GAY RIGHTS STRENGTHEN GUN RIGHTS

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I. INTRODUCTION

A written constitution is a reminder that governments can be unreasonable and unjust. Rights selected for protection in the United States Constitution are considered to be peculiarly important and uniquely vulnerable to infringement. The rights guaranteed by the Constitution protect individuals against even popular conceptions of the public good. Consequently, the judiciary's role is to act as a check on overbearing majorities and overreaching executives.

The Supreme Court held in *Obergefell v. Hodges* that the Fourteenth Amendment's guarantees of due process and equal protection protect the fundamental right of same-sex couples to marry and require every state to recognize a same-sex civil marriage lawfully licensed and performed in another state.[1] The guarantee of equal protection was implicated because the laws under review burdened the fundamental right to civil marriage.[2] It was a five-to-four decision.[3] *Obergefell* strengthens two other recent five-to-four decisions, decisions guaranteeing the enumerated right to keep and

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1. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).
2. *Id.* at 2590.
3. *Id.* at 2591.

bear arms.[4] This Article examines *Obergefell*'s methodology and applies that methodology to the right to arms.

II. HOLDING IN *OBERGEFELL V. HODGES*

> [S]ame-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.[5]

The Court arrived at this holding by observing that fundamental liberties protected by the Fourteenth Amendment are not restricted to the rights enumerated in the Bill of Rights. The identification and protection of fundamental rights "has not been reduced to any formula."[6] This is especially true when the constitutional guarantee sets forth broad principles, as does the Fourteenth Amendment.[7] New insights and cultural and political developments make new dimensions of freedom and individual autonomy become apparent to new generations.[8] However, both "history and tradition guide and discipline th[e] inquiry" of identifying and protecting fundamental rights.[9]

The *Obergefell* Court acknowledged that it was not until 2003 that any court held its State Constitution's guarantee of due process and equal protection guaranteed same-sex couples the right to civil marriage.[10] A dissenting opinion noted that no country allowed same-sex marriage until 2000 when the Netherlands did so.[11]

4. *See generally* McDonald v. City of Chicago, Ill., 561 U.S. 742 (2010); District of Columbia v. Heller (*Heller I*), 554 U.S. 570 (2008).

5. *Obergefell*, 135 S. Ct. at 2607–08.

6. *Id.* at 2598 (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

7. *See* U.S. CONST. amend. XIV.

8. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003), which invalidated sodomy laws. *Lawrence* happened, at least in part, because of cultural and political developments. "A deep transformation in American culture and politics had brought about a profound shift in the Court's perception of gay men and lesbians." DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 221 (2012). David Cole argues that changes of public opinion were responsible for three recent U.S. Supreme Court decisions: legalization of same-sex marriage, right to keep and bear arms, and protection of the rights of foreign nationals suspected of dealings with the enemy and imprisoned by U.S. in time of war. DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW (2016).

9. *Obergefell*, 135 S. Ct. at 2595–96, 2598.

10. *See id.* at 2597 (citing Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003)).

11. *Id.* at 2640 (Alito, J., dissenting) (quoting United States v. Windsor, 133 S. Ct. 2675, 2715 (2013) (Alito, J., dissenting)).

However, the Framers of the Fourteenth Amendment entrusted its protections to future generations.[12] Injustice cannot always be seen at a particular time in history. Thus, we learn from history—"without allowing the past alone to rule the present"—to "protect[] the right of all persons to enjoy liberty" in all its dimensions.[13] Therefore, once a right is recognized as fundamental and is protected, the right no longer depends on the outcome of any election.[14]

The Court's ultimate holding was based on an extension of its past holdings, including that a ban on freedom to marry based on racial differences is unconstitutional under the Fourteenth Amendment's guarantee of due process and equal protection;[15] that it is unconstitutional under the Fourteenth Amendment's guarantee of equal protection for a state constitution to impose a ban on protecting persons against discrimination based on sexual orientation;[16] that criminalization of certain same-sex acts of intimacy is unconstitutional under the Fourteenth Amendment's guarantee of due process;[17] and that the federal Defense of Marriage Act's restriction of the terms "marriage" and "spouse" to heterosexual unions is unconstitutional under the Fifth Amendment's guarantee of due process.[18] These decisions, like *Obergefell*, were based primarily on substantive due process and equal protection rather than on an enumerated right.[19] Substantive due process protects the fundamental right to marry, and the guarantee of equal protection prohibits unjustified infringement of the fundamental right to marry.[20]

12. *Id.* at 2598 (majority opinion).

13. *Id.*

14. *See id.* at 2605–06. On November 4, 2008, California voted 52.24% in favor of Proposition 8. *California Proposition 8, the "Eliminates Right of Same-Sex Couples to Marry" Initiative (2008)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_8,_the_%22Eliminates_Right_of_Same-Sex_Couples_to_Marry%22_Initiative_(2008) (last visited Jan. 13, 2016).

15. *Obergefell*, 135 S. Ct. at 2589, 2598 (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).

16. *Id.* at 2596 (citing Romer v. Evans, 517 U.S. 620 (1996)).

17. *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 578 (2003)). Justice O'Connor concurred based on the Fourteenth Amendment's Equal Protection Clause. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

18. *Id.* at 2597 (citing United States v. Windsor, 133 S. Ct. 2675, 2681 (2013)).

19. *Id.* at 2602–03; *see also supra* notes 15–18 and accompanying text.

20. *Id.* at 2606.

III. SUPREME COURT'S 21ST CENTURY RIGHT-TO-BEAR-ARMS DECISIONS

In *District of Columbia v. Heller*, a District of Columbia law that banned all handguns and any operable firearm in the home was held to be an unconstitutional infringement of the Second Amendment.[21] This holding was reached after dissecting the Second Amendment's guarantee—"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed"—and interpreting its words.[22]

The Court stated that the prefatory clause announces a purpose.[23] With all prefatory clauses, the prefatory clause does not limit the operative clause where the operative clause is expressed in clear, unambiguous terms.[24] The Court noted that "the 'militia' . . . consisted of a subset of 'the people,'"[25] and that "[r]eading the Second Amendment as protecting only the right to 'keep and bear Arms' in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as 'the people.'"[26]

"Arms" include modern firearms,[27] and the Court dismissed as "bordering on the frivolous" the argument that the Second Amendment protects only "those arms in existence in the 18th century."[28] The Court held that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[29]

The Court held in *Heller* that "[k]eep arms" means "possessing arms, for militiamen *and everyone else*,"[30] and that bearing arms means "carrying for a particular purpose—confrontation."[31] Bearing arms "was unambiguously used to refer to the carrying of weapons outside of an organized militia."[32] The Second Amendment is meant to protect the right

21. District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 635–636 (2008). An amicus curiae was filed in *Heller* by the Pink Pistols and Gays and Lesbians for Individual Liberty in support of Respondent Heller. Brief of Pink Pistols and Gays & Lesbians for Individual Liberty as Amici Curiae in Support of Respondents, *Heller I*, 554 U.S. 570 (No. 07-290).

22. *Heller I*, 554 U.S. at 576.

23. *Id.* at 599.

24. *Id.* at 577–78.

25. *Id.* at 580.

26. *Id.* at 580–81.

27. *Id.* at 581–82.

28. *Id.* at 582.

29. *Id.*

30. *Id.* at 583.

31. *Id.* at 584.

32. *Id.*

of the people to be "better able to resist tyranny,"[33] to prevent the government from "taking away the people's arms,"[34] "to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down,"[35] and "for self-defense and hunting."[36] Self-defense is the most important guarantee of the Second Amendment because a person must be alive to enjoy any right.[37] The "right of self-defense has been central to the Second Amendment right."[38] The home is "where the need for defense of self, family, and property is most acute."[39]

The Second Amendment protects those arms that are "typically possessed by law-abiding citizens for lawful purposes" and those "in common use."[40] This includes the "handgun."[41] However, excluded is the short-barreled shotgun, "dangerous and unusual weapons," and "M-16 rifles and the like."[42]

The Court provided examples of permissible regulation:

> [T]he right secured by the Second Amendment is not unlimited. . . . [T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . [P]rohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools

33. *Id.* at 597–98; *see also* Robert J. Cottrol, *Second Amendment: Not Constitutional Dysfunction but Necessary Safeguard*, 94 B.U. L. REV. 835, 845–48 (2014) ("[N]early 170 million people were murdered by their own governments in the twentieth century.").

