 PENNSYLVANIA CONSTITUTIONAL CONVENTION, DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 258–60 (1873).

211. *Dunne v. Illinois*, 94 Ill. 120, 140–41 (1879).

212. *Id.*

213. *Id.*

214. The court wrote:

In matters pertaining to the internal peace and well-being of the State, its police powers are plenary and inalienable. It is a power co-extensive with self-protection, and is sometimes termed, and not inaptly, the “law of overruling necessity.” Every necessary act for the protection, safety and best interests of the people of the State may be done under this power. Persons and property may be subjected to all reasonable restraints and burdens for the common good. Where mere property interests are involved, this power, like other powers of government, is subject to constitutional limitations; but where the internal peace and health of the people of the State are concerned, the limitations that are said to be upon the exercise of this power are, that such “regulations must have reference to the comfort, safety and welfare of society.” It is within the power of the General Assembly to enact laws for the

fellow labor unionists were not arguing for an individual right to bear arms, but rather a right to do so collectively in response to intimidation by strike-breaking forces.<sup>215</sup> The U.S. Supreme Court, in *Presser v. Illinois*, later came to a conclusion similar to that of the Illinois Supreme Court, holding that the Second Amendment did not protect mass armed parades.<sup>216</sup>

The backdrop to *Dunne* and *Presser* was elite panic about labor unrest.<sup>217</sup> The issue began to bring gun control out of its Southern base, and led the Supreme Court to begin to interpret *The Slaughter-House Cases* as forbidding the application of all the Bill of Rights to the states.<sup>218</sup>

## 2. Massachusetts (1896)

In 1896, the right to hold mass armed parades was similarly challenged in the Massachusetts Supreme Judicial Court case *Commonwealth v. Murphy*.<sup>219</sup> Murphy and a number of associates comprised the Sarsfield Guards, an independent militia company with a long history of valuable service to the public and the state.<sup>220</sup> They and another independent militia company had been prohibited from marching in parades even with inoperative rifles, apparently

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suppression of that which may endanger the public peace, and impose penalties for the infraction of such laws. What will endanger the public security must, as a general rule, be left to the wisdom of the legislative department of the government.

*Id.* at 141.

215. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 652–53 (1989).

216. *Presser v. Illinois*, 116 U.S. 252, 264–65 (1886).

217. Stephen P. Halbrook, *The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. 943, 945–46 (1999); Levinson, *supra* note 215, at 652–53; Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 MINN. L. REV. 102, 124–38 (2009).

218. In earlier post-*Slaughter-House* decisions, the Court had construed the case as merely applying to procedural or unenumerated rights. Magliocca, *supra* note 217, at 136–38.

219. *Commonwealth v. Murphy*, 44 N.E. 138, 138 (Mass. 1896).

220. 4 OLIVER AYER ROBERTS, HISTORY OF THE MILITARY COMPANY OF THE MASSACHUSETTS NOW CALLED THE ANCIENT AND HONORABLE ARTILLERY COMPANY OF MASSACHUSETTS, 1637–1888, at 403 (Alfred Mudge & Son, Printers 1901). See also OSCAR HANDLIN, BOSTON'S IMMIGRANTS, 1790–1880: A STUDY IN ACCULTURATION 157 (Harvard University Press 1941) (1991).

because they were Irish-American organizations.<sup>221</sup> Murphy argued that the statute he had violated was “in contravention of the seventeenth article of the Massachusetts Declaration of Rights, which declares that ‘the people have a right to keep and bear arms for the common defence.’”<sup>222</sup>

The court disagreed, citing *Dunne* and *Presser* for the principle that the right to arms did not include the right to mass armed parades.<sup>223</sup> The *Murphy* court also cited a litany of state cases that allowed bans on concealed carry, and characterized them as standing for the principle of legislative power to regulate the mode of carrying.<sup>224</sup>

### 3. *Missouri (1881–1886)*

Like many states, Missouri adopted a constitution that guaranteed the right to keep and bear arms, and explicitly excluded the concealed carrying of arms.<sup>225</sup> Accordingly, in 1881, the Missouri Supreme Court, in *State v. Wilforth*, no difficulty upholding a ban on concealed carry of deadly weapons.<sup>226</sup> Because Wilforth had been carrying concealed,

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221. See BOSTON CITY COUNCIL, REPORTS OF PROCEEDINGS OF THE CITY COUNCIL OF BOSTON FOR THE YEAR COMMENCING MONDAY, JANUARY 7, 1895, AND ENDING MONDAY, JANUARY 4, 1896, 535 (1896).

222. *Murphy*, 44 N.E. at 138. *Murphy* recognized a right to arms, subject to regulation. Eighty years later, the Massachusetts court would deny the existence of a right to arms. See *Commonwealth v. Davis*, 343 N.E.2d 847 (Mass. 1976).

223. The court wrote:

The right to keep and bear arms for the common defense does not include the right to associate together as a military organization, or to drill and parade with arms in cities and towns, unless authorized to do so by law. This is a matter affecting the public security, quiet, and good order, and it is within the police powers of the Legislature to regulate the bearing of arms so as to forbid such unauthorized drills and parades.

*Murphy*, 44 N.E. at 138. (citing *Presser v. Illinois*, 116 U.S. 252, 264, 265 (1886); *Dunne v. People*, 94 Ill. 120 (1879)).

224. *Id.*

225. MO. CONST. of 1875 art. II, § 17.

226. The Missouri Supreme Court wrote:

Following the weight of authority as indicated by the state courts, and in the light of section 17, article 2 of the constitution of this State, which declares “that the right of no citizen to keep and bear arms in defense of his home, person or property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons,” we must hold the act in question to be valid and binding, and as intending only to interdict the carrying of weapons

the court did not need to address the fact that the statute prohibited *all* bearing of deadly weapons into “any school room, or place where people are assembled for educational, literary, or social purposes, or to any election precinct on election day.”<sup>227</sup> Today, at least for school rooms and election precincts, the general ban on carrying could be upheld under *Heller*’s “sensitive places” rule.<sup>228</sup>

In *State v. Shelby*, the defendant was indicted in one charge for “carrying about his person a deadly weapon when under the influence of intoxicating drink, and in the other for carrying concealed a deadly weapon.”<sup>229</sup> The second charge, concealed carry, was clearly valid because of *Wilforth*.<sup>230</sup> As for the carrying-while-intoxicated charge, the *Shelby* Court read *Wilforth* as standing for a broad legislative power to regulate the manner of carrying.<sup>231</sup> The *Shelby* Court also looked to the purpose of bearing arms under the Missouri Constitution, finding that the statute was “designed to promote personal security, and to check and put down lawlessness, and . . . thus in perfect harmony with the constitution.”<sup>232</sup> There was a self-defense exception to the carrying-while-intoxicated charge, and this provision rendered the statute constitutional.<sup>233</sup>

The court concluded that the challenged statutes constituted “reasonable regulation of the use of such arms,

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concealed.

*State v. Wilforth*, 74 Mo. 528, 531 (1881).

227. *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886).

228. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008).

229. *Shelby*, 2 S.W. at 468.

230. *Id.* at 468–69.

231. The *Shelby* court wrote:

The validity of the act of 1875 is made to stand upon the ground that the legislature may thus regulate the manner in which arms may be borne. If this may be done, as to time and place, as is done by that act, no good reason is why the legislature may not do the same thing with reference to the condition of the person who carries such weapons. The mischief to be apprehended from an intoxicated person going abroad with fire-arms upon his person is equally as great as that to be feared from one who goes into an assemblage of person with one of the prohibited instruments.

*Id.* at 469.

232. *Id.*

233. *Id.* (noting a separate provision provided a defense “if the defendant shall show that he has been threatened with great bodily harm, or had good reason to carry the same in the necessary defence of his person, home, or property”).

and to which the citizen must yield, and a valid exercise of the legislative power.”<sup>234</sup> The court stated no clear theory for determining what constitutes “reasonable regulation,” but found that regulation of possession-while-intoxicated (with allowance for self-defense) was reasonable.<sup>235</sup>

*G. North Carolina (1882)*

The first postbellum North Carolina case was *State v. Speller*, which upheld a challenged gun control statute.<sup>236</sup> L. R. Speller and a man named Jenkins had engaged in an escalating argument. According to Speller, Jenkins attempted to cut Speller with a razor and made death threats against him. Jenkins and Speller subsequently swore out complaints against each other. After a police officer serving the warrant against Speller found a concealed pistol on him, Speller was arrested, indicted, and convicted of carrying a concealed weapon in violation of an 1879 North Carolina statute.<sup>237</sup>

On appeal, Speller’s attorney argued that the judge should have instructed the jury that the extenuating circumstances took precedence over the concealed weapon law.<sup>238</sup> Speller’s attorney also challenged the constitutionality of the concealed weapons statute.

The North Carolina Supreme Court affirmed the conviction.<sup>239</sup> Like Missouri’s, North Carolina’s constitution specifically excluded the practice of carrying concealed weapons.<sup>240</sup> The *Speller* Court, therefore, had no trouble dismissing the notion that the concealed carry ban violated Speller’s right to bear arms. Moreover, Speller could have openly carried a gun for protection, and there was no reason why he should have enjoyed concealment—and the special advantage of surprise—against his enemy.<sup>241</sup> Open carry was

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234. *Id.*

235. *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886).

236. *State v. Speller*, 86 N.C. 697 (1882).

237. *Id.* at 697.

238. *Id.*

239. *Id.* at 700–01.

240. N.C. CONST. art. I, § 30 (1970).

241. The court wrote:

We concede the full force of the ingenious argument made by counsel upon this point, but cannot admit its application to the statute in question. The distinction between the “right to keep and bear arms,”

protected while concealed carry was not, even in life-threatening circumstances. Thus, open carry was categorically protected.<sup>242</sup>

#### *H. West Virginia (1891)*

*State v. Workman* is another case in which a state supreme court limited the right to keep and bear arms to militia weapons.<sup>243</sup> In 1891, there was no right to arms in the state constitution, so the West Virginia Supreme Court of Appeals turned to the Second Amendment. The court held that it protected only militia-type arms, and applied to:

[W]eapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets—arms to be used in defending the State and civil liberty—and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street-fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the State.<sup>244</sup>

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and “the practice of carrying concealed weapons” is plainly observed in the Constitution of this State. The first, it is declared, shall not be infringed, while the latter may be prohibited. Art. I, § 24.

As the surest inhibition that could be put upon this practice deemed so hurtful as to be the subject of express mention in the organic law of the State, the Legislature has seen fit to enact that at no time, and under no circumstances, except upon his own premises, shall any person carry a deadly weapon concealed about his person, and it is the strict duty of the courts, whenever an occasion offers, to uphold a law thus sanctioned and approved. 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? This is as far as the statute assumes to go. It does not say that a citizen when beset with danger shall not provide for his security by wearing such arms as may be essential to that end; but simply that if he does do so, he must wear them openly, and so as to be seen by those with whom he may come in contact. The right to wear secret weapons is no more essential to the protection of one man than another, and surely it cannot be supposed that the law intends that an unwary advantage should be taken even of an enemy.

*Speller*, 86 N.C. at 700 (emphasis omitted).

242. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 (2008).

243. *State v. Workman*, 14 S.E. 9 (W. Va. 1891).

244. *Id.* at 12. For a history of the arms right in West Virginia, see generally Stephen P. Halbrook, *Rationing Firearms Purchases and the Right to Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the*

While *Heller* does not restrict the Second Amendment's application to militia-type arms, the *Heller* Court did agree with *Workman*'s finding that the right to arms does not encompass weapons that are, in *Workman*'s words, "habitually carried by bullies, blackguards, and desperadoes," rather than by good citizens.<sup>245</sup> *Workman* indicated that a defendant might escape punishment by proving himself a "quiet and peaceable citizen, of good character and standing in the community."<sup>246</sup>

#### IV. EARLY TWENTIETH CENTURY DECISIONS

In the twentieth century, gun control ceased to be a peculiar Southern institution. Fear of labor unrest and massive waves of immigrants, as well as the emigration of Southern blacks, brought gun control north.<sup>247</sup> Many gun control laws were upheld, and many others were not even constitutionally questioned.

##### A. *Ohio* (1900)

In the late nineteenth century, Ohio had a statute known as the "Tramp Law," which prohibited begging (except by women and the blind) and made it a criminal offense for a tramp to bear arms.<sup>248</sup> Although the defendant, Timothy Hogan, was not accused of carrying any sort of arms, the Ohio Supreme Court nonetheless chose to discuss the issue when it upheld the Tramp Law as constitutional in *State v. Hogan*.<sup>249</sup>

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*United States*, 96 W. VA. L. REV. 1 (1993).

245. *Workman*, 14 S.E. at 11; see also *Heller*, 128 S. Ct at 2817.

246. *Workman*, 14 S.E. at 9.

247. Don B. Kates Jr., *Toward a History of Handgun Prohibition in the United States*, in *RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT* 15-22 (Don B. Kates Jr., ed., 1979).

248. OHIO REV. CODE ANN. § 6995 (1908). Such tramp laws and related concerns were widespread in the last decades of the nineteenth century and first decades of the twentieth. See *Current Topics*, 21 ALBANY L.J. 142 (1880). See generally 40 O.F. Lewis, *The Tramp Problem*, in *ANNALS AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE* 217 (1912); *REPORT OF THE COMMITTEE ON CRIMINAL LAW, PROCEEDINGS OF THE SEVENTH ANNUAL CONFERENCE OF CHARITIES AND CORRECTION* 277-281 (1880).

We realize that the year 1900 was part of the nineteenth century, not the twentieth. *Hogan* has more in common with the twentieth-century Northern cases based on class fears than it does with the nineteenth-century southern cases based on racial animus, so we include *Hogan* in the twentieth century discussion.

249. *State v. Hogan*, 58 N.E. 572 (Ohio 1900).

According to the *Hogan* Court, the right to arms was for the noble purposes of self-defense and civil liberty; it did not apply to the nefarious purposes for which tramps carried guns, namely to terrorize good people.<sup>250</sup>

Neither the head notes nor the court's decision reveal whether the right under discussion derived from the state constitution or from the Second Amendment. Perhaps to the *Hogan* Court, they were the same. The rest of the *Hogan* decision expounded the dangers of the tramp.<sup>251</sup> *Hogan* is one of the earliest cases allowing the disarming of allegedly dangerous persons who have neither been convicted nor charged with a crime, nor have exhibited disloyalty to the

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250. The court wrote:

But it is insisted that the bill of rights is infringed, because the act forbids the tramp to bear arms. The question was not involved in this prosecution, but we see no real difficulty in it. The constitutional right to bear arms is intended to guaranty to the people, in support of just government, such right, and to afford the citizen means for defense of self and property. While this secures to him a right of which he cannot be deprived, it enjoins a 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, his person, and his property, to the annoyance and terror and danger of its citizens, his acts find no vindication in the bill of rights. That guaranty was never intended as a warrant for vicious persons to carry weapons with which to terrorize others. Going armed with unusual and dangerous weapons, to the terror of the people, is an offense at common law. A man may carry a gun for any lawful purpose, for business or amusement, but he cannot go about with that or any other dangerous weapon to terrify and alarm a peaceful people.

*Id.* at 575. The careful reader will notice the very strong similarity of the language to the *State v. Huntly* (1843) decision. See *supra* text accompanying note 118.

251. The court wrote:

Speaking of the class, the genus tramp, in this country, is a public enemy. He is numerous, and he is dangerous. He is a nomad, a wanderer on the face of the earth, with his hand against every honest man, woman, and child, in so far as they do not promptly and fully supply his demands. He is a thief, a robber, often a murderer, and always a nuisance. He does not belong to the working classes, but is an idler. He does not work, because he despises work. It is a fixed principle with him that, come what may, he will not work. He is so low in the scale of humanity that he is without that not uncommon virtue among the low, of honor among thieves. He will steal from a fellow tramp, if in need of what that fellow has, and will resort to violence when that is necessary. So numerous has the class become that the members may be said to overrun the improved parts of the country, especially the more thickly settled portions.

*Hogan* 58 N.E. at 574. This passionate, angry denunciation continues for many more paragraphs.



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### B. Idaho (1902)

L.D. Brickey was convicted of carrying a loaded revolver within the city limits of Lewiston, Idaho.<sup>252</sup> On appeal, the Idaho Supreme Court held in *In re Brickey* that the law violated both the Second Amendment and its Idaho analogue.<sup>253</sup> The legislature had the authority to “regulate the exercise of this right,” but there was a limit: it could prohibit concealed carrying, but not all carrying.<sup>254</sup>

### C. Vermont (1903)

In *State v. Rosenthal*, the Vermont Supreme Court struck down a Rutland ordinance that prohibited concealed carry of a pistol without a permit.<sup>255</sup> The court relied on the Vermont Constitution, which declares “[t]hat the people have a right to bear arms for the defense of themselves and the State.”<sup>256</sup> According to the court, the ordinance, “so far as it relates to the carrying of a pistol, is inconsistent with, and repugnant to, the Constitution and the laws of the State, and it is therefore, to that extent, void.”<sup>257</sup>

To this day, Vermont remains one of two states (the other

252. *In re Brickey*, 70 P. 609, 609 (Idaho 1902).