34. *Heller I*, 554 U.S. at 598. Framers had experience with disarmament by the British. Bostonians surrendered 1,778 muskets, 634 pistols, and 38 blunderbusses to General Gage's forces. RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON, AND OF THE BATTLES OF LEXINGTON, CONCORD AND BUNKER HILL 95 (6th ed. 1903).

35. *Heller I*, 554 U.S. at 599.

36. *Id.*

37. There is a practical reason for the right to keep and bear arms: Courts have held that neither the state nor the police owe a duty to protect the individual. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989); Hernandez v. City of Goshen, Ind., 324 F.3d 535, 538 (7th Cir. 2003); Fox v. Custis, 712 F.2d 84, 85 (4th Cir. 1983); Zelig v. Cnty. of Los Angeles, 45 P.3d 1171, 1182 (Cal. 2002); Warren v. District of Columbia, 444 A.2d 1, 5 (D.C. 1981) (en banc); Everton v. Willard, 468 So. 2d 936, 938 (Fla. 1985); Ashburn v. Anne Arundel Cnty., 510 A.2d 1078, 1083 (Md. 1986); Weiner v. Metro. Transp. Auth., 433 N.E.2d 124 (N.Y. 1982). One federal court even stated, "[T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

38. *Heller I*, 554 U.S. at 628.

39. *Id.*

40. *Id.* at 625, 627.

41. *Id.* at 628.

42. *Id.* at 625, 627.

> and government buildings, or laws imposing conditions and qualification on the commercial sale of arms.[43]

The Court noted: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[44]

The Court did not confine the right to bear arms to the home. There would be no need to mention hunting, bans on concealed carrying of arms, and bans on carrying arms in sensitive places if the right were confined to the home.[45] *Heller* provided examples of impermissible regulation of the right to carry arms, such as a law that would ban both open and concealed carrying of a pistol "without regard to time, place, or circumstances," and a law requiring "'arms to be so borne as to render them wholly useless for the purpose of defence.'"[46] Consequently, the Court voided the District of Columbia law that required firearms in the home to be inoperable at all times because it made "it impossible for citizens to use them for the core lawful purpose of self-defense and [was] hence unconstitutional."[47]

The Court did not establish a standard of review for Second Amendment cases because "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family' would fail constitutional muster."[48] However, the Court rejected rational basis scrutiny and an "interest-balancing inquiry."[49] The Court noted that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in the defense of hearth and home."[50] The Court held that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table. . . . [I]t is not the role of this Court to pronounce the Second Amendment extinct."[51]

Two years later, in *McDonald v. City of Chicago*, the Second Amendment right recognized in *Heller* was held to be applicable to the states through the due process clause of the Fourteenth Amendment.[52] The

43. *Id.* at 626–27.

44. *Id.* at 627 n.26.

45. *See id.* at 599, 604, 626–27.

46. *Id.* at 629 (quoting State v. Reid, 1 Ala. 612, 616–17 (1840); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 187 (1871)) (citing Nunn v. State, 1 Ga. 243, 251 (1846)).

47. *Id.* at 630.

48. *Id.* at 628–29 (footnote omitted) (citations omitted).

49. *Id.* at 628 n.27, 634–35.

50. *Id.* at 635.

51. *Id.* at 636.

52. McDonald v. City of Chicago, Ill., 561 U.S. 742, 791 (2010). This protection has been extended to the Commonwealth of Northern Mariana Islands. Radich v. Guerrero, Case 1:14-CV-

Court held that the right to bear arms is "fundamental to *our* scheme of ordered liberty" and is "'deeply rooted in this Nation's history and tradition.'"[53] Justice Thomas reached the same result but by applying the privileges or immunities clause of the Fourteenth Amendment.[54]

IV. *OBERGEFELL* STRENGTHENS RIGHT TO KEEP AND BEAR ARMS

Obergefell changed the definition of civil marriage to include same-sex marriage.[55] It constitutionalized what previously had been left to the legislative branch.[56] It was 1996 when the Court first ruled that a State could not enact laws discriminating against homosexuals.[57] It was 2003 when same-sex civil marriage was first recognized as a constitutional right under a State Constitution.[58] Over the past six years, voters and legislators in only eleven states and the District of Columbia protected the right to same-sex civil marriage.[59] And yet, in 2015, *Obergefell* happened.

Cultural developments in the later part of the 20th century allowed homosexuals to lead more open lives.[60] It is the flexibility of substantive due process that produced *Obergefell*. Surely, an enumerated and affirmative right in the Bill of Rights that has been incorporated through the Fourteenth Amendment is of equal dignity to an unenumerated right that has been recognized only by the courts, and not explicitly by the Constitution, and only through substantive due process.

Some members of the Supreme Court who voted with the majority in *Obergefell* not only dissented from *Heller* and *McDonald*, but are also eager to overrule both.[61] The methodology used in *Obergefell* was one of

00020, 2016 WL 1212437 (D. N. Mar. I. Mar. 28, 2016) (striking down bans on handguns and ammunition).

53. *McDonald*, 561 U.S. at 767–68 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

54. *Id.* at 805–06 (Thomas, J., concurring).

55. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015); *see also supra* Part II.

56. *Obergefell*, 135 S. Ct. at 2605–06.

57. *See* Romer v. Evans, 517 U.S. 620, 635–36 (1996).

58. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

59. *Obergefell*, 135 S. Ct. at 2611, 2615 (2015) (Roberts, C.J., dissenting).

60. *Id.* at 2596 (majority opinion).

61. Cottrol, *supra* note 33, at 839. Justice Ruth Bader Ginsburg (in the *Obergefell* majority) has said, "[T]he disappearance of that purpose [the need for a militia] eliminates the function of the Second Amendment." *Ginsburg Draws Connection Between Immigration Reform, Fair Pay for Women*, PRI (Sept. 18, 2013, 10:00 AM), http://www.pri.org/stories/2013-09-18/ginsburg-draws-connection-between-immigration-reform-fair-pay-women. In other words, the command that "the right of the people to keep and bear arms shall not be infringed" would be judicially repealed. Justice Stephen Breyer (also in the *Obergefell* majority) expressed a desire to reverse *Heller* and *McDonald*. David Kopel, *Smearing Madison*, DAVEKOPEL.COM (Mar. 2011),

reviewing history, reviewing tradition, and reviewing cultural and political developments. With such a methodology, an overruling of *Heller* and *McDonald* no longer seems possible, unless the Court also wishes to overrule *Obergefell*.

In the United States, the history and tradition of supporting the right to bear arms as a constitutional right dates back to 1776.[62] Political developments demonstrate that most state legislatures support this right.[63] In forty states a person is entitled to a permit to carry a firearm without any requirement of showing any need; these are known as "shall issue" states.[64] In thirty-one states a person may carry an unconcealed firearm without a permit; these are known as "open carry" states.[65] In ten states, a person may carry a firearm concealed without a permit; these are known as "constitutional carry" states.[66] Polls show popular support for gun ownership and for gun rights.[67]

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http://www.davekopel.com/2A/Mags/smearing-madison.html (discussing *Justice Stephen Breyer on 'FNS'*, FOX NEWS (Dec. 12, 2010, 1:01 PM), http://video.foxnews.com/v/4456313/justice-stephen-breyer-on-fns). Retired Justice John Paul Stevens, who dissented in *Heller* and *McDonald*, District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 636 (2008) (Stevens, J., dissenting); McDonald v. City of Chicago, Ill., 561 U.S. 742, 858 (2010) (Stevens, J., dissenting), left the court before *Obergefell* and continues to attack both *Heller* and *McDonald*:

> And another five words that he [Justice John Paul Stevens] proposes to add to the Second Amendment would have the effect of overturning the court's 2008 decision in District of Columbia v. Heller, from which Justice Stevens dissented: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms when serving in the Militia shall not be infringed."

Linda Greenhouse, *Speaking Truth to the Supreme Court*, N.Y. TIMES (Apr. 16, 2015), http://www.nytimes.com/2015/04/16/opinion/speaking-truth-to-the-supreme-court.html.

62. *Heller I*, 554 U.S. at 600–01.

63. *See id.* at 675–77.

64. Christopher Keleher, District of Columbia v. Heller*: The Death Knell for Illinois Handgun Bans?*, 96 ILL. B.J. 402, 405 (2008) (citing David McDowall et al., *Easing Concealed Firearms Laws: Effects on Homicide in Three States*, 86 J. CRIM. L. & CRIMINOLOGY 193, 193 (1995)).

65. Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013) (Hardiman, J., dissenting).

66. The ten states are Alaska, Arizona, Arkansas, Idaho, Kansas, Maine, Mississippi, Vermont, West Virginia, and Wyoming. ALASKA STAT. § 11.61.220 (2012); ARIZ. REV. STAT. ANN. § 13-3102 (West Supp. 2012); ARK. CODE ANN. § 5-73-120 (2006); VT. STAT. ANN. tit. 13, § 4003 (2009); WYO. STAT. ANN. § 6-8-104(a)(iv) (2011); *Bills and Laws: SB 45*, KANSAS 2015-2016 LEGIS. SESSIONS, http://www.kslegislature.org/li/b2015_16/measures/sb45; Debbie Bryce, *Constitutional Carry Took Only 18 Days to Become Law*, IDAHO ST. J. (Apr. 1, 2016), http://www.idahostatejournal.com/members/constitutional-carry-took-only-days-to-become-law/article_bf3d6ddf-ff24-571b-b6b6-5970a618db29.html; Bob Owens, *Breaking: Mississippi to Join "Constitutional Carry" Wave*, BEARING ARMS (Apr. 7, 2016, 2:01 PM), http://bearingarms.com/bob-o/2016/04/07/breaking-mississippi-join-constitutional-carry-wave; Stephen Gutowski, *Maine Becomes Sixth Constitutional Carry State*, WASH. FREE BEACON (July 9, 2015, 1:59 PM), http://freebeacon.com/issues/maine-becomes-sixth-constitutional-carry-state; Stephen Gutowski, *West Virginia Legalizes Conceal Carry Without a Permit*, WASH. FREE

The right to bear arms in the United States was first guaranteed in the Pennsylvania Constitution of 1776:

> That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.[68]

It was amended in 1790 to guarantee that "[t]he right of the citizens to bear arms in defence of themselves and the state shall not be questioned."[69]

A minority faction in the Pennsylvania convention for the ratification of the United States Constitution was the first to make proposals for a Bill of Rights on December 13, 1787.[70] They made fifteen proposals.[71] The seventh provided the following:

> That the people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power.[72]

Although all fifteen proposals were defeated, the United States Constitution was finally approved with the understanding that a Bill of Rights would be adopted.[73] The Pennsylvania proposals eventually found their way into the Bill of Rights and became the First, Second, Fourth, Fifth, Sixth, Eighth, and Tenth Amendments.[74]

BEACON (Mar. 7, 2016, 4:15 PM), http://freebeacon.com/issues/west-virginia-legalizes-concealed-carry-without-a-permit.

67. *Growing Public Support for Gun Rights*, PEW RES. CENTER (Dec. 10, 2014), http://www.people-press.org/2014/12/10/growing-public-support-for-gun-rights; Justin McCarthy, *More Than Six in 10 Americans Say Guns Make Homes Safer*, GALLUP (Nov. 7, 2014), http://www.gallup.com/poll/179213/six-americans-say-guns-homes-safer.aspx.

68. PA. CONST. of 1776, Declaration of Rights, art. XIII.

69. PA. CONST. art IX, § 21 (1790).

70. PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, at 426–29 (John Bach McMaster & Frederick D. Stone eds., 1888).

71. *Id.* at 421–23.

72. *Id.* at 422.

73. RANDY E. BARNETT & HOWARD E. KATZ, CONSTITUTIONAL LAW: CASES IN CONTEXT 41 (2d ed. 2013) ("There is general consensus among historians that the Constitution was headed for defeat until the Federalists solemnly promised to adopt, after ratification, a bill of rights in the form of amendments.").

74. *See* EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 50–56 (1957).

This history demonstrates that the understanding of "to bear arms" included self-defense and hunting. Consequently, a commentator wrote more than fifty years ago: "But history does not warrant concluding that it necessarily follows from the pairing of the concepts that a person has a right to bear arms solely in his function as a member of the militia."[75]

Two well-known scholars supported the view that the guarantee to arms belongs to the individual before *Heller*. Pulitzer Prize winning historian Leonard W. Levy stated the following:

> Believing that the [second] amendment does not authorize an individual's right to keep and bear arms is wrong. The right to bear arms is an individual right. The military connotation of bearing arms does not necessarily determine the meaning of a right to bear arms. If all it meant was the right to be a soldier or serve in the military, whether in the militia or the army, it would hardly be a cherished right and would never have reached constitutional status in the Bill of Rights. The "right" to be a soldier does not make much sense. Life in the military is dangerous and lonely, and a constitutionally protected claim or entitlement to serve in uniform does not have to exist in order for individuals to enlist if they so choose. Moreover, the right to bear arms does not necessarily have a military connotation, because Pennsylvania, whose constitution of 1776 first used the phrase "the right to bear arms," did not even have a state militia. In Pennsylvania, therefore, the right to bear arms was devoid of military significance. Moreover, such significance need not necessarily be inferred even with respect to states that had militias. Bearing arms could mean having arms. Indeed, Blackstone's Commentaries spoke expressly of the "right to have arms." An individual could bear arms without being a soldier or militiaman.[76]

75. Robert A. Sprecher, *The Lost Amendment* (pt. 1), 51 A.B.A. J. 554, 557 (1965).

> The constitutional convention rejected proposals that did not guarantee a right to keep and bear arms. A July 1789 proposed Bill of Rights, in Roger Sherman's handwriting, has been discovered in James Madison's papers. It mentions the militia, but omits any right of the people to keep and bear arms:
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> "The militia shall be under the government of the laws of the respective States, when not in the actual Service of the united [sic] States, but such rules as may be prescribed by Congress for their uniform organization & discipline shall be observed in officering and training them, but military Service shall not be required of persons religiously scrupulous of bearing arms."
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> The decision not to adopt Sherman's proposal indicates that the framers felt that it was inadequate.

Robert Dowlut, *The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots*, 8 STAN. L. & POL'Y REV. 25, 27 (1997) (footnotes omitted) (quoting Herbert Mitgang, *Handwritten Draft of a Bill of Rights Found*, N.Y. TIMES, July 29, 1987, http://www.nytimes.com/1987/07/29/us/handwritten-draft-of-a-bill-of-rights-found.html).

76. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 134–35 (Yale Univ. Press 1999).

Professor Laurence H. Tribe, constitutional law expert at Harvard Law School, wrote the following:

> Perhaps the most accurate conclusion one can reach with any confidence is that the core meaning of the Second Amendment is a populist/republican/federalism one. Its central object is to arm "We the People" so that ordinary citizens can participate in the collective defense of their community and their state. But it does so not through directly protecting a right on the part of states or other collectivities, assertable by them against the federal government, to arm the populace as they see fit. Rather, the amendment achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes—not a right to hunt for game, quite clearly, and certainly not a right to employ firearms to commit aggressive acts against other persons—a right that directly limits action by Congress or by the Executive Branch and may well, in addition, be among the privileges or immunities of United States citizens protected by § 1 of the Fourteenth Amendment against state or local government action.[77]

In 1822, the first state appellate court held that an arms law violated a state constitutional guarantee to bear arms.[78] In 1846, the Georgia Supreme Court held that a firearm law violated the Second Amendment.[79] In 1857, the U.S. Supreme Court first acknowledged the right to bear arms as an individual right in *Scott v. Sandford*, with Chief Justice Taney explaining that the Constitution would guarantee Dred Scott's right to keep and carry arms if the Court were to rule that Dred Scott was a person.[80] In 1871, the Tennessee Supreme Court recognized penumbral rights in an arms case when it struck down a pistol carrying statute as too restrictive in *Andrews v. State.*[81] *Andrews* held that:

> "[T]he right to keep arms for this purpose involves the right to practice their use
>
> . . . .