253. The Idaho Supreme Court wrote:

The second amendment to the federal constitution is in the following language: “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.” The language of section 11, article 1 of the constitution of Idaho is as follows: “the people have the right to bear arms for their security and defense, but the legislature shall regulate the exercise of this right of law.” Under these constitutional provisions, the legislature has no power to prohibit a citizen from bearing arms in any portion of the state of Idaho, whether within or without the corporate limits of cities, towns, and villages. The legislature may, as expressly provided in our state constitution, regulate the exercise of this right, but may not prohibit it. A statute prohibiting the carrying of concealed deadly weapons would be a proper exercise of the police power of the state. But the statute in question does not prohibit the carrying of weapons concealed, which is of itself a pernicious practice, but prohibits the carrying of them in any manner in cities, towns, and villages. We are compelled to hold this statute void.

*Id.*

254. *See id.*

255. *State v. Rosenthal*, 55 A. 610, 610 (Vt. 1903).

256. VT. CONST. art. 16.

257. *Rosenthal*, 55 A. at 611.

being Alaska) where a law-abiding citizen may carry a concealed handgun in public without need for a permit.<sup>258</sup>

*D. Kansas (1905)*

In *City of Salina v. Blaksley*, James Blaksley was convicted “of carrying a revolving pistol within the city while under the influence of intoxicating liquor.”<sup>259</sup> Blaksley appealed the conviction, relying on section 4 of the Kansas Bill of Rights: “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 tolerated, and the military shall be in strict subordination to the civil power.”<sup>260</sup> The prosecutor defended the city ordinance as a permissible regulation of the right.<sup>261</sup> *Sua sponte*,<sup>262</sup> the Kansas Supreme Court announced an innovative interpretation of a state constitutional arms provision: the purpose of the right was to protect the power of the state to control a militia.<sup>263</sup>

The decision was nonsense. While it is possible to imagine that a provision in the *federal* constitution might have protected state militia power against *federal*

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258. See Act of 2003, 2003 Alaska Laws (eliminating the requirement for a permit in order to carry a concealed weapon in almost all public places).

259. *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905).

260. *Id.* at 620.

261. Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 76–77 (1989).

262. *Id.*

263. *City of Salina*, 83 P. at 620. The Kansas Supreme Court wrote:

The provision in section 4 of the Bill of Rights that “the people have the right to bear arms for their defense and security” refers to the people as a collective body. It was the safety and security of society that were being considered when this provision was being put into our constitution. It is followed immediately by the declaration that standing armies in time of peace are dangerous to liberty and should not be tolerated, and that “the military shall be in strict subordination to the civil power.” It deals exclusively with the military; individual rights are not considered in this section. The manner in which the people shall exercise this right of bearing arms for the defense and security of the people is found in article 8 of the constitution, which authorizes the organizing, equipping and disciplining the militia, which shall be composed of “all able-bodied male citizens between the ages of twenty-one and forty-five years.” The militia is essentially the people’s army, and their defense and security in time of peace. In the absence of constitutional or legislative authority no person has the right to assume such duty.

*Id.*

interference, it is not possible to imagine a similar provision in a state constitution. Why would a *state* constitution need to protect the right of the state to maintain a militia? The Kansas Constitution can exercise no authority over the federal government. Moreover, a Kansas provision affirming Kansas state government militia *powers* would not be placed in the “Bill of Rights” article of the Kansas Constitution. Although the *Salina* court purported to cite some precedents, not one of them even remotely supported the proposition that the people’s “right to keep and bear arms” is not a right, but is instead a power that belongs to the state government.<sup>264</sup>

The Kansas Supreme Court implicitly abandoned *Salina* seven decades later in *Junction City v. Mevis*.<sup>265</sup> In *Mevis*, the Court ruled that a local ordinance against gun carrying was “overbroad.” Overbreadth is a tool of strict scrutiny that was formally introduced in a right to arms context by *Lakewood v. Pillow*, a 1972 Colorado case that the *Mevis* Court cited with approval.<sup>266</sup> *Mevis*, however, did not explicitly overrule *Salina*. A 2010 Kansas referendum to amend the state constitution will provide Kansas voters with the opportunity to complete the repudiation of *Salina*.<sup>267</sup>

#### *E. Washington (1907)*

As labor conflicts grew, employers often deployed goon

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264. Kopel, *supra* note 110, at 1510–12. The Kansas Constitution was modeled on the Ohio Constitution. See FRANCIS H. HELLER, THE KANSAS STATE CONSTITUTION: A REFERENCE GUIDE 4 (1992) (“[T]he delegates turned to existing models. By a formal vote they decided to use as the prototype for the new constitution the constitution written in Ohio in 1850, with that of Indiana a close second.”). Similar text in the Ohio and Indiana state constitutions has always been interpreted as protecting an individual right. See, e.g., *Klein v. Leis*, 795 N.E.2d 633 (Ohio 2003); *State v. Hogan*, 58 N.E. 572 (Ohio 1900).

The notion that the word “people” implies a power of the government, rather than a right of individual people, is contrary to the rest of the Kansas Bill of Rights. See KAN. CONST. Bill of Rights § 3 (“The people have the right to assemble . . . .”); see also KAN. CONST. Bill of Rights § 15 (“The right of the people to be secure in their persons and property . . . .”).

265. *Junction City v. Mevis*, 601 P.2d 1145 (Kan. 1979).

266. *Id.* at 1150.

267. The proposed amendment to the Kansas Constitution reads: “A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose.” Chris Green, *Gun-Rights Amendment Targets 1905 Court Ruling*, HUTCHNEWS.COM, March, 24, 2010, <http://www.hutchnews.com/Todaystop/rights2009-03-24T21-23-15>.

squads to attack strikers.<sup>268</sup> Some state constitutions of the late nineteenth century, such as those of Washington and Montana, forbade the use or importation of armed bodies of men without government consent.

In *State v. Gohl*, Gohl was convicted of "organizing, maintaining and employing an armed body of men" in violation of a Washington statute.<sup>269</sup> On appeal, Gohl argued that the statute in question violated the Washington Constitution, which stated that "[t]he right of the individual citizen to bear arms in defense of himself or the state shall not be impaired."<sup>270</sup> As the court pointed out, however, this sentence is immediately followed by the statement that the right is not to be "construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men,"<sup>271</sup> and that was exactly what Gohl had done.<sup>272</sup>

#### *F. Indiana (1908)*

In *McIntyre v. State*, the Indiana Supreme Court upheld a statute banning concealed carry. Edwin E. McIntyre had been convicted of carrying a concealed revolver in Indianapolis. McIntyre was a deputy constable in Marion County at the time of his arrest—though it appears he was not acting in that capacity at the time of the offense. On appeal, McIntyre argued that the state constitution guaranteed his right to carry concealed weapons.<sup>273</sup>

In the period between *Mitchell* (1833), and *McIntyre* (1908), Indiana adopted a new constitution but kept a provision from its 1816 Constitution noting: "That the people have a right to bear arms for the defense of themselves, and the State; and that the military shall be kept in strict subordination to the civil power."<sup>274</sup> The two provisions,

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268. Cramer, *supra* note 25, at 132–34. Most prominent among them were the Pinkertons. Allen Pinkerton's book *Strikers, Communists, Tramps and Detectives* celebrated at length the Pinkerton National Detective Agency's role in strike-breaking. ALLEN PINKERTON, *STRIKERS, COMMUNISTS, TRAMPS, AND DETECTIVES* (G.W. Carleton & Co., Publishers 1978).

269. *State v. Gohl*, 90 P. 259 (Wash. 1907).

270. WASH. CONST. art. I, § 24.

271. *Id.*

272. *Gohl*, 90 P. 259 at 260–61.

273. *McIntyre v. State*, 83 N.E. 1005 (Ind. 1908).

274. IND. CONST., art. I, §§ 32–33 (1816).

however, were located in separate sections.<sup>275</sup>

The Indiana Supreme Court ruled that “when a clause or provision of a constitution or statute has been readopted after the same has been construed by the courts of such state, it will be concluded that it was adopted with the interpretation and construction which said courts had enunciated.”<sup>276</sup> Therefore, the court looked to *Mitchell*, and held that the statute banning concealed carry was legal. As discussed *supra*, *Mitchell* had announced a result, but had provided not a word of rationale.<sup>277</sup>

### G. Oklahoma (1908)

The Oklahoma Supreme Court’s decision in *Ex parte Thomas* involved yet another challenge to a law against carrying concealed handguns. According to the court, a “pistol” was not within the right to arms.<sup>278</sup> Despite what the *Thomas* court claimed, there was not a single precedent for the proposition that all handguns could be banned.<sup>279</sup> The court reiterated the civilized warfare test<sup>280</sup> accurately, but failed to explain how large handguns would be omitted from the test’s protections.<sup>281</sup>

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275. See *id.*

276. *McIntyre*, 83 N.E. at 1006.

277. See *supra* text accompanying note 71.

278. *Ex parte Thomas*, 97 P. 260, 262 (Okla. 1908).

279. See CRAMER, *supra* note 268, at 153–54. Of course the 1905 *Salina* case from neighboring Kansas had denied that there was any personal right to arms. See *id.* at 154. But no case that had acknowledged the individual right had asserted that a ban on all handguns would be permissible. Several cases (all from the South) had authorized bans on some models of handguns. These limited bans were upheld only because they did not apply to all handguns, and protected ownership of the handgun models, which were most useful for a citizen serving in the militia. See *supra* text accompanying notes 152, 173, 178.

280. See *supra* text accompanying notes 90–96.

281. The court wrote:

Not everything that may be useful for offense or defense; but what may, properly be included or understood under the title of “arms,” taken in connect with the fact that the citizen is to keep them as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the state. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we would hold that the rifle of all descriptions, the shotgun, the musket, and repeater are all such arms; and that under the Constitution the right to keep such arms cannot be infringed or forbidden by the Legislature . . . .

Moreover, civilized warfare was the wrong test for Oklahoma. The state constitutional convention had specifically rejected proposals to limit the right to arms to "common defense."<sup>282</sup> Instead, the Oklahoma state constitution right to arms was copied nearly verbatim from the constitutions of Colorado and Missouri, both of which include a right of personal self-defense.<sup>283</sup> The Missouri Supreme Court had already ruled that revolvers are protected arms.<sup>284</sup>

#### *H. Georgia (1911)*

In 1910, the Georgia Legislature enacted a licensing requirement for the open carrying of handguns.<sup>285</sup> The 1910 law was not like the carry licensing laws in effect today in Georgia and most other states; the modern laws use objective criteria to grant concealed carry permits to adults who meet certain objective criteria, such as passing a fingerprint-based background check and a safety course.<sup>286</sup> In contrast, the 1910 Georgia statute provided almost limitless discretion to the licensing authority, so that in effect, political cronies could get licenses and black people could not. Because the

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*Thomas*, 97 P. at 263. This language comes directly from the 1871 Tennessee case *Andrews v. State*, discussed *supra*. See *Andrews v. State*, 50 Tenn. (3 Heisk.) 165 (1871). *Andrews* plainly used "repeater" to mean a revolver, which was the predominant type of handgun at the time. See *id*.

282. DANNY M. ADKISON & LISA MCNAIR PALMER, *THE OKLAHOMA STATE CONSTITUTION: A REFERENCE GUIDE* 46-47 (2001); 8 *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 36, 99 (William F. Swindler ed., 1979); see AMOS D. MAXWELL, *THE SEQUOYAH CONVENTION* 73 (1953).

283. OKLA. CONST., art. II, § 26 ("The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons."); Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 217, 236 (1982); David B. Kopel, *What State Constitutions Teach About the Second Amendment*, 29 N. KY. L. REV. 827, 844 n.131 (2002).

284. "Conceding that a revolving pistol comes within the description of such arms as one may carry for the purposes designated in the constitution . . . ." *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886). For more on *Shelby*, see *supra* text at notes 227-35.

285. The license fee was fifty cents, and a \$100 bond was required of those who sought a license to carry.

286. See Clayton E. Cramer & David B. Kopel, *Shall Issue: The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679 (1995) (describing laws enacted through 1994).

legislature had previously outlawed concealed carry,<sup>287</sup> obtaining an open carry license became the only way for a person to lawfully exercise the right to bear handguns.<sup>288</sup>

In *Strickland v. State*, the Georgia Supreme Court upheld the licensing statute.<sup>289</sup> The court observed that in some of the states where common defense was the only stated purpose of the right to arms, carry restrictions had been upheld because arms carrying for personal defense was not related to militia service.<sup>290</sup> But what about in states where the right to arms explicitly included individual self-defense? The court said that restrictions could be imposed “in connection with the general police power of the state.”<sup>291</sup> *Strickland* and the cases on which it relied, however, are invalid for Second Amendment interpretation post-*Heller* for two reasons. First, *Heller* plainly states that the right to keep

287. See *Hill v. State*, 53 Ga. 472 (1874).

288. Under modern Georgia law, a person who wishes to carry a handgun for protection, either openly or concealed, may obtain a permit which is issued under objective criteria, to adults who have a clean record. See GA. CODE ANN. § 16-11-129 (2007).

289. *Strickland v. State*, 72 S.E. 260 (Ga. 1911).

290. The Georgia Supreme Court wrote:

An examination of the various decisions, whether dealing with laws against carrying concealed weapons, or with regulations as to the prohibition against carrying weapons of a particular character, will show that two general lines of reasoning have been employed in upholding such statutes: First, that such provisions are to be construed in the light of the origin of the constitutional declarations, or their connection with words declaratory of the necessity for an efficient militia or for the common defense, or the like, where they are used, and in view of the general public purpose which such provisions were intended to subserve; and, second, that the right to bear arms, like other rights of person and property, is to be construed in direct connection with the constitutional declaration as to the right.

*Id.* at 262.

291. The court further wrote:

But even where such expressions do not occur, it has been held that the different provisions of the Constitution must be construed together, and that the declaration or preservation of certain rights is not be segregated and treated as arbitrary, but in connection with the general police power of the state, unless the language of the instrument itself should exclude such a construction. Thus, if the right to bear arms includes deadly weapons of every character, and is absolute and arbitrary in its nature, it might well be argued, as it was in earlier days, that the citizen was guaranteed the right to carry weapons or arms, in the broadest meaning of that term, whenever, wherever, and however he pleased, and that any regulation, unless expressly provided for in the Constitution, was an infringement of that right.

*Id.* at 262–63.

and bear arms is not dependent on the militia.<sup>292</sup> Second, *Heller's* result is contrary to the theory that any law which can be justified under the police power is therefore permissible under the Second Amendment.<sup>293</sup>

### *I. Florida (1912)*

In *Carlton v. State*, three brothers were convicted of first-degree murder of a peace officer in St. Johns County. Relative to the murder conviction that the Carlton brothers appealed, the related weapons violations constituted a small matter and, perhaps for this reason, the Florida Supreme Court put little effort into the discussion of the issue.<sup>294</sup>

The Carlton brothers sought to overturn the concealed weapons statute<sup>295</sup> because the Florida Bill of Rights protected the right of the people "to bear arms in defense of themselves and the lawful authority of the state."<sup>296</sup> The Florida Supreme Court held:

This section was intended to give the people the means of protecting themselves against oppression and public outrage, and was not designed as a shield for the individual man, who is prone to load his stomach with liquor and his pockets with revolvers or dynamite, and to make of himself a dangerous nuisance to society.<sup>297</sup>

*Carlton* was inconsistent with the text of the state constitution. The right to bear arms "in defense" of "the lawful authority of the state" might have been construed as a right of the people to use arms to protect themselves against tyranny and public outrage. The constitution, however, separately specified the right to bear arms "in defense of themselves," and its language most naturally pointed to ordinary personal defense.

The only precedents cited in *Carlton* were *State v.*

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292. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2814 (2008).

293. See *supra* text accompanying notes 23–24.

294. *Carlton v. State*, 58 So. 486 (Fla. 1912).

295. In 1893 (with revisions in 1901 and 1906), Florida adopted a general prohibition on the carry of handguns and repeating rifles (openly or concealed) with exceptions for peace officers and persons licensed by the county commissioners. *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941); *Carlton*, 58 So. at 488; *State ex rel. Russo v. Parker*, 49 So. 124, 125 (Fla. 1909).

296. FLA. CONST. of 1885, art. I, § 20. The same language is now in section 8 of the current constitution.

297. *Carlton*, 58 So. at 488.



*Workman* (W.V. 1891) and *Presser v. Illinois* (U.S. 1886). Neither precedent supported the notion that the right to arms did not include individual self-defense.<sup>298</sup> In light of the graver issues decided in *Carlton*, it is not surprising that the court gave so little attention to the carry issue. Unfortunately, the Florida Supreme Court still used *Carlton*'s sloppy language as a precedent in the 1960s and 1970s.<sup>299</sup>

We have some information about why Florida had adopted a requirement for a license to carry handguns in 1893, with revisions in 1901 and 1906. The Florida statute was a general prohibition on carry of handguns and repeating rifles, openly or concealed, with exceptions for peace officers and persons licensed by the county commissioners. What prompted this statute? In 1941, the Florida Supreme Court refused to find that a pistol in an automobile glove compartment was "carrying" within the meaning of the statute. A concurring opinion by Justice Buford explained:

I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. *The statute was never intended to be applied to the white population and in practice has never been so applied.* We have no statistics available, but it is a safe guess that more than 80% of the white men living rural sections of Florida have violated this statute. It is also a safe guess to say that not more than 5% of the men in Florida who own pistols and repeating rifles have ever applied to the Board of County Commissioners for a permit to have the same in their possession and there has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.<sup>300</sup>

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298. See *supra* text accompanying notes 216, 243.

299. See *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972).

300. *Watson*, 4 So. 2d at 703 (emphasis added).