77. LAURENCE H. TRIBE, I AMERICAN CONSTITUTIONAL LAW 901–02 n.221 (3d ed. 2000).

78. Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 93 (1822).

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

80. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 417, 450 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV ("[T]o keep and carry arms wherever they went. . . . Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding.").

81. Andrews v. State, 50 Tenn. (3 Heisk.) 165, 178 (1871).

> 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."[82]

Andrews also held that "the right to *keep* them [arms], with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier."[83] *Andrews* was cited several times in *District of Columbia v. Heller*.[84]

Historically, this right was so popular that future states (Vermont and Texas) guaranteed their citizens the right to bear arms while they were still independent republics. Before it was a state, Vermont guaranteed that "the people have a right to bear arms, for the defence of themselves and the State."[85] It kept an identical provision when it became a state in the union.[86] The same is true of Texas: "Every citizen shall have the right to bear arms in defence of himself and the republic. The military shall at all times and in all cases be subordinate to the civil power."[87] The Constitution of Texas continues to guarantee a right to keep and bear arms for self-defense.[88]

The civil right to bear arms continues to be a popular right.[89] There is a presence of actual societal respect for this right, a presence so strong that one can feel it in this Nation. Presently the constitutions of forty-four states

82. *Id.*

83. *Id.* at 182.

84. District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 608, 614, 629, 688 (2008).

85. VT. CONST. ch. I, art. XV (1777); *see also* George A. Mocsary, Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment As a Nonindividual Right*, 76 FORDHAM L. REV. 2113, 2124 n.88 (2008).

86. *See* VT. CONST. ch. I, art. XVI (1793).

87. CONST. OF THE REPUBLIC OF TEX. of 1836, Declaration of Rights, § 14.

88. TEX. CONST. art. I, § 13.

89. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012) ("[P]rotected civil rights, such as the right to bear arms or vote in elections . . . ."); Ferguson v. Perry, 740 S.E.2d 598, 604 (Ga. 2013) ("[T]his Court and other courts have said that the right to possess firearms is indeed a 'civil right.'"); *see also, e.g.*, United States v. Stone, 139 F.3d 822, 830–31 (11th Cir. 1998) (per curiam) (quoting United States v. Sharp, 12 F.3d 605, 607–08 (6th Cir. 1993)) (explaining that felony convictions "carry disabilities" including the deprivation of "civil rights as important as the right to vote, the right to keep and bear arms, and the right to engage in a chosen business or profession"). State courts, interpreting state guarantees to arms, hold that the right to possess a firearm is a civil right. Fla. Carry, Inc. v. Univ. of N. Fla., 133 So. 3d 966, 983, n.12 (Fla. Dist. Ct. App. 2013) (en banc) (Makar, J., concurring); Williams v. State, 402 So. 2d 78, 79 (Fla. Dist. Ct. App. 1981); Smith v. State, 697 S.E.2d 177, 184 (Ga. 2010) (noting that a criminal conviction may impact the defendant's "civil rights, such as the right to vote or possess firearms"); State v. Trower, 629 N.W.2d 594, 597 (S.D. 2001); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 182 (1871). "*Heller* is a victory for civil rights . . . ." Anders Walker, *From Ballots to Bullets:* District of Columbia v. Heller *and the New Civil Rights*, 69 LA. L. REV. 509, 510 (2009).

guarantee this right.[90] Only California, Iowa, Maryland, Minnesota, New Jersey, and New York lack a guarantee.[91] In the 21st century, Kansas,[92] Louisiana,[93] Missouri,[94] and Alabama[95] strengthened their guarantees to bear arms. There is an affirmative history of protection of this right. History and tradition are powerful confirmations that the right to bear arms is deeply rooted in our history and accepted as part of the culture of this nation, and that this right fulfills the human yearning for security, safe haven, and personal autonomy.

There are, however, outliers. Massachusetts, the first state to constitutionalize same-sex civil marriage, is one outlier. In the year of the Bicentennial, *Commonwealth v. Davis* held that neither the state guarantee to bear arms nor the Second Amendment protects an individual right.[96]

90. The guarantees are reproduced in the appendix to this Article. *See infra* Appendix. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006), and David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359 (1998), for a helpful discussion of these guarantees.

91. However, the constitutional right to self-defense is guaranteed in California, Iowa, and New Jersey. CAL. CONST. art. I, § 1; IOWA CONST. art. I, § 1; N.J. CONST. art. 1, ¶ 1. Logically, the guarantee to self-defense should include the right to defensive arms to make that right meaningful.

92. On November 2, 2010, 88.2% of the voters approved the new Kansas guarantee to bear arms, thus nullifying *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905), which opined that neither the state constitutional right to bear arms for defense and security nor the Second Amendment guarantee an individual right. *See Kansas Right to Bear Arms Question, Constitutional Amendment Question 1 (2010)*, BALLOTPEDIA, https://ballotpedia.org/Kansas_Right_to_Bear_Arms_Question,_Constitutional_Amendment_Question_1_(2010) (last visited Jan. 13, 2016).

93. On November 6, 2012, 73.45% of the voters approved the new Louisiana guarantee specifically requiring strict scrutiny interpretation. *See Louisiana Right to Bear Arms, Amendment 2 (2012)*, BALLOTPEDIA, https://ballotpedia.org/Louisiana_Right_to_Bear_Arms,_Amendment_2_(2012) (last visited Jan. 13, 2016).

94. On August 5, 2014, 60.95% of the voters approved the new Missouri guarantee specifically requiring strict scrutiny interpretation. *Missouri Right to Bear Arms, Amendment 5 (August 2014)*, BALLOTPEDIA, https://ballotpedia.org/Missouri_Right_to_Bear_Arms,_Amendment_5_(August_2014) (last visited Jan. 13, 2016).

95. On November 4, 2014, 72.5% of the voters approved the new Alabama guarantee specifically requiring strict scrutiny interpretation. *Alabama Right to Bear Arms, Amendment 3 (2014)*, BALLOTPEDIA, https://ballotpedia.org/Alabama_Right_to_Bear_Arms,_Amendment_3_(2014) (last visited Jan. 13, 2016).

96. Commonwealth v. Davis, 343 N.E.2d 847, 849, 850 (Mass. 1976). However, on November 2, 1976, the voters rejected the Massachusetts Prohibition of Handguns ballot with a 69.21% no vote. *Massachusetts Prohibition of Handguns, Question 5 (1976)*, BALLOTPEDIA, https://ballotpedia.org/Massachusetts_Prohibition_of_Handguns,_Question_5_(1976) (last visited Jan. 13, 2016). The Massachusetts Supreme Court earlier interpreted the state guarantee to bear arms as an individual right in a libel case. Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313–14 (1825) ("The liberty of the press was to be unrestrained, but he who used it was to be

More recently, even though *Heller* teaches that constitutionally protected "arms" are not restricted to those of the 18th century,[97] The Massachusetts Supreme Court held in *Commonwealth v. Caetano* that an electric stun gun is not protected by the Second Amendment.[98] However, the U.S. Supreme Court disagreed.[99] The high court held that the decision of the Massachusetts Supreme Court was inconsistent with *Heller*.[100] The justices said that, under *Heller*, arms are not restricted to those of the 18th century, and that arms are not restricted to firearms. Consequently, the judgment of the Massachusetts Supreme Court was vacated, and the case was remanded for further proceedings not inconsistent with the U.S. Supreme Court's opinion.[101]

Another outlier is New York City. It singled out the Second Amendment for especially unfavorable treatment, a notion that the Supreme Court rejected in *McDonald*.[102] In *Kwong v. Bloomberg*,[103] New York City's uniquely steep fee to possess a handgun in the home was upheld.[104] The fee is the highest in the state and in the nation.[105] New York City imposes a $340 application fee to obtain a residential handgun license that is valid for three years.[106] There is an additional $94.25 fee for fingerprinting and background checks conducted by the New York State Division of Criminal Justice Services.[107] The court even questioned whether the fee was an "appreciable restraint," but determined that, even if it was, the law survives intermediate scrutiny and that such fees are comparable to fees charged to hold a rally or parade.[108] Of course, the reality is that a rally or parade is not conducted in a home, while the Second Amendment's core right is to possess a firearm in the home. The concurring opinion agreed: "Although the fee constitutes a substantial burden on the fundamental

responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction."). The Supreme Court in *Heller I* addressed the court's language in *Blanding*, "The analogy makes no sense if firearms could not be used for any individual purpose at all." District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 602 (2008).