*J. New York (1911–1931)*

In *People v. Persce*, New York's highest court, the Court of Appeals, heard a challenge to Penal Law section 1897, which prohibited the possession or carrying of a "slungshot, billy, sand club or metal knuckles."<sup>301</sup> The statute was unclear as to whether it prohibited possessing in one's home, carrying with criminal intent, or simply carrying in public.<sup>302</sup>

Detective Giuseppe Persce was arrested at two o'clock in the morning, in a room with two other men. A slungshot was found in his pocket, and he was charged and convicted under section 1897 in New York County (Manhattan). On appeal, Persce's attorneys argued that the statute made "mere possession of a slungshot or a billy, no matter how innocent, a felony" and was therefore unconstitutional.<sup>303</sup> Persce's attorneys cited the Eighth and Fourteenth Amendments to the U.S. Constitution, but not the Second Amendment. They also cited provisions of the New York State Constitution, but there were no provisions related to the right to keep and bear arms. The New York Civil Rights Law included a verbatim copy of the Second Amendment.<sup>304</sup> Although Persce did not plead the Civil Rights Law, the Court of Appeals addressed it.

The court refused to overturn the statute and held that the legislature had the authority to prohibit simple possession of an object, even where possession was not associated with criminal intent. The court discussed the purpose of this statute and the weapons to which it applied, characterizing them as "dangerous and foul weapons seldom used for justifiable purposes but ordinarily the effective and illegitimate implements of thugs and brutes in carrying out their unlawful purposes."<sup>305</sup>

The court then addressed the statutory right to bear arms, finding it applied to "ordinary legitimate weapons for defense" and not "to instruments which are ordinarily used for criminal and improper purposes."<sup>306</sup> The formulation is very similar to *Heller's* test for what arms are encompassed in

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301. *People v. Persce*, 204 N.Y. 397, 398 (1912).

302. *Id.*

303. *Id.*

304. *Id.* at 403.

305. *Id.* at 398–99, 400, 402–03.

306. *Id.* at 403.

the Second Amendment.<sup>307</sup>

The Sullivan Law, passed in 1911, required a license not only for carrying handguns, but also for their ownership. Its sponsor was New York State Senator Timothy Sullivan, who was widely believed to be involved in financial corruption in the city government.<sup>308</sup> In *People ex rel. Darling v. Warden of City Prison*, New York's intermediate court of appeals made the distinction between prohibition and regulation, and therefore upheld a conviction for unlicensed possession of a handgun at home.<sup>309</sup> This was apparently a test case.<sup>310</sup>

Darling's argument against the statute was based on "the inherent and inalienable right to keep and bear arms, declared by the English Bill of Rights, inherited by the Congress, recognized by the Bill of Rights adopted in this State, . . . and alluded to in the second amendment to the Constitution of the United States."<sup>311</sup> Not surprisingly, the court found that the U.S. Bill of Rights was not a limitation on state actions—a perfectly valid assertion in 1913. By moral retort, the New York court noted the U.S. Supreme Court's 1897 decision in *Robertson v. Baldwin*, which reasoned that all constitutional protections have some implicit exceptions.<sup>312</sup> Just as laws against libel or obscenity do not violate the First Amendment, "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons."<sup>313</sup> But of course, the Sullivan Law was not about *carrying* concealed weapons, but

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307. See *supra* text at note 8.

308. MARK GROSSMAN, POLITICAL CORRUPTION IN AMERICA: AN ENCYCLOPEDIA OF SCANDALS, POWER, AND GREED 312 (2003); see *People ex rel. Darling v. Warden of City Prison*, 139 N.Y.S. 277 (App. Div. 1913).

309. *Darling*, 139 N.Y.S. 277.

310. The court wrote:

The relator notified the police that he had a pistol in his house without a permit. Thereupon a captain of police went to his house and found a loaded revolver and some loaded shells in a small cabinet in the bedroom adjoining the parlor. He asked the defendant why he kept the revolver there and defendant said he preferred not to answer the question. The captain asked if defendant had a permit, to which he replied no. Whereupon the captain placed the relator under arrest and took him before a city magistrate, charging him with a violation of section 1897 . . . .

*Id.* at 279.

311. *Id.* at 281.

312. *Id.*

313. *Id.* at 283.

rather *owning* concealable weapons.

Concerning the New York Civil Rights Law (also known as the New York Bill of Rights), the *Darling* Court pointed out that it was not a part of the New York Constitution, and being statutory, was simply another law that could be limited by a subsequent state legislative act. Even so, the Civil Rights Laws reflected principles of free government everywhere:

Nevertheless we fully recognize the proposition that the rights enumerated in the Bill of Rights were not created by such declaration. They are of such character as necessarily pertains to free men in a free State. But in order to appeal thereto for the purpose of declaring null and void an act of the Legislature, possessing all the law-making power of the people, it is necessary, before the act is declared null and void, that it should clearly be made to appear that it is in flat violation of some fundamental right of which the citizen may not be deprived by any power.

The right to keep and bear arms is coupled with the statement why the right is preserved and protected, viz., that "a well regulated militia being necessary to the security of a free State." (Civil Rights Law, §4). If the Legislature had prohibited the keeping of arms, it would have been clearly beyond its power.<sup>314</sup>

Thus, banning guns would have violated the Civil Rights Law. The legislature, however, merely required a license. As long as the licensing law was not "unduly oppressive," it was constitutional.<sup>315</sup>

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314. *Id.* at 284.

315. The court wrote:

In the statute at bar the Legislature has not prohibited the keeping of arms. For the safety of the public, for the preservation of the public peace, in the exercise of the police power, the means employed being within its discretion and not in that of the courts, unless flagrantly in violation of constitutional provisions, the Legislature has passed a regulative, not a prohibitory, act. Legislation which has for its object the promotion of the public welfare and safety falls within the scope of the police power and must be submitted to even though it imposes restraints and burdens on the individual. The rights of the individual are subordinate to the welfare of the State. The only question that can then arise is whether the means employed are appropriate and reasonably necessary for the accomplishment of the purpose in view and are not unduly oppressive.

*People ex rel. Darling v. Warden of City Prison*, 139 N.Y.S. 277, 285 (1913).

The *Darling* court split 3–2. Dissenting Justice Scott wrote that the Sullivan Law ought to be narrowly construed, especially when based on “that somewhat vague and shadowy right known as the police power.”<sup>316</sup>

#### K. Ohio (1920)

A 1917 Ohio statute prohibited the carrying of “a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person,” with the usual exemptions for police officers.<sup>317</sup> Doubtlessly reflective of the labor strife then gripping the United States, “specially appointed police officers” were entitled to carry arms if they posted a \$1000 bond, apparently to work as company police.<sup>318</sup> General Code section 13693 also provided an affirmative defense for ordinary persons who carried concealed weapons: “[T]he jury shall acquit the defendant if it appear that he was at the time engaged in a lawful business, calling or employment, and that the circumstances, in which he was placed, justified a prudent man in carrying such weapon for the defense of his person, property, or family.”<sup>319</sup>

In *State v. Nieto*, Mike Nieto, “a Mexican in the employ of the United Alloy Steel Company,” was asleep in a railroad car that was functioning as a company bunkhouse.<sup>320</sup> Nieto was accused of threatening the camp cook’s life while drunk on Christmas night, 1919.<sup>321</sup> On the morning of December 26, two company police officers searched the still-intoxicated Nieto while he lay in his bed, and found a revolver concealed in his clothing.<sup>322</sup>

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316. Justice Scott wrote:

[T]hat every statute shall be given a reasonable construction, where its language is susceptible of more than one construction, and in determining what is a reasonable construction, regard is to be had not only to the language but also to the evil sought to be guarded against and to the nature of the remedy provided. This is especially true of statutes like the one now under consideration which is highly penal, creates a crime out of that which was formerly lawful and relies for its authority upon the existence of that somewhat vague and shadowy right known as the police power.

*Id.* at 287 (Scott, J., dissenting).

317. *State v. Nieto*, 130 N.E. 663, 663 (Ohio 1920).

318. *Id.* at 664.

319. *Id.* at 665 (quoting section 13693 of the General Code).

320. *Id.* at 663.

321. *Id.*

322. *Id.*

The trial judge charged the jury to determine whether the bunkhouse was Nieto's home, because "if that was his place of living, where he slept, then that was his home, and, being his home, he had a right, . . . as a matter of law, to have a pistol, either loaded or empty, with him and in his possession, or concealed on his person."<sup>323</sup> Not surprisingly, the jury acquitted Nieto and the prosecutor appealed. Unlike in many other arms cases in which a jury set the defendant free, Nieto had an attorney when the matter reached the state supreme court.<sup>324</sup> Nieto's attorney argued that the statute violated Article I, section 4 of the Ohio Constitution.<sup>325</sup>

The majority opinion, written by Justice Avery, pointed to such decisions as *Dunston v. State*, and *Carroll v. State* for the theory that the state could prohibit concealed carry in one's own home.<sup>326</sup> The court employed a balancing of interests approach to the right to be armed:

The statute does not operate as a prohibition against carrying weapons, but as a regulation of the manner of carrying them. The gist of the offense is concealment. The constitution contains no prohibition against the legislature making such police regulations as may be necessary for the welfare of the public at large as to the manner in which arms shall be borne.<sup>327</sup>

Justice Wanamaker's dissent discussed the racial issue

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323. *State v. Nieto*, 130 N.E. 663 (Ohio 1920).

324. *Id.*

325. *Id.* at 663-64.

326. *Id.* at 664. *Dunston v. State*, 27 So. 333, 334 (Ala. 1900), found that concealed carry of a pistol in one's own home could be prohibited because the law was intended to avoid "bad influences" exerted upon the wearer or a deadly weapon and the resulting insecurity of others. *Carroll v. State*, 28 Ark. 99, 101 (1872), similarly upheld a ban on concealed carry in one's own home:

There is no provision in the statute excusing a party when carrying a pistol concealed as a weapon on his own premises, nor would it constitute any excuse for so wearing a weapon, to show that the accused was in fear or even in danger of being attacked. . . .

Neither natural nor constitutional right authorizes a citizen to use his own property or bear his own arms in such way as to injure the property or endanger the life of his fellow citizen, and these regulations must be left to the wisdom of the legislature, so long as their discretion is kept within reasonable bounds. And it is not unreasonable for the legislature to enact that deadly weapons shall not be worn concealed, that those associating with the bearer may guard against injury by accident or otherwise.

327. *Nieto*, 130 N.E. at 664.

that underlies much of gun control history in the United States. He stated:

I desire to give some special attention to some of the authorities cited, supreme court decisions from Alabama, Georgia, Arkansas, Kentucky, and one or two inferior court decisions from New York, which are given in support of the doctrines upheld by this court. The southern states have very largely furnished the precedents. *It is only necessary to observe that the race issue there has extremely intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions.*<sup>328</sup>

Justice Wanamaker did not dispute the notion of lawful regulation, but did argue that the standard of review should be rigorous:

I hold that the laws of the state of Ohio should be so applied and so interpreted as to favor the law-abiding rather than the law-violating people. If this decision shall stand as the law of Ohio, a very large percentage of the good people of Ohio to-day are criminals, because they are daily committing criminal acts by having these weapons in their own homes for their own defense. The only safe course for them to pursue, instead of having the weapon concealed on or about their person, or under their pillow at night, is to hang the revolver on the wall and put below it a large placard with these words inscribed:

"The Ohio supreme court having decided that it is a crime to carry a concealed weapon on one's person in one's home, even in one's bed or bunk, this weapon is hung upon the wall that you may see it, and before you commit any burglary or assault, please, Mr. Burglar, hand me my gun."<sup>329</sup>

Decades later, the Wisconsin Supreme Court took a similar approach, holding that concealed carry may not be prohibited in one's home or place of business.<sup>330</sup>

#### *L. North Carolina (1921)*

In 1919, North Carolina's Forsyth County passed an ordinance that prohibited carrying "Bowie knives, dirks, daggers, slung-shots, loaded canes, brass, iron, or metallic

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328. *Id.* at 669 (Wanamaker, J., dissenting) (emphasis added).

329. *Id.* at 670 (Wanamaker, J., dissenting).

330. *See State v. Hamdan*, 665 N.W.2d 785, 807 (Wis. 2003).

knucks, razors," or handguns in public without a permit.<sup>331</sup> In 1921, O.W. Kerner was attacked in Kernersville, Forsyth County.<sup>332</sup> He went to his place of business, retrieved a handgun, and returned to where he had been attacked.<sup>333</sup> At trial, the court directed a verdict of not guilty, opining that the statute conflicted with the constitutional right to bear arms, and the state appealed.<sup>334</sup>

The North Carolina Supreme Court struck down the Forsyth County law based on North Carolina's constitutional protections:

The Constitution of this state, section 24, art. 1, which is entitled, "Declaration of Rights," provides, "The right of the people to keep and bear arms shall not be infringed," adding, "nothing herein contained shall justify the practice of carrying concealed weapons or prevent the Legislature from enacting penal statutes against said practice." This exception 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. This constitutional guaranty was construed in *State v. Speller*, 86 N. C. 697, in which it was held that the distinction was between the "right to keep and bear arms" and the "practice of carrying concealed weapons." The former 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. The provision against carrying them concealed was to prevent assassinations or advantages taken by the lawless; i.e., against the abuse of the privilege.<sup>335</sup>

The court held that of all the weapons banned from carry by the Forsyth County ordinance, only the pistol was protected:

None of these except "pistol" can be construed as coming within the meaning of the word "arms" used in the constitutional guaranty of the right to bear arms. We are of the opinion, however, that "pistol" *ex vi termini* is properly included within the word "arms," and that the

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331. *State v. Kerner*, 107 S.E. 222, 224 (N.C. 1921).

332. *Id.* at 222.

333. *Id.*

334. *Id.*

335. *Id.* at 223.



right to bear such arms cannot be infringed. The historical use of pistols as “arms” of offense and defense is beyond controversy.

It is true that the invention of guns with a carrying range of probably 100 miles, submarines, deadly gases, and of airplanes carrying bombs and other modern devices, have much reduced the importance of the pistol in warfare except at close range. But the ordinary private citizen, whose right to carry arms cannot be infringed upon, is not likely to purchase these expensive and most modern devices just named. To him the rifle, the musket, the shotgun, and the pistol are about the only arms which he could be expected to “bear,” and his right to do this is that which is guaranteed by the Constitution. To deprive him of bearing any of these arms is to infringe upon the right guaranteed to him by the Constitution.<sup>336</sup>

The court made clear that there was no problem with laws that prohibited “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.”<sup>337</sup> These were “reasonable regulations” that did “not infringe upon the object of the constitutional guaranty which is to preserve to the people the right to acquire and retain a practical knowledge of the use of fire arms.”<sup>338</sup> The court also held that laws prohibiting “pistols of small size which are not borne as arms but which are easily and ordinarily carried concealed” would be constitutional.<sup>339</sup>

In short, a discretionary licensing system for open carry of large handguns was unconstitutional. The right to carry handguns was “not an idle or an obsolete guaranty, for there are still localities, not necessary to mention, where great corporations, under the guise of detective agents or private police, terrorize their employees by armed force.”<sup>340</sup>

Which “great corporations” was the court referring to? Perhaps the court was cognizant of the labor violence in West Virginia, where deputy sheriffs, nominally public employees,

336. *Id.* at 224.

337. *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921).

338. *Id.*

339. *Id.* (“To exclude all pistols, however, is not a regulation, but a prohibition, of arms which come under the designation of “arms” which the people are entitled to bear.”).

340. *Id.*

were paid their salaries by coal companies, and were stationed on coal company property while perpetrating violence against strikers and union organizers. West Virginia was a site of continuing labor violence from 1890 into the early 1920s.<sup>341</sup>

*M. Michigan (1922)*

Ostensibly to protect wildlife, a 1921 Michigan ordinance required a permit for aliens to possess a firearm.<sup>342</sup> Gun control laws supposedly for the protection of wildlife have a long history. Blackstone observed that game laws had many motivations, including the "preventi[on] of popular insurrections and resistance to the government, by disarming the bulk of the people: which last is a reason often meant, than avowed, by the makers of forest or game laws."<sup>343</sup>

The defendant in *People v. Zerillo* was a ne'er-do-well, and the temptation to put him behind bars must have been strong. The Michigan Supreme Court, however, decided otherwise, and defended the rights of aliens. James Zerillo (alias Joseph Zerillo) possessed a .38-caliber revolver in the door of his car when he was arrested at approximately 5 a.m. in Detroit.<sup>344</sup> The Michigan Supreme Court noted that Zerillo was not charged with illegal hunting or with intending to hunt.<sup>345</sup>

Under the Michigan Constitution, "Every person has a right to bear arms for the defense of himself and the state."<sup>346</sup> In explicating this provision, the Michigan Supreme Court looked to the more detailed provision in the Colorado Constitution:

That the right of no person to keep and bear arms in defense of his home, person, and property, or in aid of the civil power when there to lawfully summoned, shall be

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341. Deputy sheriffs, paid by the coal companies to guard company facilities, often committed illegal violence against union organizers. WINTHROP D. LANE, *CIVIL WAR IN WEST VIRGINIA* 17-19, 48-49 (2d ed. 1969). Armed violence, on both sides, was not at all in short supply during this period, with coal companies using private detective agencies to intimidate and on occasion, murder union organizers. *Id.*

342. 1921 MICH. PUB. ACTS 23.

343. 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*412.

344. *People v. Zerillo*, 189 N.W. 927, 927-28 (Mich. 1922).

345. *Id.* at 928.