97. *Heller I*, 554 U.S. at 582.

98. Commonwealth v. Caetano, 26 N.E.3d 688, 689 (Mass. 2015). *But see* People v. Yanna, 824 N.W.2d 241, 246 (Mich. Ct. App. 2012) (holding that a stun gun ban violates the right to keep and bear arms).

99. Caetano v. Massachusetts, 136 S. Ct. 1027 (2016) (per curiam).

100. *Id.*

101. *Id.*

102. McDonald v. City of Chicago, Ill., 561 U.S. 742, 778–79 (2010).

103. Kwong v. Bloomberg, 723 F.3d 160 (2d Cir. 2013).

104. *Id.* at 161.

105. Appellants' Brief at 53–55, *Kwong*, 723 F.3d 160 (No. 12-1578).

106. *Kwong*, 723 F.3d at 161.

107. *Id.* at 162 n.5.

108. *Id.* at 165–67.

Second Amendment right to possess a handgun in the home for self-defense . . . and thereby necessitates intermediate scrutiny, the statute survives such heightened review."[109]

Obergefell takes a broad view of the guarantee of equal protection to prevent inequality in the enjoyment of a fundamental right.[110] Thus, the guarantee of equal protection prevents the enforcement of laws that would confine the enjoyment of a fundamental enumerated right to only people who can afford the payment of a steep fee. *Kwong* was pre-*Obergefell*. A post-*Obergefell* case with similar facts and law should result in a different decision, if the standards of *Obergefell* are to be followed.

V. *HELLER* AND *MCDONALD* IN THE INFERIOR COURTS

Some inferior courts since *Heller* and *McDonald* have used the Supreme Court's decisions to provide individuals with some specific Second Amendment protections. For example, bans on carrying or transporting arms outside the home are unconstitutional.[111] A ban on firearm possession cannot be based on old misdemeanor or on all misdemeanor convictions.[112] The Second Amendment protects the sale of firearms,[113] the possession of ammunition,[114] and the right to target practice so as to maintain proficiency with firearms.[115] "Arms" protected by the Second Amendment include electronic stun guns[116] and switchblade knives.[117] A ban on possession of firearms on premises where alcoholic beverages are sold or consumed may not extend to a parking lot.[118] A ten-day waiting period before a firearm may be transferred may be

109. *Id.* at 172 (Walker, J., concurring) (citation omitted).

110. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

111. Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012); Palmer v. District of Columbia, 59 F. Supp. 3d 173, 183 (D.D.C. 2014); State v. DeCiccio, 105 A.3d 165, 209 (Conn. 2014); People v. Aguilar, 2 N.E.3d 321, 328 (Ill. 2013). *But see* Woollard v. Gallagher, 712 F.3d 865, 882 (4th Cir. 2013); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 101 (2d Cir. 2012).

112. Suarez v. Holder, No. 1:14-CV-968, 2015 U.S. Dist. LEXIS 19378, at *4 (M.D. Pa. Feb. 18, 2015); Binderup v. Holder, No. 13-cv-06750, 2014 U.S. Dist. LEXIS 135110, at *86 (E.D. Pa. Sept. 25, 2014); Wesson v. Town of Salisbury, 13 F. Supp. 3d 171, 178 (D. Mass. 2014); Gowder v. City of Chicago, 923 F. Supp. 2d 1110, 1126 (N.D. Ill. 2012). *But see* Schrader v. Holder, 704 F.3d 980, 982 (D.C. Cir. 2013).

113. *See* Mance v. Holder, 74 F. Supp. 3d 795, 804 (N.D. Tex. 2015); Ill. Ass'n of Firearms Retailers v. City of Chicago, 961 F. Supp. 2d 928, 932–33 (N.D. Ill. 2014).

114. Herrington v. United States, 6 A.3d 1237, 1246–47 (D.C. 2010).

115. Ezell v. City of Chicago, 651 F.3d 684, 711 (7th Cir. 2011). Target practice obviously requires ammunition.

116. People v. Yanna, 824 N.W.2d 241, 246 (Mich. Ct. App. 2012). *But see* Commonwealth v. Caetano, 26 N.E.3d 688, 689 (Mass. 2015).

117. State v. Herrmann, 873 N.W.2d 257, 260 (Wis. Ct. App. 2015).

118. Taylor v. City of Baton Rouge, 39 F. Supp. 3d 807, 817 (M.D. La. 2014).

unconstitutional as applied.[119] Even laws on possession of firearms while intoxicated may be unconstitutional as applied.[120]

The New York Court of Appeals was able to avoid the constitutional argument in a 2013 case. New York requires a permit to merely possess a pistol in the home, but it restricts permits to residents of New York.[121] The Second Amendment was raised to challenge the residency requirement in *Osterweil v. Bartlett*, but the court held that part-time residents were eligible, thus avoiding the constitutional argument.[122] Other courts have employed a narrow interpretation of *Heller* and *McDonald*, applying intermediate scrutiny in all cases and showing deference to the legislative branch.

Friedman v. Highland Park was a challenge to an ordinance banning firearms labeled "assault weapons" and firearm magazines with a capacity to hold more than ten rounds of ammunition.[123] According to a report from an organization opposed to the civil right to keep and bear arms, the label "assault weapon" is based on the exploitation of confusion:

> The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons.[124]

Regardless of labels—assault rifle, automatic rifle, machine gun, submachine gun, machine pistol—modern military infantry firearms have

119. Silvester v. Harris, 41 F. Supp. 3d 927, 967–68 (E.D. Cal. 2014). A New Jersey woman was stabbed to death while waiting for a permit to purchase a gun. Jim Walsh, *Ex-Boyfriend Sought in Woman's Slaying*, COURIER-POST (Dec. 4, 2015, 9:56 AM), http://www.courierpostonline.com/story/news/crime/2015/06/04/woman-fatally-stabbed-berlin-twp/28461361.

120. People v. DeRoche, 829 N.W.2d 891, 897 (Mich. Ct. App. 2013) (per curiam).

121. *See* N.Y. PENAL LAW § 400.00(3)(a) (McKinney 2008).

122. Osterweil v. Bartlett, 999 N.E.2d 516, 520 (N.Y. 2013). The court also held that the "residence" language in section 400.00(3)(a) was originally designed to discourage individuals from "forum-shopping" when applying for handgun permits. *Id.* at 519.

123. Friedman v. City of Highland Park, Ill., 784 F.3d 406, 407 (7th Cir.), *cert. denied*, 136 S. Ct. 447 (2015).

124. *Assault Weapons and Accessories in America*, VIOLENCE POL'Y CTR., http://www.vpc.org/studies/awaconc.htm (last visited Jan. 13, 2016). Opponents of firearm ownership also exploit this. FRANK O'BRIEN ET AL., PREVENTING GUN VIOLENCE THROUGH EFFECTIVE MESSAGING 5 (2012) ("Powerful and emotionally-engaging images are vitally important reinforcers of strong messages. For example, intimidating images of military-style weapons help bring to life the point that we are dealing with a different situation than in earlier times."). This booklet provides "language dos and don'ts" and advises to focus on emotion. *Id.* at 6, 9.

one thing in common: fully automatic fire capability.[125] The Supreme Court has defined the meaning of automatic, fully automatic, and semi-automatic firearm.[126] The firearms under review in *Friedman* have only semi-automatic fire capability.[127]

The *Friedman* court upheld the Highland Park ordinance.[128] The court reasoned that the firearms in question were not common at the time of the ratification of the Second Amendment, and law-abiding citizens still retain adequate means of self-defense because most long guns, pistols, and revolvers are still available.[129] The *Friedman* court said that citizens and criminals can find substitutes for the banned firearms.[130] It is unknown if that strange confederacy of citizens and criminals mentioned in the opinion is serious or satire.[131] The court held that the benefits and burdens of the ordinance should be left to the political process, and that merely making the public feel safe is a benefit.[132] It is well settled that, unlike the nation against which we revolted, our constitution is supreme and not the enactments of a legislative body.[133] Unlike the United Kingdom, we cannot, for example, legislatively repeal the protection against double jeopardy and against ex post facto laws.[134] The United Kingdom repealed double jeopardy in 2003 for serious offenses and paid no attention to ex post facto laws when it provided, "This part applies whether acquittal was before or after the passing of this Act."[135]

125. *See generally* EDWARD C. EZELL, SMALL ARMS OF THE WORLD (12th ed. 1983); IAN HOGG, MILITARY SMALL ARMS OF THE 20TH CENTURY (7th ed. 2000).