346. MICH. CONST. of 1908, art. II, § 5.

called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.<sup>347</sup>

The court found this should also include the right of the legislature to regulate the carrying of firearms, noting:

Firearms serve the people of this country a useful purpose wholly aside from hunting, and under a constitution like ours, granting to aliens who are bona fide residents of the state the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens, and to *every person* the right to bear arms for the defense of himself and the state, while the Legislature has power in the most comprehensive manner to regulate the carrying and use of firearms, that body has no power to constitute it a crime for a person, alien or citizen, to possess a revolver for the legitimate defense of himself and his property. The provision in the Constitution granting the right to all persons to bear arms is a limitation upon the power of the Legislature to enact any law to the contrary.

The exercise of a right guaranteed by the Constitution cannot be made subject to the will of the sheriff. The part of the act under which the prosecution was planted is not one of regulation, but is one of prohibition and confiscation. It is not regulation to make it a crime for an unnaturalized foreign-born resident of the state to possess a revolver, unless permitted to have one by the sheriff of the county where he resides.<sup>348</sup>

*Zerillo* fits within the standard nineteenth century understanding of the right to arms, and comports with the *Heller* approach to Second Amendment analysis. Significantly, the court did not defer to legislative assertions about the purported purpose of protecting game. The court looked past the legislative claim to observe that in effect, the law made it a crime for a legal alien “to possess a revolver for the legitimate defense of himself and his property.”<sup>349</sup>

Although in theory an alien could apply for a license, “[t]he exercise of a right guaranteed by the Constitution cannot be made subject to the will of the sheriff.”<sup>350</sup> The

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347. COLO. CONST. art. II, §13.

348. *Zerillo*, 189 N.W. at 928.

349. *Id.*

350. *Id.*

phrase “the will of the sheriff” is key to how the right to arms developed in the late twentieth and early twenty-first centuries. In about eighty percent of the states today, the long-standing controversy about concealed arms has ended with a compromise that satisfies large majorities, including law enforcement: in order to carry concealed arms in public places, a permit is required. The permit may require a fingerprint-based background check as well as safety training. If the applicant has a clean record and passes the safety class, the applicant “shall” be granted a permit to carry a concealed handgun for lawful self-defense.<sup>351</sup>

While open carry remains legal in most states, the socially-preferred form of carrying is now concealed carry.<sup>352</sup> Concealed carry is considered preferable because it reduces the opportunities for a miscreant to snatch a gun.<sup>353</sup> In addition, concealed carry reduces the anxiety among what some nineteenth century courts called the “timid” portion of the populace who are afraid of seeing a firearm.<sup>354</sup>

The *Zerillo* decision is also consistent with *Heller* in that the court did not delve into whether a particular gun is a militia weapon. The *Zerillo* court accepted the self-defense text of the state constitution. Moreover, *Zerillo* recognized broad legislative power to regulate arms-carrying, but legitimate regulation did not include capricious licensing or prohibition.<sup>355</sup>

Finally, *Zerillo* affirmed that legal aliens can sometimes have constitutional rights. While the legislature might be able to ban aliens from taking game, the state Constitution protects the right of “every person,” including legal aliens, to self-defense.<sup>356</sup> At the height of the resurgence of the second

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351. Cramer & Kopel, *supra* note 286.

352. See Sam Howe Verhovek, *Why Not Unconcealed Guns?* N.Y. TIMES, Sept. 3, 1995, at 41.

353. See, e.g., David B. Kopel, *The Licensing of Concealed Handguns for Lawful Protection: Support from Five State Supreme Courts*, 68 ALB. L. REV. 305, 335 (2005).

354. *Haile v. State*, 38 Ark. 564, 566 (1882).

355. *Zerillo*, 189 N.W. at 929.

356. In *Robertson v. Baldwin*, 165 U.S. 275 (1897), the Supreme Court, interpreting the Thirteenth Amendment so as not to ban personal service contracts for merchant seamen, said that all constitutional rights include implicit exceptions, commonly understood at the time of adoption.

“Every person” does not mean “every person” in the most hyper-literal sense. It does not include soldiers of an invading army; if Chinese troops

Ku Klux Klan, the Michigan Supreme Court vindicated the rights of immigrants.

*N. New Jersey (1925)*

Because the New Jersey Constitution is one of only six U.S. state constitutions without a right to arms guarantee, the first New Jersey decision on the meaning of the right did not emerge until 1925. In *State v. Angelo*, defendant Dominick Angelo pleaded guilty to carrying a concealed revolver and upon sentencing, appealed on the grounds that his right to bear arms was infringed.

Presumably, Angelo's argument and the court's decision were based upon the Second Amendment. The Supreme Court of New Jersey accepted the existence of such an individual Second Amendment right to arms for personal defense, denied that the right was absolute, and then said that the statute was constitutional.<sup>357</sup> The first two steps seem obvious, but the third step needed more analysis. That a right is non-absolute does not prove that every restriction on the right is constitutional. Thus, *Angelo* suffered from the same logical gaps as the 1842 Arkansas decision in *State v. Buzzard*.<sup>358</sup>

*O. Oklahoma (1929)*

One result of alcohol prohibition was a vicious cycle of law evasion and increasing repression by law enforcement authorities. As in the drug war of today, law enforcement in the "alcohol war" often looked for broad laws to give them the power to punish suspected traffickers in illegal substances—even when the suspect could not be proved in court to be a trafficker.

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entered Michigan, the Michigan state government would not violate the state constitution by disarming them. Likewise, "every person" has an implicit exception for persons confined in prisons or jails.

357. The Supreme Court of New Jersey wrote:

The right of a citizen to bear arms is not unrestricted. The state government, in the exercise of its police power, may provide such conditions precedent to the right to carry concealed weapons as the safety and welfare of the people of the state in its judgment require. The statute upon which the indictment was based is a valid exercise of the police power.

*State v. Angelo*, 130 A. 458, 459 (N.J. 1925).

358. See *supra* notes 108–117 and accompanying text.

The case of *Pierce v. Oklahoma* came out of Oklahoma during Prohibition. Three police officers went to Fritz Pierce's property with a search warrant for a still.<sup>359</sup> When they arrived, Pierce came to the door with a gun in his belt, "about half of the gun being visible."<sup>360</sup> While the officers were searching for a still, Pierce went into his yard with the gun in his belt.<sup>361</sup> At no point did Pierce attempt to use the gun, which he said he had purchased to protect himself from robbery.<sup>362</sup> The police found no still or any other evidence of criminal behavior—except that Pierce had walked from his front door into the front yard wearing a gun—so they arrested him.<sup>363</sup>

On appeal, Pierce pointed to Article 2, section 26 of the Oklahoma Constitution, and argued the right to carry a gun openly in one's own house and yard.<sup>364</sup> The Court of Criminal Appeals rejected this position, pointing to *Ex parte Thomas*; according to the court, the right to arms included only "such arms as are recognized in civilized warfare."<sup>365</sup>

The civilized warfare test is not an implausible standard for state constitutions that mention "common defense" as the sole purpose for the right to arms. The *Pierce* Court's use of civilized warfare, however, was grossly defective in at least two respects.

First and most importantly, the right to arms in the 1907 Oklahoma Constitution includes self-defense: "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited . . . ."<sup>366</sup> Therefore, the proper Oklahoma standard is whether the particular arm is useful "in defense of his home, person, or property," or if it is useful "in aid of the civil power, when thereunto legally summoned." Either use would qualify for constitutional protection.<sup>367</sup>

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359. *Pierce v. State*, 275 P. 393, 393 (Okla. Crim. App. 1929).

360. *Id.* at 394.

361. *Id.*

362. *Id.* at 393.

363. *Id.* at 396.

364. *Id.* at 394.

365. *Pierce v. State*, 275 P. 393, 395 (Okla. Crim. App. 1929).

366. OKLA. CONST. art. II, § 26.

367. This is the approach taken by Oregon courts, for a similar provision in that state. See *infra* notes 467–505 and accompanying text.

Second, even if “civilized warfare” were the proper rule in Oklahoma, at least some handguns qualified for protection. The nineteenth century “Army and Navy model” handguns are indisputable examples. In 1929 (as in 1879, 1969, or 2010), handguns were among the firearms often carried in the army and navy, and select militia (today’s National Guard).<sup>368</sup> But, the Oklahoma court asserted that handguns were not of military utility, thus, their carrying and possession could be banned.<sup>369</sup> In this context, *Pierce*’s upholding of the prohibition on carrying or possessing handguns on one’s own property is inconsistent with *Heller*.

*P. Tennessee (1928)*

Fifty years after allowing the near-nullification of the right to bear arms, the Tennessee Supreme Court overturned a city ban on the carrying of pistols.<sup>370</sup> W.R. Glasscock, T. F. Brandon, and Dick Edwards, apparently independently of each other, were convicted of violating the Chattanooga ordinance.<sup>371</sup> The decision in *Glasscock v. City of Chattanooga*, however, does not mention the manner in which the defendants were carrying pistols.

The court quoted the 1870 Tennessee Constitution, recapitulated the 1871 *Andrews* decision, and pointed out that the city ordinance prohibited *all* carrying of pistols:

There is no qualification of the prohibition against the carrying of a pistol in the city ordinance before us, but is made unlawful “to carry on or about the person any pistol”; that is, any sort of pistol in any sort of manner. Upon the authority of *Andrews v. State* . . . we must accordingly hold the provision of this ordinance as to the

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368. 10 U.S.C. § 311 (2006).

369. The court wrote:

[T]he Legislature has power to not only prohibit the carrying of concealed or unconcealed weapons [of the type specified in the deadly weapons statutes], but also has the power to even prohibit the ownership or possession of such arms. . . . As law now is in this state, a person may lawfully own and possess any of the weapons named . . . and may move such weapons from room to room in their place of residence, but may not wear them on their person and transport them about the yard as shown by the evidence to have been done by the defendant in this case.

*Pierce*, 275 P. at 395.

370. *Glasscock v. City of Chattanooga*, 11 S.W.2d 678 (Tenn. 1928).

371. *Id.* at 678.

carrying of a pistol invalid.<sup>372</sup>

While it found the Chattanooga ordinance unconstitutional, the Tennessee court did not challenge the state statute that only one mode of carrying a handgun was protected—openly, in the hand.<sup>373</sup>

*Q. Michigan (1931)*

The Michigan Supreme Court, in *People v. Brown*, upheld the conviction of a three-time felon for possession of a blackjack.<sup>374</sup> This fourth felony conviction subjected him to a life sentence.

In *Zerillo*, the Michigan Supreme Court voided a ban on firearms possession by legal aliens.<sup>375</sup> The *Brown* court drew a distinction based on the type of weapon:

Some arms, although they have a valid use for the protection of the state by organized and instructed soldiery in times of war or riot, are too dangerous to be kept in a settled community by individuals, and, in times of peace, find their use by bands of criminals and have legitimate employment only by guards and police. Some weapons are adapted and recognized by the common opinion of good citizens as proper for private defense of person and property. Others are the peculiar tools of the criminal. The police power of the state to preserve public safety and peace and to regulate the bearing of arms cannot fairly be restricted to the mere establishment of conditions under which all sorts of weapons may be privately possessed, but it may take account of the character and ordinary use of weapons and interdict those whose customary employment by individuals is to violate the law. The power is, of course, subject to the limitation that its exercise be reasonable, and it cannot constitutionally result in the prohibition of the possession of those arms which, by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of person and property. . . .

The list of weapons in section 16751, *supra*, is significant and demonstrates a definite intention of the

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372. *Id.*

373. See *supra* note 150 and accompanying text.

374. *People v. Brown*, 235 N.W. 245 (Mich. 1931).

375. See *supra* notes 344–56 and accompanying text.



Legislature to protect society from a recognized menace. *It does not include ordinary guns, swords, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure.* It is a partial inventory of the arsenal of the “public enemy,” the “gangster.”<sup>376</sup>

The court’s protection of “ordinary guns, swords, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure” foreshadows *Heller*’s rule of protecting all arms commonly possessed for legitimate purposes.<sup>377</sup>

#### *R. California (1932)*

The California Court of Appeals in *People v. Ferguson* addressed a weapon considered criminal in nature, upholding a prohibition on possession of metal knuckles. The court explained that while “[f]irearms have their legitimate uses,” metal knuckles do not, so they could be prohibited.<sup>378</sup>

The California Constitution contains no right to arms guarantee. *Ferguson* should therefore be understood as an explication of the limits of the police power—a power that does not extend to banning firearms or other arms that have “legitimate uses.”

#### *S. Colorado (1936)*

Colorado, like some other states during the emergence of the second Ku Klux Klan, prohibited resident aliens from hunting “any wild bird or animal, either game or otherwise” and prohibited all aliens from owning firearms.<sup>379</sup> In *People*

376. *Brown*, 235 N.W. at 247–48 (emphasis added).

377. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2815 (2008).

378. The California Court of Appeals wrote:

Firearms have their legitimate uses; hence the law regulates their use and prescribes who shall be prohibited their possession. But there is impressed upon slung-shots, sandbags, blackjacks and metal knuckles the indubitable *indicia* of criminal purpose. To every person of ordinary intelligence these instruments are known to be the tools of the brawl fighter and cowardly assassin and of no beneficial use whatever to a good citizen or to society. The legislature may take note of and act upon such common facts. It can regulate and proscribe the use of a thing so that its beneficial use may be enjoyed and its detrimental use prohibited. It follows that if the beneficial use of a thing is entirely lacking or grossly disproportionate to its harmful use the police power may absolutely prohibit its possession.

*People v. Ferguson*, 129 Cal. App. 300, 304 (Ct. App. 1933) (citation omitted).

379. *People v. Nakamura*, 62 P.2d 246, 246 (Colo. 1936) (quoting Colo. Compiled Laws, § 6882 (1921)).

*v. Nakamura*, defendant Charles Nakamura was charged with violating the statute.<sup>380</sup> He pleaded guilty on the first count of "unlawful possession of three pheasants."<sup>381</sup> On the second count, unlawful possession of a firearm, he pointed to Article 2 of the Colorado Constitution.<sup>382</sup> Section 13 noted that "[t]he right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."<sup>383</sup> The trial court quashed the second count of the indictment, and the prosecutor appealed.<sup>384</sup>

The Colorado Supreme Court refused to accept the state's argument that the right in question was solely a collective right,<sup>385</sup> and held that right of every "person" included legal aliens:

It is equally clear that the act wholly disarms aliens for all purposes. The state may preserve its wild game for its citizens, may prevent the hunting and killing of same by aliens, and for that purpose may enact appropriate laws, but in so doing, it cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article 2 of the Constitution, to bear arms in defense of home, person, and property. The guaranty thus extended is meaningless if any person is denied the right to possess arms for such protection. Under this constitutional guaranty, there is no distinction between unnaturalized foreign-born residents and citizens.<sup>386</sup>

While the dissent urged that attention be paid to whether Nakamura himself had the guns for self-defense, the majority was more concerned that the statute presumptively disarmed an entire class of people.

#### *T. Idaho (1945)*

In *Idaho v. Hart*, the defendant argued that an ordinance prohibiting the carrying of concealed deadly weapons was

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380. *Id.*

381. *Id.*

382. COLO. CONST. art. II.

383. *Id.* § 13.

384. *Nakamura*, 62 P.2d at 246.

385. *Id.* at 247.

386. *Id.*

unconstitutional.<sup>387</sup> The *Hart* majority pointed to *In re Brickey*,<sup>388</sup> where the court had insisted that some form of carry had to be legal, to avoid running afoul of the Second Amendment and the Idaho Constitution. It also pointed to *State v. Woodward*, which acknowledged the right to open carry.<sup>389</sup> The *Hart* Court ruled that because open carry was legal, it was a “reasonable exercise of the police power of a municipality to prohibit the concealed carrying of deadly or dangerous weapons.”<sup>390</sup>

Chief Justice Ailshie’s dissent pointed to the imminent peril faced by Hart, whose life had been threatened, and to the impossibility of obtaining a concealed carry permit in an emergency.<sup>391</sup> The dissent, however, did not explain why Hart could not have protected himself by carrying an unconcealed handgun.

## V. MODERN ERA DECISIONS

Adam Winkler’s attempt at a comprehensive review of state cases begins with 1946 decisions.<sup>392</sup> There is nothing wrong with his choice of a start date, but there is nothing particularly illuminating about it either. Unlike the Civil War, the Second World War did not lead to any broad changes in state right to arms jurisprudence. Because Winkler was

387. *State v. Hart*, 157 P.2d 72 (Idaho 1945).

388. See *supra* notes 252–54 and accompanying text.

389. *State v. Woodward*, 74 P.2d 92 (Idaho 1937). In *Woodward*, the defendant appealed his conviction for assault with a deadly weapon on the grounds that the jury instruction biased the jury against him. *Id.* at 94. The instruction acknowledged a right to keep and bear arms for “security and defense,” but also stated, “[t]he legislature, however, has the power to regulate the exercise of this right, and this you may consider in connection with the other instructions given you herewith.” *Id.* The Idaho Supreme Court ruled that because open carry was constitutionally protected, the jury instruction had prejudiced the jury, and therefore the court ordered a new trial. *Id.* at 97.

390. *Hart*, 157 P.2d at 73.

391. Chief Justice Ailshie wrote:

The right to defend one’s person is not dependent upon a permit from anyone else but the one being attacked or threatened to be attacked. It would be utter folly to talk about requiring a man to get a permit to carry a gun concealed to defend himself, when he is suddenly attacked by a ruffian with threats to take his life. What he needs is the right to act then and, unless he has a gun or other weapon with which to offer equal persuasive peril, his right of self-defense would vanish and so would he.

*Id.* at 75 (Ailshie, C.J., dissenting).

392. Winkler, *supra* note 26, at 687, 711.

writing before the *Heller* decision, he could not have known that *Heller* would cite some of the earlier cases, such as *Chandler* and *Nunn*.<sup>393</sup> Nor could he have known that *Heller* would adopt rules about what types of weapons may be banned, restrictions on arms carrying in sensitive places, and other rules which appear very similar to the standards adopted in pre-WWII cases.<sup>394</sup>

As an author, Winkler was free to concentrate only on the more recent cases. But the *Heller* leaves Winkler's article incomplete as a guide for anyone looking to state cases to interpret the Second Amendment.

#### A. *Missouri* (1946)

In *State v. Plassard*, Frank Plassard was convicted of "feloniously exhibiting a deadly weapon" in Newton County, Missouri.<sup>395</sup> Plassard occupied a farm over which some familial disputes had clouded his legal possession of the property.<sup>396</sup> In an argument about who was to plow part of the land, Plassard fired one shot from a .22 rifle in the presence of a constable, though in a direction clearly intended as a warning and not as an attempt at injury.<sup>397</sup> The Missouri Supreme Court addressed whether Plassard had a right to carry a gun on his own land, noting that if he was defending his home and property he had a constitutional right to bear arms.<sup>398</sup> Plassard was within his constitutional rights because the arms were borne on private property.<sup>399</sup>

#### B. *Illinois* (1950)

Walter Liss was convicted in Chicago of carrying a pistol "concealed on or about his person."<sup>400</sup> The Illinois Supreme Court's decision in *People v. Liss*, written by the aptly-named Justice Gunn, reversed the conviction because of the lack of evidence that Liss knew the gun was in the car he was driving, which belonged to someone else.<sup>401</sup> Of most interest,

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393. See *supra* notes 125–32 and accompanying text.

394. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2815–18 (2008).

395. *State v. Plassard*, 195 S.W.2d 495, 496 (Mo. 1946).

396. *Id.*

397. *Id.*

398. *Id.* at 497 (citing MO. CONST. of 1875 art. II, § 17).

399. *Id.*

400. *People v. Liss*, 94 N.E.2d 320 (Ill. 1950).

401. *Id.* at 323.

however, is the Illinois Supreme Court's assertion about the Second Amendment and the purpose for which the concealed-carry statute was intended:

The second amendment to the constitution of the United States provides the right of the people to keep and bear arms shall not be infringed. This, of course, does not prevent the enactment of a law against carrying concealed weapons, but it does indicate it should be kept in mind, in the construction of a statute of such character, that it is aimed at persons of criminal instincts, and for the prevention of crime, and not against use in the protection of person or property. There is not an iota of evidence that the defendant was a criminal, or had associated with criminals, or that he came within any of the specific provisions against carrying a deadly weapon.<sup>402</sup>

*Liss* suggests that a concealed weapon statute that did not include malign intent as an element of the crime would violate the Second Amendment. *Liss* thus used the technique of narrow construction to avoid a constitutional violation.

### C. *Montana* (1952)

In *Montana v. Nickerson*, Clarence Nickerson was convicted of assault after drawing a loaded revolver on Fred Hochalter, who had a law enforcement position with a nearby Indian reservation.<sup>403</sup> Hochalter had knocked on the door and Nickerson had bade him enter while training a handgun on the doorway.<sup>404</sup> In this particular case, the remote location, along with Nickerson's reasonable concern that a criminal with whom he had experienced a number of confrontations was returning to do him injury, persuaded the Montana Supreme Court that Nickerson's actions were not criminal.<sup>405</sup> In justifying Nickerson's actions, the court found:

The law of this jurisdiction accords to the defendant the right to keep and bear arms and to use same in defense of his own home, his person and property.

The second amendment to the Constitution of the United States provides that "the right of the people to keep and bear arms, shall not be infringed."

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402. *Id.*

403. *State v. Nickerson*, 247 P.2d 188, 189 (Mont.1952).

404. *Id.* at 190.

405. *Id.* at 193.

The Constitution of Montana provides: "The right of any person to keep or bear arms in defense of his own home, person and property, . . . shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons."<sup>406</sup>

Accordingly, the court recognized the right to open carry for self-defense. As in *Liss*, the court used narrow construction (regarding the necessary elements of the crime of assault) in order to safeguard the constitutional right.

#### *D. Indiana (1958)*

The defendant in *Matthews v. State* was convicted of "assault and battery with intent to commit murder and carrying a pistol without a license" in Vanderburgh County, Indiana.<sup>407</sup> Jasper Leroy Matthews apparently intended to kill one person, but shot another.<sup>408</sup> While the "intent to commit murder" was the most serious charge, most of the Indiana Supreme Court's majority decision—and nearly all of the dissent—involved the relatively minor charge of carrying a pistol without a license. Indiana law required a license for carrying a pistol in public places, and the majority found this to be a reasonable regulation.<sup>409</sup> The court held that this law did not interfere with the right of self-defense because people could freely carry long guns anywhere, and could carry unlicensed pistols in their homes and place of business.<sup>410</sup>

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406. *Id.* at 192 (omission in original).

407. *Matthews v. State*, 148 N.E.2d 334, 334 (Ind. 1958).

408. *Id.* at 335.

409. *Id.* at 337.

410. The court wrote:

Appellant further asserts that the Firearms Act violates Art. I, §32 of the Indiana Constitution which provides that "The people shall have a right to bear arms, for the defense of themselves and the State," because it restricts the right of the people to bear arms for their own defense.

The purpose of the Firearms Act is to achieve a maximum degree of control over criminal and careless uses of certain types of firearms, while at the same time making them available to persons where needed for protection. . . .

Since, under the Act here under consideration, people may carry pistols in their homes and fixed places of business, without a license, and other kinds and types of firearms any place, we are unable to see wherein it contravenes any of the provisions of Art. 1, § 32 of the Indiana Constitution.

*Id.* at 337-38.

*E. Texas (1960)*

In *Morrison v. State*, the Texas Court of Criminal Appeals drew upon Michigan's decision in *People v. Brown* to hold that a submachine gun was one of the weapons of the "gangster," not protected by the Texas Constitution's guarantee of a right to arms.<sup>411</sup> Charles Walter Morrison had used the submachine gun to render his wife's car inoperable and discourage her from leaving him—not the best manner of demonstrating his merits as a husband.<sup>412</sup>

The *Morrison* court's decision reiterated the language from *Brown* that protected weapons were "those arms which by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of persons and property."<sup>413</sup> The court cited many precedents to justify that "gangster" weapons were not protected.<sup>414</sup> *Morrison* is one of the many cases that prefigures *Heller*'s rule that protected arms are those commonly kept by law-abiding citizens for legitimate purposes.

*F. Florida (1960)*

When George B. Davis, III and John Allen Johnson were "apprehended in a remote part of Dade County each had a pistol in his hand and each carried a pistol in an unconcealed holder."<sup>415</sup> Both were charged under a state statute that prohibited the carrying of pistols without a permit that was issued from the county commissioners.<sup>416</sup> Davis and Johnson argued that the statute was a violation of section 20 of the Declaration of Rights of the Florida Constitution, which provides: "The right of the people to bear arms in defence of themselves, and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne."<sup>417</sup>

The Florida Supreme Court upheld the statute in *Davis*

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411. *Morrison v. State*, 339 S.W.2d 529 (Tex. Crim. App. 1960).

412. *Id.* at 530.

413. *Id.* at 532.

414. *Id.*

415. *Davis v. State*, 146 So. 2d 892, 893 (Fla. 1962).

416. *Id.*

417. *Id.* (emphasis omitted); FLA. CONST. of 1885, Declaration of Rights, § 20.

*v. State*, reasoning that the state's explicit authority to the "manner in which they may be borne" was to protect the people from "the bearing of weapons by the unskilled, the irresponsible, and the lawless."<sup>418</sup> Oddly enough, the court claimed to be unaware of any previous decisions concerning this law, including *Watson v. Stone*, a 1941 decision in which Justice Buford's concurring opinion explained that the licensing statute's true purpose was to disarm black people.<sup>419</sup>

The court expressed no interest in why the original statute applied only to pistols and repeating rifles, noting "[w]e are concerned with whether or not the legislature went too far, not with whether or not that body did not go far enough. The wisdom of the law is a matter of legislative not judicial concern."<sup>420</sup>

#### *G. New Jersey (1968)*

Illinois in 1967 and New Jersey in 1966 were the first Northern states to enact a comprehensive licensing system for the purchase of firearms.<sup>421</sup> The law requires that a person wishing to purchase a handgun or long gun first obtain a purchase permit from the local police.<sup>422</sup>

Arthur Burton and a number of associates, collectively the Citizens Committee for Firearms Legislation, filed suit arguing that the new law violated the Second Amendment.<sup>423</sup> The intermediate court of appeals (Superior Court Appellate Division) disagreed, and gave one of the more chilling expressions of the balancing of interests approach to constitutional rights:

We find no substantial merit in the claim that this law wrongfully infringes upon the individual's constitutional rights under any of the provisions specified. Under the State's police powers, the common good takes precedence over private rights. One's home may be destroyed to

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418. *Davis*, 146 So. 2d at 894.

419. *Watson v. Stone*, 4 So. 2d 700, 703-04 (Fla. 1941) (Buford, J., concurring).

420. *Davis*, 146 So. 2d at 894.

421. Firearms Owners Identification Card Act, 430 ILCS 65/0.02 et seq. (Ill. Compiled Statutes) (approved Aug. 3, 1967; eff. July 1, 1968); Mark K. Benenson, *A Controlled Look at Gun Controls*, 14 N.Y.L. FORUM 718, 718 (1968).

422. N.J. STAT. ANN. § 2A:151-33 (repealed 1979).

423. *Burton v. Sills*, 240 A.2d 432 (N.J. Super. Ct. App. Div. 1968).



prevent a conflagration. One's freedom of locomotion may be impeded to prevent the spread of a contagious disease. Our basic freedoms may be curtailed if sufficient reason exists therefor. Only in a very limited sense is a person free to do as he pleases in our modern American society. Regulation by the government is price we pay for living in an organized community.<sup>424</sup>

Rather than "balancing," the court put a cannon ball on the side of the state, and a feather in the opposite pan. Incredibly, the court cited not a single precedent for its decision. The New Jersey Supreme Court, however, did a better job of providing legal analysis in *Burton v. Sills*.<sup>425</sup>

The statute allowed the local police chief to deny a permit to "any person where the issuance would not be in the interest of the public health, safety or welfare."<sup>426</sup> At oral argument, the New Jersey Attorney General conceded that the wide discretion could only be used when there was a particular problem with an individual applicant.<sup>427</sup> Thus, discretion could not be used to deny licenses just because the police chief thought that reducing gun ownership would be socially beneficial.

The New Jersey Supreme Court wrote: "In the light of this narrowed construction, the statutory standard is undoubtedly sufficient to withstand attack."<sup>428</sup> It rejected Appellants' Second Amendment arguments because it found the Second Amendment did not grant an individual right.<sup>429</sup>

Burton and his fellow plaintiffs appealed to the U.S. Supreme Court; but because they filed an appeal rather than a petition for a writ of certiorari, the Supreme Court responded with the standard rejection, stating "the appeal is dismissed for want of a substantial federal question."<sup>430</sup> While the summary dismissal did not adopt any particular rationale, it did mean that a lower federal court could not have found New Jersey's licensing system to be facially

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424. *Id.* at 461-62.

425. *Burton v. Sills*, 248 A.2d 521 (N.J. 1968).

426. N.J. STAT. ANN. § 2A:151-33 (repealed 1979).

427. *Burton*, 248 A.2d at 523.

428. *Id.*

429. *Id.* at 525-29.

430. *Burton v. Sills*, 394 U.S. 812 (1969). A summary dismissal operates to preclude a lower federal court from reaching a different result in the case. See *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

unconstitutional in its entirety.

#### *H. New Mexico (1971)*

Leland James Moberg entered a police station in Las Vegas, New Mexico, wearing a holstered pistol, intending to report a theft from his automobile.<sup>431</sup> A Las Vegas ordinance prohibited carrying any deadly weapon, openly or concealed, including "guns, pistols, knives with blades longer than two and half inches, slingshots, sandbags, metallic metal knuckles, concealed rocks, and all other weapons, by whatever name known, with which dangerous wounds can be inflicted."<sup>432</sup>

Moberg was convicted under the ordinance and appealed based on Article II, section 6 of the New Mexico Constitution, which states: "The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons." The New Mexico Court of Appeals agreed, noting that ordinances prohibiting the carrying of concealed weapons have been held a proper exercise of police power. The court noted that *State v. Hart* and *Davis v. State* both upheld some gun control laws, but that those laws merely *regulated* the right to bear arms, unlike the ordinance at issue, which completely prohibited the right to bear arms.<sup>433</sup>

Given the right to bear arms, a ban on carrying handguns was unconstitutional.

#### *I. Florida (1972)*

In *Rinzler v. Carson*, Leonard Rinzler, owned a submachine gun, and registered with the federal government in accordance with the National Firearms Act of 1934.<sup>434</sup> He kept the gun at his business and used it in self-defense during a 1969 incident in which he fired at his attacker's feet, apparently without causing injury.<sup>435</sup> Rinzler was arrested

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431. *City of Las Vegas v. Moberg*, 485 P.2d 737 (N.M. Ct. App. 1971).

432. *Id.* at 738 (quoting Las Vegas, Nev., Ordinance No. 3-3).

433. *Id.* ("It is our opinion that an ordinance may not deny the people the constitutionally guaranteed right to bear arms, and to that extent the ordinance under consideration is void.")

434. *Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972).

435. *Id.* at 663.

and Sheriff Dale Carson seized the gun.<sup>436</sup>

The criminal charges against Rinzler were eventually dismissed, but in the meantime, the Florida Legislature enacted Florida statute section 790.221, which prohibited possession of “any short-barreled rifle, short-barreled shotgun, or machine gun which is, or may readily be made, operable.” Accordingly, Sheriff Carson refused to return Rinzler’s gun.<sup>437</sup> The sheriff also relied on a Jacksonville ordinance as justification for holding on to Rinzler’s property.<sup>438</sup>

Rinzler sued for return of his submachine gun, invoking the right to keep and bear arms provision of the 1968 Florida Constitution.<sup>439</sup> The Florida Supreme Court held that the machine gun ban was “a valid exercise of the police power of the state.”<sup>440</sup> In particular, the court noted that while the legislature may not entirely prohibit the right to keep and bear arms, it can regulate “the use and the manner” of bearing certain weapons.<sup>441</sup> The court cited several Florida precedents: *Nelson v. State* (discussing a ban on convicted felons possessing concealable firearms);<sup>442</sup> *Davis v. State* (involving a license to carry pistols and repeating rifles);<sup>443</sup> and *Carlton v. State* (prohibiting concealed carry of weapons).<sup>444</sup>

The *Rinzler* Court upheld the machine gun ban for the same reason *Heller* suggested: machine guns were not Second Amendment arms; they were “too dangerous to be kept in a settled community by individuals, and one which, in times of peace, finds its use by a criminal.”<sup>445</sup> The *Rinzler* Court further found they were not “legitimate weapons of defense and protection,” but instead were “peculiarly adaptable to use by criminals in the pursuit of their criminal activities.”<sup>446</sup>

Florida’s machine gun statute was written broadly and

436. *Id.*

437. *Id.* at 664.

438. *Id.*

439. *Id.* at 665.

440. *Rinzler v. Carson*, 262 So. 2d 661, 665 (Fla. 1972).

441. *Id.*

442. *Nelson v. State*, 195 So. 2d 853 (Fla. 1967).

443. See *supra* notes 415–20 and accompanying text.

444. See *supra* notes 294–97 and accompanying text.

445. *Rinzler*, 262 So. 2d 661 at 665–66; see also *District of Columbia v. Heller*, 128 S. Ct. 2783, 2815 (2008).

446. *Rinzler*, 262 So. 2d at 666.

could be construed to include semi-automatic firearms.<sup>447</sup> *Rinzler* found that semi-automatic firearms were protected by the right to arms.<sup>448</sup> Accordingly, the court construed the statute narrowly, so as not to prohibit semi-automatics. It reasoned that semi-automatics were “commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property.”<sup>449</sup>

*J. Colorado (1972)*

A Lakewood, Colorado, ordinance prohibited carrying or possession of any handgun “except within his own domicile,” with the exemptions for travel to and from “any range, gallery or hunting areas.”<sup>450</sup> Also exempted were people licensed by the city and of course, the police.<sup>451</sup>

The Colorado Supreme Court overturned this ordinance in *Lakewood v. Pillow*, holding:

[T]hat it is so general in its scope that it includes within its prohibitions the right to carry on certain businesses and to engage in certain activities which cannot under the police powers be reasonably classified as unlawful . . . . Furthermore, it makes it unlawful for a person to possess a firearm in a vehicle or in a place of business for the

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447. In a semi-automatic, the gun fires only one shot when the trigger is pulled. In an automatic (a term often used as a synonym for “machine gun”), when the trigger is kept pressed, shots will fire automatically, one after the other, until all the ammunition is gone.

448. *Id.*

449. The court wrote:

The definition of the term “machine gun” used in the statute as being “any firearm, as defined herein, which shoots or is designed to shoot, automatically or semi-automatically, more than one shot, without manually reloading, by a single function of the trigger,” could be construed to prohibit any person owning or possessing any semi-automatic hand gun. *But such a construction might run counter to the historic constitutional right of the people to keep and bear arms.* We cannot believe that it was the intention of the Legislature in enacting this statute to deny such right, and it is our duty in construing the statute to preserve its constitutionality, if reasonably possible. *We, therefore, hold that the statute does not prohibit the ownership, custody and possession of weapons not concealed upon the person, which, although designed to shoot more than one shot semi-automatically, are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles.*

*Id.* (emphasis added).