126. Staples v. United States, 511 U.S. 600, 602 n.1 (1994).

127. *Friedman*, 784 F.3d at 415 (Manion, J., dissenting).

128. *Id.* at 412 (majority opinion).

129. *Id.* at 410–11.

130. *Id.* at 411. In a democracy the tradition is to distinguish between the ordinary citizen and the common criminal. In a democracy we do not assign collective guilt and mete out collective punishment. Communists explained their willingness to punish the innocent: "It is better to liquidate hundreds of innocent people than to let one guilty person remain in the party." JAMES A. MICHENER, THE BRIDGE AT ANDAU 119 (Fawcett Crest Books 1957).

131. *See generally Friedman*, 784 F.3d 406.

132. *Id.* at 412.

133. U.S. CONST. art. VI, cl. 2; Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 16,857); Simpson v. State, 13 Tenn. (5 Yer.) 356, 359–60 (1833) (stating right to bear arms trumps common law).

134. *See Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 309, 28 F. Cas. 1012; *see also* Madan Singh Choudhary, Note, *Protection Against Ex-Post-Facto Laws*, LEGAL SERV. INDIA, http://www.legalserviceindia.com/article/l60-Protection-against-ex-post-facto-laws.html (last visited Mar. 15, 2016).

135. Criminal Justice Act 2003, pt. 10, § 75 (Eng.). In the United States, the Fifth Amendment protects an individual against double jeopardy. U.S. CONST. amend. V. Unlike the United Kingdom, the United States Constitution explicitly prohibits both federal and state legislatures from passing any ex post facto law. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art.I, § 10, cl. 1.

The *Friedman* court used the term "well regulated militia" to excuse a legislative enactment triumphing over an affirmative constitutional right that "shall not be infringed."[136] The court failed to understand that at the time of the ratification of the Second Amendment the term "well regulated militia" meant a trained militia.[137]

The *Friedman* dissenting opinion reminded that in a state case the public understanding of the right to bear arms must refer to the time of the ratification of the Fourteenth Amendment, that the firearms in question are commonly used by law-abiding people throughout the country, and that strict scrutiny must apply because the ordinance is a ban on keeping arms in the home by law-abiding people.[138]

Heller instructs that arms are not restricted to those of the 18th century; to make such an argument "border[s] on the frivolous."[139] *Heller* teaches that certain policy choices are off the table and that courts may not "pronounce the Second Amendment extinct."[140] Neither *Heller* nor *McDonald* showed deference to legislative bodies.[141] *Obergefell* teaches again that it is the Constitution that is supreme, not the political process.[142] *Obergefell* struck down more than thirty state constitutions that restricted civil marriage to a man and a woman.[143]

The *New York State Rifle & Pistol Association v. Cuomo*[144] court also employed a narrow interpretation of *Heller* and *McDonald*. The case is another decision involving semi-automatic "assault weapons" and firearm magazines that hold more than ten rounds of ammunition.[145] The court assumed the firearms and magazines in question are commonly used and possessed by law-abiding citizens for lawful purposes.[146] The court used the commonly accepted two-step approach to a law challenged under the

136. *See Friedman*, 784 F.3d at 413–14 (Manion, J., dissenting).

137. "In its obsolete form pertaining to troops, *regulated* is defined as 'properly disciplined.' Moreover, *discipline* in relation to arms is defined as 'training in the practice of arms.'" Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 198–99 n.92 (citing 7 THE OXFORD ENGLISH DICTIONARY 380 (1933); 3 THE OXFORD ENGLISH DICTIONARY 416 (1933)). "Therefore, a well-regulated militia means one that has had some training or at least is composed of people who have had some training. This is to prevent the militia from becoming a disorderly mob, dangerous not to the enemy but to its own state and country." *Id.*

138. *Friedman*, 784 F.3d at 412, 415, 418 (Manion, J., dissenting).

139. District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 582 (2008).

140. *Id.* at 636.

141. *Friedman*, 784 F.3d at 413–14 (Manion, J., dissenting).

142. Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

143. *Id.* at 2631–32 (Thomas, J., dissenting).

144. N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242 (2d Cir. 2015).

145. *See* N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 253–54 (2d Cir. 2015).

146. *Id.* at 254–55 (citing District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 627 (2008)).

Second Amendment.[147] It first decided that the prohibited conduct fell under the Second Amendment.[148] Since the Second Amendment was implicated, the court had to settle on a level of scrutiny.[149] It applied intermediate scrutiny and upheld the statute because the statute was substantially related to public safety and crime reduction.[150] The court noted that alternative firearms were available and that the ban applied only to a limited subset of semi-automatic firearms and thus did not ban an entire class of arms.[151] However, the ban on loading more than seven rounds of ammunition into a firearm magazine capable of holding ten rounds and the ban on a non-semi-automatic rifle (i.e., pump-action) did not survive intermediate scrutiny based on the record presented.[152] Another court held that, if a class of arms is protected, banning a subset of such arms is unconstitutional, and the availability of alternative arms will not save the statute.[153]

Another narrow interpretation came from *Heller II*.[154] The case involved a Second Amendment challenge to statutes that included a ban on certain semi-automatic firearms and a ban on ammunition magazines having a capacity of more than ten rounds of ammunition.[155]

In *Heller II*, the court concluded that semi-automatic rifles and magazines having a capacity of more than ten rounds are in "common use."[156] However, it did not decide whether the prohibition of certain semi-automatic rifles and magazines "meaningfully affect the right to keep and bear arms."[157] The majority stated, "We need not resolve that question, however, because even assuming they do impinge upon the right protected by the Second Amendment, we think intermediate scrutiny is the appropriate standard of review and the prohibitions survive that standard."[158] Thus, the court upheld a total ban on the possession of commonly possessed firearms and magazines by law-abiding persons in their homes.[159] It even questioned whether semi-automatic pistols are protected by the Supreme Court's *Heller I* decision.[160]

147. *Id.* at 252–53.
148. *Id.* at 257.
149. *Id.*
150. *Id.* at 260–61.
151. *Id.* at 260.
152. *Id.* at 269.
153. State v. Herrmann, 873 N.W.2d 257, 263 (Wis. Ct. App. 2015).
154. Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1267 (D.C. Cir. 2011).
155. *Id.* at 1249.
156. *Id.* at 1261.
157. *Id.*
158. *Id.*
159. *Id.* at 1247–48.
160. *See id.* at 1267.