450. *City of Lakewood v. Pillow*, 501 P.2d 744, 745 (Colo. 1972).

451. *Id.*

purpose of self-defense. Several of these activities are constitutionally protected.<sup>452</sup>

The court agreed that the ordinance was a lawful exercise of the police power, but it noted that the analysis did not end there. The ordinance had to have a proper fit with its objectives:

A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.<sup>453</sup>

The *Lakewood* Court used the analytical techniques of overbreadth, narrow tailoring, and “less restrictive alternative” to reach its conclusion. As Winkler acknowledged, the requirements of narrow tailoring and less restrictive means are “the most important elements of heightened review.”<sup>454</sup>

In the subsequent decades, many other states favorably cited *Lakewood*, sometimes as part of a decision declaring a gun control statute unconstitutional.<sup>455</sup> The tools of strict

452. *Id.* (citing COLO. CONST. art. II, §13).

453. *Id.* (citations omitted).

454. Winkler, *supra* note 26, at 696; see also *id.* at 727 (describing “narrow tailoring” as “[s]trict scrutiny’s second prong”). For an examination of overbreadth in diverse contexts, see generally John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53 (2004). It is true that the *Lakewood* ordinance perhaps could have been stricken under a lower standard of review. Yet the fact is, the Colorado Supreme Court chose to apply strict scrutiny. Consider a law which declares: “In order to prevent traffic congestion, no negroes may drive automobiles on Tuesdays.” Such a law would surely fail rational basis review. However, if the court strikes the law because the court says that the law is “overbroad, not narrowly tailored, and not the less restrictive alternative,” then we know that the court applied strict scrutiny and that the court considered strict scrutiny appropriate for the type of law in question.

455. *Benjamin v. Bailey*, 662 A.2d 1226, 1234 (Conn. 1995); *Winters v. Concentra Health Services, Inc.*, No. CV075012082S, 2008 WL 803134, at \*3 (Conn. Super. Ct. Mar. 5, 2008) (refusing to strike plaintiff’s claim that he was illegally discharged for lawful carry of a firearm at work, when the company had no policy against firearms in the workplace, and the state constitution protected the right to carry handguns); *Junction City v. Mevis*, 601 P.2d 1145, 1150 (Kan. 1979) (relying on *Pillow* to void a city ordinance against handgun

scrutiny are part of state court jurisprudence on right to arms cases, even if the cases do not use the words "strict scrutiny." In this context, if someone uses carpentry tools to shape wood, then he is engaging in carpentry even if he does not say "I am a carpenter." In the broader spirit of *Lakewood*, courts can also employ other First Amendment tools, beyond the particular ones that the *Lakewood* court used.

The United States Court of Appeals for the Fifth Circuit, in *United States v. Emerson*, adopted a similar standard, allowing "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country."<sup>456</sup> Incidentally, the *Emerson* language shows that the mere appearance of the word "reasonable" in an opinion does not mean that the court is using a feeble standard of review.

#### K. Ohio (1976)

In *Mosher v. City of Dayton*, the Ohio Supreme Court upheld a Dayton ordinance that required handgun purchasers

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carrying); *Bowers v. State*, 389 A.2d 341, 347 (Md. 1978) (citing *Pillow* for the proposition that "more rigorous standard of vagueness review is triggered whenever an ill-defined penal statute is alleged to infringe upon Any of the fundamental freedoms protected under the Bill of Rights," but upholding the child abuse law because it would pass strict scrutiny); *People v. Swint*, 572 N.W.2d 666, 673 n.8 (Mich. Ct. App. 1997) (upholding felon-in-possession law, and noting Colorado courts had done the same because *Pillow* involved a non-felon); *Arnold v. Cleveland*, 616 N.E.2d 163, 176 (Ohio 1993) (Hoffman, J., concurring and dissenting) (stating that because "[e]xercise of the police power may not be achieved by a means which sweeps unnecessarily broadly," the Cleveland "assault weapon" ban should be declared unconstitutional); *City of Seattle v. Riggins*, 818 P.2d 1100, 1104 (Wash. Ct. App. 1991) (stating that *Pillow* is not applicable because carrying a dangerous knife within city limits is not an innocent activity); *Perito v. County of Brooke*, 597 S.E.2d 311, 316 (W. Va. 2004) (stating that *Pillow* is consistent with ban on firearms possession by convicted felons); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 143 (W. Va. 1988) (finding that discretionary statute licensing for concealed handguns is unconstitutional); *State v. Hamdan*, 665 N.W.2d 785, 817 (Wis. 2003) (Crooks, J., concurring and dissenting) (stating that because the concealed carry law was "unnecessarily broad" it should be declared unconstitutional, rather than, as the majority held, only declared unconstitutional in certain applications). But see *Galloway v. State*, 781 A.2d 851, 861 n.11 (Md. 2001) (finding that in Maryland, overbreadth is only for First Amendment, and not applicable to harassment statute).

456. *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001).

to obtain an identification card. The court observed that “[t]he ordinance does not deprive any individual of the protection of Section 4, Article I of the Ohio Constitution. All that the ordinance requires is that the person seeking to possess a handgun be identified under the provisions of the ordinance.”<sup>457</sup>

After citing *State v. Nieto* to show that the state had the authority to regulate the carrying of arms, the court stated:

The Dayton ordinance in the present case is still less restrictive, for it does not limit the bearing of arms, but only requires that anyone who wishes to acquire a weapon first obtain an identification card in order to demonstrate that he is entitled to possess such a weapon. This is a reasonable police regulation which finds ample justification in the public interest of keeping dangerous weapons out of the hands of convicted felons and others forbidden to own and carry them. . . . Reasonable gun control legislation is within the police power of a legislative body to enact . . . .<sup>458</sup>

*Mosher* is a leading case supporting a “reasonableness” standard.

#### *L. Connecticut (1979)*

The Connecticut Constitution of 1818 guaranteed the right of every citizen “to bear arms in defense of himself and the State.”<sup>459</sup> This provision was retained in the 1955 and 1965 Constitutions. But until *Rabbitt v. Leonard* in 1979, there were no cases dependent on that clause. Here, the case advanced only to Superior Court.<sup>460</sup>

Joseph M. Rabbitt’s permit to carry a handgun was revoked without notice.<sup>461</sup> In response, Rabbitt sought a writ of mandamus to force the reinstatement of his permit, and argued that his “fundamental right to bear arms and to defend himself” under the Connecticut Constitution had been denied.<sup>462</sup> The court pointed to U.S. Supreme Court decisions in *United States v. Cruikshank*, and *United States v. Miller*,

457. *Mosher v. City of Dayton*, 358 N.E.2d 540, 542 (Ohio 1976).

458. *Id.* at 543.

459. CONN. CONST. art. I, § 17, amended by CONN. CONST. art. I, § 15.

460. *Rabbitt v. Leonard*, 413 A.2d 489, 490 (Conn. Super. Ct. 1979).

461. *Id.* at 489.

462. *Id.* at 490.

and to Circuit Court of Appeals decisions to demonstrate that the Second Amendment was not a restriction on state laws.<sup>463</sup> The court also used these cases to show that there was not an "absolute right of an individual to carry a gun."<sup>464</sup>

The court then discussed the text of the Connecticut Constitution:

The language of article first, §15, of the Connecticut constitution, which states that "[e]very citizen has a right to bear arms in defense of himself and the state," is different from that of the second amendment and the other state constitutional provisions discussed above. The use of the conjunction "and" gives every citizen a dual right; he has the right to bear arms to defend the state, a clear reference to the militia; and he may also bear arms to defend himself. It appears that a Connecticut citizen, under the language of the Connecticut constitution, has a fundamental right to bear arms in self-defense, a liberty interest which must be protected by procedural due process.<sup>465</sup>

In this particular case, Rabbitt had failed to exercise his procedural right to request a de novo administrative hearing regarding his permit. Accordingly, his lawsuit was dismissed.<sup>466</sup>

#### *M. Oregon (1980-1989)*

A series of decisions from the Oregon Supreme Court and Court of Appeals in the 1980s provides several modern examples of taking the right to keep and bear arms seriously.<sup>467</sup> In 1980, the Oregon Supreme Court decided *State v. Kessler*.<sup>468</sup> This decision is one of the most historically thorough state right to arms opinions. Rather than simply relying on precedent from other courts, the Oregon Supreme Court traced the origins of the Oregon Constitutional provision, Article I, section 27, which notes: "The people shall have the right to bear arms for the defence

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463. *Id.*

464. *Id.*

465. *Id.* at 491.

466. *Rabbitt v. Leonard*, 413 A.2d 489, 490 (Conn. Super. Ct. 1979).

467. *Cf.* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 194 (Harvard University Press 1977) (stating that citizens have rights which cannot be trumped by majority will or majority perceptions of utility).

468. *State v. Kessler*, 614 P.2d 94 (Or. 1980).



of themselves, and the State.”

Kessler was convicted of possessing two billy clubs in his apartment, in violation of the state statute banning “possession of a slugging weapon.”<sup>469</sup> Kessler argued that the statute violated his right to possess arms in his home for personal defense.<sup>470</sup>

The *Kessler* Court acknowledged that the meaning of the Oregon right to arms had never been explored by the Oregon courts. So the court decided to investigate three questions: “(a) To whom does the right belong? (b) What is the meaning of ‘defense of themselves’? (c) What is the meaning of ‘arms,’ and what, if any, weapons of current usage are included in this term?”<sup>471</sup> The court recognized:

[T]hat there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.<sup>472</sup>

The *Kessler* court first traced Oregon’s arms provision to the Indiana Constitution of 1816, then to the state constitutions of Kentucky (1799) and Ohio (1802); from there, the court recognized the Second Amendment and the 1689 English Bill of Rights.<sup>473</sup> The court cited *People v. Brown* for the position that the Second Amendment protected both militia rights and personal self-defense.<sup>474</sup>

The court then took up the question of what constitutes “arms,” concluding that the term “probably was intended to include those weapons used by settlers for both personal and military defense . . . [and] was not limited to firearms, but included several handcarried weapons commonly used for defense . . . [and] would not have included cannon or other heavy ordnance not kept by militiamen or private citizens.”<sup>475</sup>

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469. *Id.* at 95 (citing OR. REV. STAT. § 166.510 (repealed 1985)).

470. *Id.* at 97.

471. *Id.* at 95.

472. *Id.*

473. *Id.* at 96.

474. *State v. Kessler*, 614 P.2d 94, 98 (Or. 1980) (citing *People v. Brown*, 235 N.W. 245, 246 (Mich. 1931)).

475. *Id.* at 98.

Because the Oregon Constitution included “defense of themselves,” the *Kessler* Court concluded that any weapon commonly used for defense was protected, even if “unlikely to be used as a militia weapon.”<sup>476</sup> The court also held that the right to keep arms was neither unrestricted nor unregulated, and cited *State v. Cartwright*<sup>477</sup> as precedent for laws prohibiting firearms possession by felons.<sup>478</sup>

Because a billy club was within the definition of “arms” and the clubs in question were in Kessler’s home, “the defendant’s possession of a billy club in his home is protected by Article I, Section 27, of the Oregon Constitution.”<sup>479</sup> The court reversed Kessler’s conviction on the possession charge.<sup>480</sup> The court found that possession of a weapon in one’s home was not the same as the unrestricted right to carry it outside one’s home. It pointed to Edward III’s 1328 Statute of Northampton, which forbade the carrying of firearms “for the purpose of terrifying the people,” and a 1678 Massachusetts law that prohibited shooting “near any house, barn, garden, or highway in any town” where a person might be accidentally hit.<sup>481</sup> Many state courts had upheld carry regulations if they did not “frustrate the guarantees of the state constitution.”<sup>482</sup>

Before *Kessler* was decided, Michael Blocker was convicted of possessing a billy club in his car, in violation of the same statute that had snared Kessler.<sup>483</sup> The Court of Appeals waited for *Kessler* to be handed down, then overturned Blocker’s conviction, citing *Kessler* as precedent. The State appealed the decision.<sup>484</sup>

Much of the *State v. Blocker* decision sought to define what constituted “vague” and “overbroad” laws.<sup>485</sup> The *Blocker* court ruled that the legislature could prohibit the carrying of a concealed weapon, but had not done so; the

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476. *Id.* at 99.

477. *State v. Cartwright*, 418 P.2d 822 (Or. 1966).

478. *Kessler*, 614 P.2d at 99.

479. *Id.* at 100.

480. *Id.*

481. *Id.* at 99.

482. *Id.*

483. *State v. Blocker*, 630 P.2d 824, 824 (Or. 1981).

484. *Id.* at 825.

485. *Id.*

statute banned possession of a billy club anywhere.<sup>486</sup> The court emphasized that certain types of regulation of the bearing of arms were legal, giving some examples of then current Oregon statutes that were constitutional:

This state has several such regulatory statutes, with which we are not concerned in this case: ORS 166.220(1) prohibiting possession of a dangerous weapon with intent to use such weapon unlawfully against another; ORS 166.240, prohibiting carrying certain weapons concealed about one's person; ORS 166.250, prohibiting carrying any firearm concealed upon the person or within any vehicle without a license to do so.

On the other hand, ORS 166.510, with which we are here concerned, is not, nor is it apparently intended to be, a restriction on the manner of possession or use of certain weapons. The statute is written as a total proscription of the mere possession of certain weapons, and that mere possession, insofar as a billy is concerned, is constitutionally protected.<sup>487</sup>

Carrying arms with criminal intent could be prohibited, as could concealed carry; the legislature, however, had to allow carrying for self-defense.<sup>488</sup>

Three years later, in *State v. Delgado*, the Oregon Supreme Court used similar reasoning in a switchblade case. Police stopped Joseph Luna Delgado on October 3, 1983 because he “appeared disorderly.”<sup>489</sup> During a patdown search, the officer found a switch-blade knife in the defendant's back pocket, and Delgado was convicted of possessing a prohibited weapon.<sup>490</sup>

On appeal, the conviction was reversed based on *Blocker* and *Kessler*.<sup>491</sup> The prosecution asked the Oregon Supreme Court to review the question of whether switch-blades were constitutionally protected arms.<sup>492</sup> Because *Kessler* recognized that “hand-carried weapons commonly used by individuals for personal defense” were constitutionally protected, the state argued that switch-blades were not

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486. *Id.* at 826.

487. *Id.*

488. *Id.*

489. *State v. Delgado*, 692 P.2d 610, 611 (Or. 1984).

490. *Id.*

491. *Id.*

492. *Id.*

commonly used for defense, and were therefore outside the Oregon Constitution.<sup>493</sup>

The court rejected the prosecution's claim that switch-blade knives were "almost exclusively the weapon of the thug and delinquent," calling the evidence "no more than impressionistic observations on the criminal use of switch-blades."<sup>494</sup> Next the court took up the purported distinction between "offensive" and "defensive" arms:

More importantly, however, we are unpersuaded by the distinction which the state urges of "offensive" and "defensive" weapons. All hand-held weapons necessarily share both characteristics. A kitchen knife can as easily be raised in attack as in defense. The spring mechanism does not, instantly and irrevocably, convert the jackknife into an "offensive" weapon. Similarly, the clasp feature of the common jackknife does not mean that it is incapable of aggressive and violent purposes. It is not the design of the knife but the use to which it is put that determines its "offensive" or "defensive" character.<sup>495</sup>

The court explained the test for whether a class of weapon was constitutionally protected:

The appropriate inquiry in this case at bar is 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. In particular, it must be determined whether the drafters would have intended the word "arms" to include the switch-blade knife as a weapon commonly used by individuals for self defense.<sup>496</sup>

After studying the history of pocket knives, fighting knives, sword-canes, and Bowie knives, the court concluded that prohibiting the mere possession or carrying of such arms was unconstitutional. In doing so, it recognized the important role knives had played in American life, rejecting the state's argument that the switch-blade was so substantially different from historical antecedents as not to have been contemplated by the state's constitutional drafters:

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493. *Id.*

494. *Id.* at 612.

495. *State v. Delgado*, 692 P.2d 610, 612 (Or. 1984).

496. *Id.*

It is clear, then, that knives have played an important role in American life, both as tools and as weapons. The folding pocket-knife, in particular, since the early 18th century has been commonly carried by men in America and used primarily for work, but also for fighting.

This brings us to the switch-blade knife. . . . If ORS 166.510(1) proscribed the possession of mere pocket-knives, there can be no question but that the statute would be held to conflict directly with Article I, section 27. The only difference is the presence of the spring-operated mechanism that opens the knife. We are unconvinced by the state's argument that the switch-blade is so "substantially different from its historical antecedent" (the jackknife) that it could not have been within the contemplation of the constitutional drafters. They must have been aware that technological changes were occurring in weaponry and in tools generally. The format and efficiency of weaponry was proceeding apace. This was the period of development of the Gatling gun, breech loading rifles, metallic cartridges and repeating rifles. The addition of a spring to open the blade of a jackknife is hardly a more astonishing innovation than those just mentioned. . . .

This court recognizes the seriousness with which the legislature views the possession of certain weapons, especially switch-blades. The problem here is that ORS 166.510(1) absolutely proscribes the mere possession or carrying of such arms. This the constitution does not permit.<sup>497</sup>

Thus, the decision took a categorical view—even with a category of weapon that legislators believed to be peculiarly the weapon of criminals.

The next Oregon decision, *Barnett v. State*, went no higher than the Oregon Court of Appeals.<sup>498</sup> Plaintiff Harry E. Barnett sued for relief from a conviction for carrying a blackjack.<sup>499</sup> Apparently he had been convicted before the Oregon Supreme Court recognized the invalidity of the laws proscribing various weapons; the Court of Appeals granted him relief from the disabilities of that prior conviction.<sup>500</sup>

497. *Id.* at 614.

498. *Barnett v. State*, 695 P.2d 991 (Or. Ct. App. 1985).

499. *Id.* at 991.

500. *Id.*

The last of this group of Oregon decisions is *State v. Smoot*, which answered the questions *Delgado* had raised regarding the limits of the right to bear switch-blade knives.<sup>501</sup> In Lane County, Oregon, Dayne Arthur Smoot was convicted of carrying a switch-blade knife concealed in a trouser pocket.<sup>502</sup> The Oregon Court of Appeals upheld the conviction because only the manner of carrying this constitutionally protected arm was regulated: "A person may possess and carry a switchblade so long as it is not concealed."<sup>503</sup> The Oregon cases are very useful for courts seeking to apply the Second Amendment. First of all, they use part of the same test as *Heller*, holding that arms commonly possessed by law-abiding citizens for legitimate purposes such as self-defense are protected. *Heller* is somewhat broader, since *Heller's* legitimate purposes test would also include hunting, target shooting, collecting, or other activities not involving self-defense.

The Oregon courts did not blindly accept a legislative declaration, based on little more than prejudice and intuition, that a particular arm was primarily used by criminals. In this regard, the Oregon courts were far more intellectually rigorous than the courts of some other states.<sup>504</sup> The Oregon courts engaged in careful historical inquiry about particular arms to see if they were commonly owned for lawful self-defense. The Oregon courts also recognized that technological improvements are expected in American life. Like *Heller*, the Oregon decisions recognized that the right to arms does not include only arms of the type that existed when the constitution was ratified.<sup>505</sup>

#### *N. Illinois (1984)*

*Kalodimos v. Morton Grove* is the perfect case for a post-*Heller* court to study in attempting to apply the Second Amendment—perfect in the sense that *Kalodimos* is perfectly

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501. *State v. Smoot*, 775 P.2d 344, 344 (Or. Ct. App. 1989).

502. *Id.*

503. *Id.* at 345. As a practical matter, one might wonder how switchblades or other folding knives are supposed to be carried openly. While there are belt sheaths for fixed-blade knives, folders are usually fairly small (since they fold in half) and are designed to be carried in a pocket.

504. See, e.g., *Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972); see also *supra* notes 434–449 and accompanying text.

505. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2814 (2008).

wrong, and is the platonic ideal of what courts should not do. Although the Illinois Constitution contains a right to arms guarantee, the *Kalodimos* court upheld the handgun ban by a 4–3 vote.<sup>506</sup> The *Heller* Court held that a handgun ban is unconstitutional, so *Kalodimos* is entirely wrong as applied to the Second Amendment.

In 1981, the Chicago suburb of Morton Grove banned all operable handguns.<sup>507</sup> The 1970 Illinois Constitution guarantees: “Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.”<sup>508</sup>

Much of the majority opinion in *Kalodimos* focused on the recent state constitutional convention, which the majority said had intended to allow handgun bans.<sup>509</sup> The minority firmly disputed this point,<sup>510</sup> but the specifics of Illinois history are irrelevant for Second Amendment application.

The more important errors, for Second Amendment purposes, were the majority’s assertion that the police power included the “prohibition of any class of arms” and that invocation of the police power allowed a government to do everything but impose “a ban on all firearms that an individual citizen might use . . . .”<sup>511</sup>

The plaintiffs in *Kalodimos* argued that “handguns are a form of weapon commonly used for defense of person and property and, consequently, they fall within the general protection of section 22.”<sup>512</sup> In *Heller*, this fact was sufficient for handguns to be constitutionally protected.<sup>513</sup> The *Kalodimos* plaintiffs then reasoned that “there is no principle which permits the complete abridgment of one form of

506. *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266 (Ill. 1984).

507. *Morton Grove, Ill., Ordinance 81-11* (June 8, 1981). A challenge to the ordinance under the U.S. Constitution failed. See *Quilici v. Vill. of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983). After the U.S. Supreme Court’s announcement of the decision in *District of Columbia v. Heller*, the Morton Grove ordinance was repealed. See Robert Channick, *Morton Grove repeals 27-year-old gun ban*, CHI. TRIB., July 29, 2008, available at [http://articles.chicagotribune.com/2008-07-29/news/0807280686\\_1\\_repeal-illinois-supreme-court-morton-grove](http://articles.chicagotribune.com/2008-07-29/news/0807280686_1_repeal-illinois-supreme-court-morton-grove)

508. ILL. CONST. art. I, § 22.

509. *Kalodimos*, 470 N.E.2d at 269–73.

510. *Id.* at 282–86 (Moran, J., dissenting).

511. *Id.* at 272–73.

512. *Id.* at 273.

513. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 (2008).

constitutionally protected behavior whenever other forms of behavior which enjoy the same form of protection and lead to a substantially similar end are permitted.”<sup>514</sup> *Heller* reached precisely the same conclusion; the fact that Washingtonians could still have rifles or shotguns did not mean that the City Council could ban handguns.<sup>515</sup>

Contrary to *Heller*, the *Kalodimos* majority retorted that all of plaintiffs’ cites for the aforesaid point were to First Amendment cases, and First Amendment principles were inapplicable to the right to arms.<sup>516</sup> The refusal to consider First Amendment principles thus led the *Kalodimos* court into a result that is incorrect, at least as *Heller* construes the Second Amendment.

The majority also asserted that the right to arms is subject to “substantial infringement in the exercise of the police power,” and that rational basis was the appropriate standard of review.<sup>517</sup> This is contrary to *Heller*.<sup>518</sup> It is also contrary to the text of the Second Amendment and the Illinois Constitution. Both say that the right “shall not be infringed.” The *Kalodimos* approach would nullify the text, and convey the impression that James Madison and his Illinois counterparts had written that the right “may be substantially infringed.”

A dissent by Chief Justice Ryan pointed out that the findings of fact in the ordinance’s preamble were a sham.<sup>519</sup> The city council had conducted no factual inquiry, and the “findings” may well have been “window dressing” to advance a political viewpoint.<sup>520</sup> “We are not compelled to blindly follow the incantations of a legislative body inserted in legislative enactments to lend an aura of validity to the act,” wrote the Chief Justice.<sup>521</sup> Therefore, he concluded:

If we permit the constitutionally given right to arms to be nullified by simply inserting a few ‘magic words’ in an ordinance which gives the ordinance an appearance of being a valid exercise of the police

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514. *Kalodimos*, 470 N.E.2d at 273.

515. *Heller*, 128 S. Ct. at 2818.

516. *Kalodimos*, 470 N.E.2d at 273.

517. *Id.* at 278.

518. See *supra* notes 23–24 and accompanying text.

519. *Kalodimos*, 470 N.E.2d at 279–81 (Ryan, C.J., dissenting).

520. *Id.* (Ryan, C.J., dissenting).

521. *Id.* at 281 (Ryan, C.J., dissenting).



power, when it is in fact only the assertion of a political philosophy and a publicizing of that viewpoint, then we have in effect eliminated this right that has been granted by the Constitution.<sup>522</sup>

*O. West Virginia (1988)*

Article III, section 22 of the West Virginia Constitution, approved by the voters on November 4, 1986, reads: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use."

Harold L. Buckner was pulled over and arrested for drunk driving in Princeton, Mercer County, West Virginia.<sup>523</sup> The police found a .22 caliber pistol in Buckner's jacket pocket.<sup>524</sup> He did not have a license to carry, but a judge refused to allow a charge of "carrying a dangerous and deadly weapon," under West Virginia Code 61-7-1, on the grounds that the statute in question violated the recently enacted constitutional provision.<sup>525</sup> The prosecutor filed a writ of mandamus with the Circuit Court of Mercer County, to compel the judge to allow the criminal charge.<sup>526</sup> The Circuit Court agreed that the statute conflicted with the constitution, and sought an opinion from the West Virginia Supreme Court of Appeals.<sup>527</sup>

The court concluded that the statute prohibiting the carrying of dangerous or deadly weapons without a license was unconstitutionally overbroad, for it "sweeps so broadly as to infringe a right that it cannot permissibly reach, in this case, the constitutional right of a person to keep and bear arms in defense of self, family, home and state, guaranteed by art. III, § 22."<sup>528</sup> The court accepted that the state had the authority to regulate the bearing of arms, so long as the regulation did not "frustrate" the constitutional guarantees.<sup>529</sup>

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522. *Id.* at 281-82 (Ryan, C.J., dissenting).

523. *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 140 (W. Va. 1988).

524. *Id.*

525. *Id.* at 141.

526. *Id.*

527. *Id.*

528. *Id.* at 144.

529. The court wrote:

We stress that our holding above in no way means that the right of a

Closely following the Colorado Supreme Court's language in *Lakewood v. Pillow*, the court wrote:

We stress, however, that the legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved. . . .

[A] governmental purpose to control or prohibit certain activities, which may be constitutionally subject to state regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the realm of protected freedoms, such as the right to keep and bear arms guaranteed in our State Constitution.<sup>530</sup>

The court declared that a complete prohibition on carrying a pistol without a permit was unconstitutional; but laws that regulated carrying, including licensing of concealed carry, might be constitutional if they were not "overbroad." Again, the tools of strict scrutiny were employed.

The West Virginia legislature promptly changed the concealed carry law to provide for a non-discretionary "Shall Issue" licensing system for concealed handgun carry.

#### *P. Ohio (1993)*

Laws against "assault weapons" apply to a class of arms distinguished by cosmetics, not by firepower.<sup>531</sup> The guns may have black plastic stocks rather than brown wooden stocks; or they may have trivial features such as bayonet lugs, or features which make them more accurate, such as threads for a muzzle brakes (an attachment that makes the

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person to bear arms is absolute. Other jurisdictions concluding that state statutes or municipal ordinances have violated constitutional provisions guaranteeing a right to bear arms for defensive purposes, though not specific in what ways this is to be done, have recognized that a government may regulate the exercise of the right, provided the regulations or restrictions do not frustrate the guarantees of the constitutional provision.

State *ex rel.* City of Princeton v. Buckner, 377 S.E.2d 139, 145 (W. Va. 1988) (citation omitted).

530. *Id.* at 146, 149.

531. David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381, 386-88 (1994). This article was cited in *Kasler v. Lungren*, 72 Cal. Rptr. 2d 260, 265 (Ct. App. 1998).

firearm steadier on a second shot).<sup>532</sup> Most so-called “assault weapons” are rifles, and like other rifles, they are used less often in crime than other guns.<sup>533</sup> Accordingly, “assault weapon” bans should have difficulty passing any meaningful level of scrutiny.<sup>534</sup>

As Justice Clarence Thomas has observed, “assault weapon” “is a political term, developed by anti-gun publicists to expand the category of ‘assault rifles’ so as to allow an attack on as many additional firearms as possible on the basis of undefined ‘evil’ appearance.”<sup>535</sup> Adam Winkler accurately recognized that bans on “assault weapons” could not possibly pass strict or intermediate scrutiny.<sup>536</sup> Indeed, such a law could not pass a serious application of the rational basis test.<sup>537</sup>

The next three cases all used the lowest possible standard of review in order to uphold “assault weapon” bans.<sup>538</sup> Post-*Heller*, these cases are of no value in Second Amendment analysis. Empirically, a handgun ban is far easier to justify than an “assault weapon” ban. Handguns are physically different from other guns; most handguns are small enough to be relatively easy to conceal. In addition, handguns, unlike “assault weapons,” are often used in crime. Yet like handguns, so-called “assault weapons” are commonly used for legitimate purposes by law-abiding people.<sup>539</sup> If a handgun ban is unconstitutional, then *a fortiori* an “assault weapon” is unconstitutional.

In a challenge to Cleveland’s “assault weapons”

532. Kopel, *supra* note 531, at 383, 387, 417.

533. *Id.* at 406–10.

534. *Id.* at 401.

535. *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (quoting Bruce H. Kobayashi & Joseph P. Olson, In re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of “Assault Weapons,” 8 STAN. L. & POL’Y REV. 41, 43 (1997)).

536. Winkler, *supra* note 26, at 721.

537. Kopel, *supra* note 531, at 404.

538. See, e.g., *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994); *Benjamin v. Bailey*, 662 A.2d 1226 (Conn. 1995); *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993).

539. See Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285, 1295 (2009); Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837, 890 n.227 (2008).

ordinance, the Ohio Supreme Court, in *Arnold v. City of Cleveland*, first stated that the state constitutional right to arms for self-defense protected a fundamental right.<sup>540</sup> The court's test for a fundamental right was derived from the U.S. Supreme Court's *Palko v. Connecticut* decision, which sets a standard for selective incorporation under the Fourteenth Amendment's Due Process clause.<sup>541</sup>

The court noted that the right was not absolute, pointing out that the police power bestowed upon municipalities through Article XVIII of the Ohio Constitution grants substantial authority to regulate on behalf of public safety and health.<sup>542</sup> Based on the grant of authority, the court concluded that "In reviewing the reasonableness of an ordinance, we are guided by certain principles. It is not a court's function to pass judgment on the wisdom of the legislation, for that is the task of the legislative body which enacted the legislation."<sup>543</sup>

Despite the court's fine language about "ordered liberty," the court said that the standard of review for the right to arms—and for all other rights under the Ohio Constitution—was merely the rational basis test.<sup>544</sup> As long as a city ordinance's stated purpose had some plausible connection to the police powers of government, the court felt obligated to defer. The result is that the right to arms, and the rest of the Ohio Bill of Rights, might as well have never been written. Even without the enumeration of constitutional rights, any law must at least pass rational basis review, as Justice Scalia observed in *Heller*.<sup>545</sup>

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540. The Ohio Supreme Court wrote:

The right of defense of self, property and family is a fundamental part of our concept of ordered liberty. To deprive our citizens of the right to possess any firearm would thwart the right that was so thoughtfully granted by our forefathers and the drafters of our Constitution. For many, the mere possession of a firearm in the home offers a source of security. Furthermore, given the history of our nation and this state, the right of a person to possess certain firearms has indeed been a symbol of freedom.

*Arnold*, 616 N.E.2d at 169–70 (1993). The case is discussed in detail in Kopel et al., *supra* note 161, at 1218–40.

541. *Palko v. Connecticut*, 302 U.S. 319 (1937).

542. *Arnold*, 616 N.E.2d at 171.

543. *Id.* at 172.

544. *Id.* at 169–70.

545. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 n. 27 (2008).

The Ohio court had to adopt a very low standard of review in order to uphold the law. To accomplish the same ends, courts in Colorado and Connecticut followed that lead.

*Q. Colorado (1994)*

*Robertson v. City and County of Denver* involved a Denver “assault weapons” ban.<sup>546</sup> Applying *Lakewood v. Pillow*, the district court found the ordinance unconstitutional.<sup>547</sup> Under Colorado law, the appeal went straight to the Colorado Supreme Court. The court refused to consider the question of whether the right to keep and bear arms was fundamental: “Rather, we have consistently concluded that the state may regulate the exercise of that right under its inherent police power so long as the exercise of that power is reasonable.”<sup>548</sup> The court found the Denver ordinance “reasonable” based on the claim that assault weapons were especially likely to be criminally misused.<sup>549</sup> That the Attorney General of Colorado presented evidence demonstrating that all of the City Council’s “findings of fact” were incorrect made no difference.<sup>550</sup>

The case was decided in the district court on cross motions for summary judgment.<sup>551</sup> The Attorney General had claimed that at trial, he could prove that every one of the “findings of fact” adopted by the Denver City Council was indisputably false.<sup>552</sup> The Supreme Court denied the Attorney General even the opportunity to test the evidence, and treated the City Council’s mere assertions as dispositive.<sup>553</sup>

*Robertson* is contemptuous of the right to arms. It is a useful precedent for any court that wishes to uphold an anti-gun ordinance that is based on empirically wrong factual premises. The case is of no use to a court that takes the right

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546. *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994).

547. *Id.* at 327.

548. *Id.* at 328. The case is discussed in detail in Kopel et al., *supra* note 161. Kopel represented the Colorado Attorney General, who intervened in the case in support of the plaintiffs who urged that the law be declared unconstitutional.

549. *Robertson*, 874 P.2d at 331.

550. See Brief of Appellee at 5–11, *Robertson*, 874 P.2d 325 (No. 93SA91), 1993 WL 13038212.

551. *Robertson*, 874 P.2d at 347.

552. See Brief of Appellee, *supra* note 550, at 15.

553. *Robertson*, 874 P.2d at 333.

to arms seriously. As discussed *supra*, the D.C. handgun ban was based on the police power, and would easily pass a reasonableness test.<sup>554</sup> Ergo, *Robertson v. Denver* is not a legitimate case for applying the post-*Heller* Second Amendment.

The *Robertson* Court purported to follow *Pillow*, and did not accept the Denver District Attorney's invitation to modify the *Pillow* decision.<sup>555</sup> But the court in *Robertson* actually followed only part of *Pillow*—it merely looked at whether the ordinance was within the police power and unlike the court in *Pillow*, the *Robertson* court did not look for narrow tailoring, overbreadth, and less restrictive means. Still, *Pillow* remains a valid precedent, albeit one that the Colorado Supreme Court did not truly obey.