The majority in *Heller II* confused point-of-sale record keeping requirements with the requirement that a pistol, in order to be lawfully possessed, must be registered to the possessor of the pistol with some governmental agency.[161] New York serves as an example for the latter. In New York, the pistol license contains a description of the license holder and a description of the pistol, such as "calibre, make, model, manufacturer's name and serial number."[162] There is no evidence that pistol registration is longstanding. It is an outlier law that cannot serve as a justification for rejecting a constitutional challenge.[163]

The dissenting opinion in *Heller II* noted that the Supreme Court rejected Justice Breyer's form of intermediate scrutiny, but that the majority employed it to uphold the challenged law.[164] The dissent stated, "*Heller* was resolved in favor of categoricalism—with the categories defined by text, history, and tradition—and against balancing tests such as strict or intermediate scrutiny or reasonableness."[165] The dissent also noted,

> No court of appeals decision since Heller has applied intermediate scrutiny to a ban on a class of arms that have not traditionally been banned and are in common use. A ban on a class of arms is not an "incidental" regulation. It is equivalent to a ban on a category of speech. Such restrictions on core enumerated constitutional protections are not subjected to mere intermediate scrutiny review. The majority opinion here is in uncharted territory in suggesting that intermediate scrutiny can apply to an outright ban on possession of a class of weapons that have not traditionally been banned.[166]

Since Judge Kavanaugh's dissent in *Heller II*, a number of courts have held that so-called assault weapons and magazines having a capacity in excess of ten rounds of ammunition can be banned.[167]

Heller v. District of Columbia (*Heller III*, D.C. Cir., 2015) was the third Second Amendment challenge to a local law by Mr. Heller. The *Heller III* court employed a narrow interpretation of *Heller I*, with mixed results.[168] The court applied the now familiar two-step analysis.[169] After

161. *See id.* at 1253–54.

162. N.Y. PENAL LAW § 400.00(7) (McKinney 2008).

163. *Heller II*, 670 F.3d at 1270–71 (Kavanaugh, J., dissenting).

164. *Id.* at 1275–77.

165. *Id.* at 1282.

166. *Id.* at 1285 (first emphasis added).

167. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 269 (2d Cir. 2015); Friedman v. City of Highland Park, Ill., 784 F.3d 406, 407, 412 (7th Cir.), *cert. denied*, 136 S. Ct. 447 (2015); People v. Zondorak, 163 Cal. Rptr. 3d 491, 498 (Ct. App. 2013).

168. Heller v. District of Columbia (*Heller III*), 801 F.3d 264, 274 (D.C. Cir. 2015) (upholding *Heller I* but ruling some of the requirements unconstitutional based on the intermediate scrutiny test, which *Heller I* did not apply).

169. *Id.* at 272.

finding that the challenged laws implicated the Second Amendment, it then applied intermediate scrutiny to determine which laws were infringements and which laws were not.[170]

The *Heller III* court upheld the basic registration requirement as applied to long guns, the requirement that a registrant be fingerprinted and photographed and make a personal appearance to register a firearm, the requirement that an individual pay certain fees associated with the registration of a firearm, and the requirement that registrants complete a firearms safety and training course.[171] However, the court voided the requirement that a person bring with him or her the firearm to be registered, the requirement that a gun owner re-register his firearm every three years, the requirement that conditions registration of a firearm upon passing a test of knowledge of the District's firearms laws, and the prohibition on registration of more than one pistol per registrant during any 30-day period.[172]

The Supreme Court in *Heller I* held that a purpose of the Second Amendment includes the ability to better resist tyranny and to prevent disarming of the people.[173] Intermediate scrutiny, applied to people who do not fall into a class that can presumptively be disarmed, such as the mentally ill, provides for incremental disarmament because the government has the low burden of merely demonstrating that the statute is substantially related to public safety and crime reduction.[174] Furthermore, registration of firearms greatly facilitates civilian disarmament.[175]

170. *Id.* at 274.

171. *Id.* at 274–75, 278–79.

172. *Id.* at 277–80.

173. District of Columbia v. Heller (*Heller I*), 554 U.S. 570, 598–99 (2008).

174. *See Heller III*, 801 F.3d at 274, 286–87.

175. Totalitarian states are obsessed with disarming designated public enemies. *See generally* STEPHEN P. HALBROOK, GUN CONTROL IN THE THIRD REICH: DISARMING THE JEWS AND "ENEMIES OF THE STATE" (2013) (discussing how strict gun-control laws during the time of the Third Reich rendered Jews and political opponents practically defenseless). Disarmament by oppressors is well known. Bostonians surrendered 1,778 muskets, 634 pistols, and 38 blunderbusses to General Gage's forces. FROTHINGHAM, *supra* note 34, at 95. "Anybody posting a placard the Germans didn't like would be liable to immediate execution, and a similar penalty was provided for those who failed to turn in firearms or radio sets within twenty-four hours." WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 782 (1960). The Nazis seized Albert Einstein's bank account for a weapons violation: the possession of a common knife in his home. 1 JOHN TOLAND, ADOLF HITLER 310 (1976). "The repression continued with issuance of a series of harsh edicts[,] . . . such as the one to surrender all arms immediately or be shot." *Id.* at 81. Hitler, however, during the early stages of his climb to power, got a pistol permit from the sympathetic police. *Id.* at 114. "Owning a pistol meant an obligatory conviction for terrorism." 1 ALEKSANDR I. SOLZHENITSYN, THE GULAG ARCHIPELAGO 195 (Thomas P. Whitney trans., 1974). The right to have firearms or other weapons is forbidden and self-defense is also curtailed. *Id.* at 431–32.

An example of a court that takes a narrow interpretation of *Heller* by confining the Second Amendment to the home is the Maryland Court of Appeals. Maryland forbids the carrying of a pistol without a license, whether openly or concealed, and the issuing of a license is strictly discretionary.[176] The court refused to extend *Heller* beyond the home.[177] It held, "If the Supreme Court, in this dicta, meant its holding to extend beyond home possession, it will need to say so more plainly."[178] The court ignored decisions that say that inferior courts are bound by Supreme Court dicta.[179]

Some courts have recognized an existing animus against the Second Amendment:

> The fact that courts may be reluctant to recognize the protection of the Second Amendment outside the home says more about the courts than the Second Amendment. Limiting this fundamental right to the home would be akin to limiting the protection of First Amendment freedom of speech to political speech or college campuses.[180]

Gun owners have been subjected to vicious stereotypes.[181] They are no different from other groups who petition the courts for the protection of their rights. It took two recent Supreme Court opinions to provide them with some protection.

Inferior courts should interpret the Second Amendment in a way that is supported by *Heller I* and *McDonald*, by history, and by modern technology. The Supreme Court excluded from Second Amendment

176. *See* Woollard v. Gallagher, 712 F.3d 865, 869 (4th Cir. 2013).

177. *See Heller I*, 554 U.S. at 635; Williams v. State, 10 A.3d 1167, 1177 (Md. 2011).

178. *Williams*, 10 A.3d at 1177.

179. Peterson v. Martinez, 707 F.3d 1197, 1210 (10th Cir. 2013).

180. United States v. Weaver, No. 2:09-cr-00222, 2012 U.S. Dist. LEXIS 29613, at *14 n.7 (S.D. W. Va. Mar. 7, 2012).

181. Subjecting law-abiding gun owners to vicious stereotypes is nothing new, and commentators have condemned it. *See* Anthony J. Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57, 63–64 (1995); Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 72–73 & n.227 (1992); Douglas Laycock, *Vicious Stereotypes in Polite Society*, 8 CONST. COMMENT. 395, 397–98 (1991); L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1376–77 (1997); *see also* David Babat, Senior Honors Project, *The Discriminatory History of Gun Control*, UNIV. R.I. (2009), http://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1142&context=srhonorsprog. Former N.Y. City Mayor Michael Bloomberg claimed that "95 percent of murders fall into a specific category: a male minority between the ages of 15 and 25." Jessica Chasmar, *Michael Bloomberg Suggests Disarming Minorities to 'Keep Them Alive'*, WASH. TIMES (Feb. 8, 2015), http://www.washingtontimes.com/news/2015/feb/8/sughed-michael-bloomberg-suggests-disarming-minori. He said, "Cities need to get guns out of this group's hands and keep them alive . . . ." *Id.*

protection machine guns, shotguns with a barrel length under eighteen inches, and dangerous and unusual weapons.[182] Furthermore, it held that arms technology is not limited to that of the 18th century.[183] Therefore, there should be a strong presumption that all arms that are not specifically excluded from the protection of the Second Amendment are constitutionally protected. Thus, an arm could not be banned by simply applying to it an emotionally-laden and misleading label such as "assault weapon."[184]

Strict scrutiny should be applied to any law that implicates the Second Amendment and involves its core right, that is, possession of arms in the home by law-abiding people. This would prevent the common practice of simply applying intermediate scrutiny to any law that implicates the Second Amendment.