#### R. Connecticut (1995)

The Connecticut Supreme Court upheld the legislature's statewide "assault weapon" ban in *Benjamin v. Bailey*.<sup>556</sup> In contrast to the Ohio court in *Arnold*, the Connecticut court emphasized that "reasonable regulation" was a higher standard than "rational basis":

The constitutional right to bear arms would be illusory, of course, if it could be abrogated entirely on the basis of a mere rational reason for restricting legislation. Accordingly, courts in other states also have recognized that the right would be infringed if, in the name of "reasonable regulation," a state were to proscribe the possession of all firearms that could be used in self-defense.<sup>557</sup>

The court relied upon the analysis of *Robertson*, apparently believing that because some of the banned guns had been used in crimes, and because the law only banned a small percentage of all guns, there was a sufficient basis to pass the "reasonableness" test.<sup>558</sup>

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554. See *supra* notes 23–24 and accompanying text.

555. Brief of the Denver District Attorney as Amicus Curiae Supporting the Defendants-Respondents, *Robertson*, 874 P.2d 325 (No. 93SA91), 1993 WL 13038213.

556. *Benjamin v. Bailey*, 662 A.2d 1226 (Conn. 1995).

557. *Id.* at 1234.

558. See *id.* at 1234–35.

*S. Washington (1996)*

In *City of Seattle v. Montana*, the Washington Supreme Court upheld Seattle's "dangerous knife" ordinance,<sup>559</sup> which is among the more restrictive laws in the Northwest. It prohibits public possession of any fixed blade knife with a blade more than three-and-a-half inches long, whether carried openly or concealed.<sup>560</sup> There are exemptions for knives carried by licensed hunters or fisherman, knives wrapped and not available for use, and knives contained in tool boxes.<sup>561</sup> Alberto Montana was arrested on a "drug loitering" charge, and found in possession of a knife that violated the ordinance.<sup>562</sup>

The court upheld the ordinance, reasoning that while the Washington Constitution's arms provision certainly protected weapons ("Only '[i]nstruments *made on purpose* to fight with are called *arms*.'"), the ordinance survived because "it is a reasonable exercise of police power and is not in conflict with general law."<sup>563</sup> The court also specified the standard of review: "A law is a reasonable regulation if it promotes public safety, health or welfare and bears a reasonable and substantial relation to accomplishing the purpose pursued."<sup>564</sup>

The "substantial relation" element elevates the reasonableness test above mere rational basis. Indeed, "substantial relation" seems close to the intermediate scrutiny standard.<sup>565</sup> But the *Seattle* Court's extreme deference to legislative intuitions (basically, that knives are dangerous and so their carrying can be banned) made the standard of review ineffective in the particular case.<sup>566</sup>

559. *City of Seattle v. Montana*, 919 P.2d 1218 (Wash. 1996).

560. *Id.* at 1221.

561. *Id.*

562. *Id.* at 1220.

563. *Id.* at 1222.

564. *Id.* at 1222-23.

565. *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976).

566. The *Seattle* court wrote:

SMC 12A.14.080 furthers a substantial public interest in safety, addressing the threat posed by knife-wielding individuals and those disposed to brawls and quarrels, through reducing the number and availability of fixed-blade knives in public places in Seattle. It addresses the reality of life in our state's largest city, where at all hours residents must step outside their homes and workplaces and mingle with numerous strangers in public places. Unfortunately, street crime involving knives is a daily risk. . . .

*T. Ohio (2003)*

The plaintiff in *Klein v. Leis* challenged Ohio's ban on concealed carrying of deadly weapons as a violation of the Ohio Constitution's right to arms.<sup>567</sup> The Ohio Supreme Court held that the regulation was reasonable, in that it was not "a clear and palpable abuse of power."<sup>568</sup> Notably, open carry, with no need for a permit, was entirely lawful. Moreover, the concealed carry law allowed an affirmative defense for persons who were carrying for self-defense.<sup>569</sup>

Justice O'Connor's dissent argued for intermediate scrutiny for carry regulation, while also invoking the principles of narrow tailoring and less restrictive means.<sup>570</sup>

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Given the reality of modern urban life, Seattle has an interest in regulating fixed blade knives to promote public safety and good order. Seattle may decide fixed blade knives are more likely to be carried for malevolent purposes than for self-defense, and the burden imposed on innocent people carrying fixed blade knives is far outweighed by the potential harm of other people carrying such knives concealed or unconcealed. The harm of carrying concealed knives is even more manifest.

*Montana*, 919 P.2d at 1223, 1225.

567. *Klein v. Leis*, 795 N.E.2d 633 (Ohio 2003).

568. *Id.* at 638.

569. *Id.* at 639–40. For the text of the affirmative defense, see text at *supra* note 319.

570. Justice O'Connor wrote:

The right to bear arms for defense and security provided by the Ohio Constitution is a fundamental individual right. Majority opinion, ante at ¶ 7. . . . Generally, infringements upon fundamental rights are subject to strict scrutiny. Like other fundamental rights, the right to bear arms for security and defense should normally be protected by strict scrutiny. To survive strict scrutiny, a restriction must be necessary to serve a compelling government interest.

A manner restriction on the right to bear arms should be subjected to the same level of scrutiny as a manner restriction on the right of free speech. Thus, I would invoke intermediate scrutiny. . . .

Under intermediate scrutiny, a regulation will be upheld only if the regulation is narrowly tailored to serve an important government interest and leaves open other means of exercising the right. The state argues that the carrying of concealed weapons must be banned to protect public safety. Ensuring public safety is an important government interest that would satisfy the first prong of the test, if the statute were narrowly tailored. Further, the state correctly asserts that the statute leaves open the ability to bear arms by openly carrying a firearm, satisfying the third prong of the test.

We next turn to whether R.C. 2923.12 is narrowly tailored to serve its goal. To promote public safety, the statute prohibits the carrying of a concealed weapon by anyone unless he establishes that he had reasonable cause to believe the weapon was needed for defensive



In particular, the affirmative defense was not the less restrictive means.<sup>571</sup>

#### *U. Wisconsin (2003)*

Along with Illinois, Wisconsin is one of only two states that do not have a procedure to issue licenses for the carrying of concealed weapons.<sup>572</sup> Although Illinois law includes some statutory exceptions allowing for concealed carry (e.g., in one's home or place of business, or by certain categories of persons),<sup>573</sup> the Wisconsin statute bans concealed carry under all circumstances. Open carry, however, is lawful without a permit.

*State v. Cole*<sup>574</sup> and *State v. Hamdan*<sup>575</sup> comprise a pair of cases, decided on the same day, in which the Wisconsin Supreme Court determined whether the concealed carry ban violated the right to arms, which an overwhelming majority of voters had added to the state constitution in 1998.<sup>576</sup>

purposes. The appellees argue that the statute is not narrowly tailored because a citizen is subject to arrest *prior* to being allowed to demonstrate that he was engaged in constitutionally protected activity. I agree that "lesser, more exact restrictions may achieve the [government's] desired goals."

*Id.* at 639–40 (O'Connor, J., dissenting) (citations omitted).

571. She further wrote:

Moreover, the opportunity for the accused to establish that he was exercising a fundamental right does not justify subjecting him to arrest each time he exercises the right. This is as offensive as a statute allowing the arrest of anyone who speaks in public, but permitting the speaker to prove at trial that the speech was constitutionally protected.

*Id.* at 641 (O'Connor, J., dissenting).

572. To be precise, Vermont is another state with no procedure for concealed carry licenses. But since the Vermont Supreme Court has ruled that unlicensed concealed carry is constitutionally protected, there is no need for a license system. See *supra* notes 255–57 and accompanying text.

573. See 720 ILL. COMP. STAT. ANN. 5/24–1(a)(1) (2008) (stating a general ban on carry); 720 ILL. COMP. STAT. ANN. 5/24–1(a)(4) (stating that the ban does not apply if the gun is "not immediately accessible"; ban does not apply "on his land or in his own abode . . . or fixed place of business"); 720 ILL. COMP. STAT. ANN. 5/24 2(a) (exceptions for security guards, watchmen, and so on); 720 ILL. COMP. STAT. ANN. 5/24 2(b) (giving exceptions for sporting purposes).

574. *State v. Cole*, 665 N.W.2d 328 (Wis. 2003).

575. *State v. Hamdan*, 665 N.W.2d 785 (Wis. 2003). *Cole* and *Hamdan* are discussed in more detail in David B. Kopel, *The Licensing of Concealed Handguns for Lawful Protection: Support from Five State Supreme Courts*, 68 ALB. L. REV. 305, 314–24 (2005).

576. Seventy-four percent of the public had voted in favor. See Jeffrey Monks, Comment, *The End of Gun Control or Protection Against Tyranny?*, 2001 WIS. L. REV. 249, 250 n.10.

The court ruled that the concealed carry ban in one's home or place of business was unconstitutional.<sup>577</sup> The concealed carry ban in automobiles, however, was constitutional.<sup>578</sup> The court explained that even though open carry was an option, it was not a sufficient substitute for concealed carry in some circumstances.<sup>579</sup> For example, in the home, concealment was better suited to keeping guns hidden from children. In a place of business, concealment provided protection without alarming customers or making the gun easy to steal.<sup>580</sup>

While the Attorney General argued for a reasonableness standard of review, the defense asked for "strict scrutiny, or at least intermediate scrutiny, in determining the constitutionality of Wis. Stat. § 941.23, because the right to bear arms is a fundamental constitutional right."<sup>581</sup>

The court agreed that "the state constitutional right to bear arms is fundamental."<sup>582</sup> It decided, though, that a "reasonableness" test was more appropriate: "We are persuaded that this standard is appropriate because the interests of public safety involved here are compelling."<sup>583</sup> This is an odd formulation, because strict scrutiny itself makes explicit account for compelling state interests.

The Wisconsin court emphasized that reasonableness "should not be mistaken for a rational basis test. The explicit grant of a fundamental right to bear arms clearly requires something more, because the right must not be allowed to become illusory."<sup>584</sup> As applied in Wisconsin, "reasonableness" is a balancing test and does not

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577. *Hamdan*, 665 N.W.2d at 812 ("[W]e conclude that he had a constitutional right to keep and bear arms for the lawful purpose of security at the time he carried his concealed weapon, that his conviction for carrying a concealed weapon was unconstitutional, and his conviction must be reversed.").

578. *Cole*, 665 N.W.2d 328.

579. *Hamdan*, 665 N.W.2d at 809–10 ("Overall, we believe that requiring the continuous, open carrying of a firearm in one's business would effectively eviscerate Article I, Section 25 and lead to undesirable consequences. Under the view of the State and the [dissenting] Chief Justice, a storeowner either must sacrifice the exercise of his right to use arms for security or must put himself and others at risk by openly displaying the weapon.").

580. *Id.* at 804.

581. *Cole*, 665 N.W.2d at 336.

582. *Id.*

583. *Id.* at 337.

584. *Id.* at 338.

automatically mean deference to the legislature: “Under circumstances such as those in this case, the reasonableness test focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare.”<sup>585</sup> In holding that the concealed carry ban could not be applied in the home or a place of business, the court reasoned that the government interests in mandating open carry rather than concealed carry in such places were weak and unpersuasive.<sup>586</sup>

Although the Wisconsin cases—like Connecticut’s *Benjamin*<sup>587</sup>—used the word “reasonableness,” their application is very different. In *Benjamin*, government assertions were enough to demonstrate reasonableness, and in Wisconsin they were not. Wisconsin-style “reasonableness” review could lead to so-called “assault weapons” bans being declared unconstitutional—if the opponents of prohibition could support their claim that the banned guns differ only cosmetically from other firearms.

#### V. North Carolina (2009)

*Britt v. State*, another case that took reasonableness seriously, involved a challenge to North Carolina’s 2004 statute banning all firearms possession by anyone ever convicted of a felony.<sup>588</sup> Britt had pleaded guilty to a controlled substance violation in 1979.<sup>589</sup> His right to own a firearm was restored in 1987, and he peacefully owned firearms from then until 2004.<sup>590</sup> After the enactment of the complete ban in 2004, he voluntarily surrendered his guns.<sup>591</sup>

The North Carolina Supreme Court, in a 5–2 decision, decided that Britt “affirmatively demonstrated that he is not among the class of citizens who pose a threat to public peace and safety.”<sup>592</sup> The court considered his “uncontested lifelong nonviolence towards other citizens, his thirty years of law-

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585. *Id.*

586. *Id.* at 344.

587. See *supra* notes 556–58 and accompanying text.

588. *Britt v. State*, 681 S.E.2d 320 (N.C. 2009); N.C. GEN. STAT. § 14-415.1 (2009).

589. *Britt*, 681 S.E.2d at 321.

590. *Id.* at 323.

591. *Id.* at 322.

592. *Id.* at 323.

abiding conduct since his crime, his seventeen years of responsible, lawful firearm possession between 1987 and 2004, and his assiduous and proactive compliance with the 2004 amendment.<sup>593</sup>

Accordingly, the court found that as applied to Britt, the lifetime ban was “not a reasonable regulation.”<sup>594</sup> This was because a gun regulation must be “reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.”<sup>595</sup> Having decided the case under reasonableness, the court said that it did not need to decide whether strict scrutiny was necessary.<sup>596</sup>

In a Second Amendment context, however, the North Carolina reasonableness inquiry would never be conducted since *Heller* states that gun bans for felons are presumptively constitutional.<sup>597</sup> Perhaps at some point the Court will clarify whether there are any exceptions to this general rule.<sup>598</sup>

## VI. CONCLUSION

In our survey of many leading state cases on the right to arms, we find a much more complex situation than has been described by people who claim that highly deferential “reasonableness” has been the universal standard. To be sure, “reasonableness” has played an important role in many cases. Some courts have taken reasonableness seriously, while others have turned it into nothing more than a weak version of the rational basis test.

More importantly, reasonableness has not been the only device in the judicial toolbox; categoricalism has been an oft-used tool. That is, to determine the constitutionality of a particular arms control law, the court decides whether it fits within the protected categories of the right to arms. Is a

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593. *Id.*

594. *Id.* at 322.

595. *Britt v. State*, 681 S.E.2d 320, 322 (N.C. 2009).

596. *Id.* at 322 n.2.

597. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008).

598. *See United States v. McCane*, 573 F.3d 1037, 1047–50 (10th Cir. 2009) (Tymkovich, J., concurring) (pointing out the tension between *Heller*’s core holding and a lifetime ban for all non-violent felons); *see also* C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695 (2009) (demonstrating that, unlike some of the other gun controls approved in *Heller*, lifetime bans for felons are not well-established in the history of the American legal tradition).

particular type of weapon among the “arms” that are included in the right? Is concealed carry one form of “bearing arms”? The answers to these questions have been diverse, partly because of differences in the texts of state constitutions, and partly because some cases have been influenced by racial animus or other forms of elite panic.

The main point of this article is that categoricalism has been a long-standing technique of judicial review regarding the right to arms. If something is within the protection of the arms right, it cannot be banned, nor can it be regulated so as to frustrate the exercise of the right. Some cases suggest that even a licensing system would violate the right—especially if the licensing system includes discretion which might frustrate an ordinary person’s exercise of the right.

A second venerable judicial tool is narrow construction. To prevent infringements of the right to arms, a criminal statute may be construed narrowly. For example, a ban on carrying guns may be read to include an implicit requirement that the carrying is illegal only if the carrying is with malign intent.

Third, some courts have used tools that were first developed for strict scrutiny review under the First Amendment: overbreadth, narrow tailoring, and less restrictive alternative. Even though the courts employing these techniques have not used the words “strict scrutiny,” the use of these techniques suggests a standard of review quite similar to strict scrutiny.

The most plausible methodology for how to interpret the Second Amendment, however, is the same manner in which the courts apply the rest of the Bill of Rights. In every case, the legislature carries the burden to justify denial of an individual right. A sincere legislative belief that rights suppression contributes to public health or safety is not enough.

To treat the Second Amendment as deserving a standard of review inferior to the rest of the Bill of Rights is inappropriate. As the Supreme Court has held, there is no legitimate basis for treating one constitutional right as more preferred, and another right as less preferred or protected.<sup>599</sup>

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599. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 484 (1982) (“[W]e know of no principled basis on which to

This does not mean that the results will always be the same. Many gun control laws—particularly those aiming to prevent gun acquisition by dangerous criminals—may be based on a compelling state interest. In contrast, few speech restrictions could have a compelling state interest.

Thus, the National Instant Check System (NICS) would almost certainly be upheld against a Second Amendment challenge. Under current federal law, when a person buys a gun in a store, the seller must first conduct a telephone or online check with a state law enforcement agency or the FBI. The check verifies that the buyer is not prohibited from buying a firearm because of a criminal conviction or other disqualifying condition.<sup>600</sup> Sometimes the check is completed in minutes, and sometimes it takes several hours.

As applied to firearms, NICS would likely be considered constitutional because the burden is relatively small, and can be seen as narrowly tailored and as the least restrictive alternative (compared to a more elaborate licensing system requiring weeks or months). Significantly, NICS aims to protect a compelling state interest in preventing especially dangerous people from acquiring guns. In contrast, there is not a compelling state interest in preventing dangerous people from acquiring books, so NICS could not constitutionally be applied to bookstores.

In this article, we do not attempt to resolve the debate over how much deference courts should give to legislatures. Whatever standard of deference one picks, the rule should be applied consistently, with no right, including the right to arms, being specially favored or disfavored. Two centuries of state court decisions provide many good examples of courts that have respected and seriously enforced the right to arms, doing much more than supinely accepting all anti-gun laws under a feeble standard of deference.

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create a hierarchy of constitutional values.”).

600. 18 U.S.C. § 922(t) (2006).