Obergefell requires every state to recognize a same-sex civil marriage lawfully licensed and performed in another state.[185] Since the Second Amendment is an enumerated and affirmative right that applies to the entire nation, this principle of law from *Obergefell* should apply to firearm licenses or permits from a sister state. This would avoid severe injustices. Two examples will be given. In one, a young woman with a Pennsylvania pistol carrying license was arrested in New Jersey following a minor traffic infraction.[186] New Jersey does not recognize an out-of-state license.[187] She was facing a felony charge and a mandatory term of imprisonment, but the governor of New Jersey pardoned her after a nationwide outcry.[188] In the other case, a Marine veteran, a double amputee in a wheel chair, came for treatment at Walter Reed Army Medical Center in Washington, D.C.[189] He had an Ohio license to carry a pistol.[190] His pistol was discovered after his car had a flat tire and was taken to a repair shop.[191] The District of

182. *Heller I*, 554 U.S. at 627, 637, 720.

183. *Id.* at 582.

184. *See id.* at 713.

185. Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

186. Claude Brodesser-Akner, *Gov. Christie Grants Pardon to Pistol-Packing Pa. Mother Shaneen Allen*, NJ.COM (Apr. 2, 2015, 2:53 PM), http://www.nj.com/politics/index.ssf/2015/04/gov_christie_grants_pardon_to_pistol-packing_pa_mo.html.

187. *See id.*

188. *Id.*; *see also* Claude Brodesser-Akner, *Christie Pardons Three of N.J. Gun Charges*, NJ.COM (Oct. 1, 2015, 8:17 AM), http://www.nj.com/politics/index.ssf/2015/10/christie_pardons_three_of_nj_gun_charges.html.

189. Keith L. Alexander, *Marine Amputee Acquitted on Gun Possession Charges*, WASH. POST (Jan. 14, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011302840.html.

190. *Id.*

191. *Id.*

Columbia does not recognize an out-of-state license.[192] He was charged with having an unregistered pistol, possessing ammunition for an unregistered pistol, and carrying a pistol without a license.[193] The last charge is a five-year felony.[194] A jury acquitted him on the felony charge.[195]

It remains to be seen whether the Second Amendment will be treated in the future as an ordinary constitutional right or as the greatly weakened private property taking clause of the Fifth Amendment[196] or the occasionally enforced Tenth Amendment.[197]

VI. CONCLUSION

Constitutional guarantees to protect personal liberty are to be liberally construed.[198] The decision in *Heller* was based on the text of an enumerated and affirmative right, and that text is supported by long history and tradition. *Obergefell*, on the other hand, was decided based on substantive due process and on recent cultural changes. The Second Amendment is an affirmative right that is deeply rooted in this nation's history and tradition. *Heller* and *McDonald* teach that the Court will not pronounce an enumerated freedom extinct. In our system of government, the constitution reigns and not the predilection of judges or of members of the legislative and executive branches.

192. *Id.*
193. *Id.*
194. *See id.*
195. *Id.*
196. *See generally* Kelo v. City of New London, 545 U.S. 469 (2005).
197. *See, e.g.*, Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2623–24 (2013); Bond v. United States, 131 S. Ct. 2355 (2011); Printz v. United States, 521 U.S. 898, 918–19 (1997).
198. Boyd v. United States, 116 U.S. 616, 635 (1886) ("[C]onstitutional provisions for the security of person and property should be liberally construed.").

> Constitutional rights thus implicitly protect those closely related acts necessary to their exercise. "There comes a point . . . at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself." The right to keep and bear arms, for example, "implies a corresponding right to obtain the bullets necessary to use them," and "to acquire and maintain proficiency in their use." Without protection for these closely related rights, the Second Amendment would be toothless. Likewise, the First Amendment "right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise."

Luis v. United States, No. 14-149, 2016 WL 1228690, at *15 (Mar. 30, 2016) (Thomas, J., concurring) (citations omitted).

The Court cannot throw out *Heller* without throwing out *Obergefell*. If *Obergefell* stays at the party, so does *Heller*. It is a marriage pronounced by the Supreme Court.

APPENDIX

STATE CONSTITUTIONAL GUARANTEES TO ARMS

Alabama: (a) Every citizen has a fundamental right to bear arms in defense of himself or herself and the state. Any restriction on this right shall be subject to strict scrutiny. (b) No citizen shall be compelled by any international treaty or international law to take an action that prohibits, limits, or otherwise interferes with his or her fundamental right to keep and bear arms in defense of himself or herself and the state, if such treaty or law, or its adoption, violates the United States Constitution. ALA. CONST. art. I, § 26 (West, Westlaw through Dec. 1, 2014 amendments).

Alaska: 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 individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State. ALASKA CONST. art. I, § 19.

Arizona: The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. ARIZ. CONST. art. II, § 26.

Arkansas: The citizens of this State shall have the right to keep and bear arms, for their common defense. ARK. CONST. art. II, § 5.

California: No provision.

Colorado: 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 thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons. COLO. CONST. art. II, § 13.

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. CONN. CONST. art. I, § 15.

Delaware: A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use. DEL. CONST. art. I, § 20.

Florida: (a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.
(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, "purchase" means the transfer of money or other valuable consideration to the retailer, and "handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.
(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.
(d) This restriction shall not apply to a trade in of another handgun. FLA. CONST. art. I, § 8.

Georgia: 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. GA. CONST. art. I, § 1, ¶ VIII.

Hawaii: 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. HAW. CONST. art. I, § 17.

Idaho: The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor

prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony. IDAHO CONST. art. I, § 11.

Illinois: Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed. ILL. CONST. art. I, § 22.

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State. IND. CONST. art. I, § 32.

Iowa: No provision.

Kansas: 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. KAN. CONST. b. rts., § 4.

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

First: The right of enjoying and defending their lives and liberties. . . .

Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons. KY. CONST. b. rts., § 1.

Louisiana: The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny. LA. CONST. art. I, § 11.

Maine: Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned. ME. CONST. art. I, § 16.

Maryland: No provision.

Massachusetts: The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it. MASS. CONST. pt. I, art. XVII.

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state. MICH. CONST. art. I, § 6.

Minnesota: No provision.

Mississippi: The right of every 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 not be called in question, but the legislature may regulate or forbid carrying concealed weapons. MISS. CONST. art. III, § 12.

Missouri: That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the right of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity. MO. CONST. art. I, § 23.

Montana: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons. MONT. CONST. art. II, § 12.

Nebraska: All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed. NEB. CONST. art. I, § 1.

Nevada: Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes. NEV. CONST. art. I, § 11(1).

New Hampshire: All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state. N.H. CONST. pt. 1, art. 2-a.

New Jersey: No provision.

New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms. N.M. CONST. art. II, § 6.

New York: No provision.

North Carolina: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall

justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice. N.C. CONST. art. I, § 30.

North Dakota: All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed. N.D. CONST. art. I, § 1.

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

Oklahoma: 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. OKLA. CONST. art. II, § 26.

Oregon: The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power[.] OR. CONST. art. I, § 27.

Pennsylvania: The right of the citizens to bear arms in defence of themselves and the State shall not be questioned. PA. CONST. art. I, § 21.

Rhode Island: The right of the people to keep and bear arms shall not be infringed. R.I. CONST. art. I, § 22.

South Carolina: 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. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. S.C. CONST. art. I, § 20.

South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. S.D. CONST. art. VI, § 24.

Tennessee: That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime. TENN. CONST. art. I, § 26.

Texas: Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime. TEX. CONST. art. I, § 23.

Utah: The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms. UTAH CONST. art. I, § 6.

Vermont: That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power. VT. CONST. ch. I, art. 16.

Virginia: That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power. VA. CONST. art. I, § 13.

Washington: The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men. WASH. CONST. art. I, § 24.

West Virginia: 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. W. VA. CONST. art. III, § 22.

Wisconsin: The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose. WIS. CONST. art. I, § 25.

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. WYO. CONST. art. I, § 24.