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State Constitutional Law as a Basis for Federal Constitutional Interpretation: the Lessons of the Second Amendment

D. Bruce Black

Kara L. Kapp

STATE CONSTITUTIONAL LAW AS A BASIS FOR FEDERAL CONSTITUTIONAL INTERPRETATION: THE LESSONS OF THE SECOND AMENDMENT

The Honorable Bruce D. Black* & Kara L. Kapp**

ABSTRACT

This Article advocates that courts should rely more heavily on an underappreciated method of constitutional interpretation: reference to parallel state constitutional text and jurisprudence. This article is novel insofar as it develops a normative argument for why courts should consult state constitutions in interpreting the meaning of the federal constitution. To illustrate the value of this method for jurists who ascribe to various judicial philosophies, the authors apply this method to the U.S. Supreme Court's newly developed Second Amendment jurisprudence. While District of Columbia v. Heller provides some guidance in interpreting the Second Amendment under the Court's new framework, many questions remain unanswered in its wake. For instance, the Court has not yet answered what level of scrutiny should apply to Second Amendment regulations. Additional questions include exactly what kinds of "arms" will fall within the protection of the Amendment, in what kinds of places the right be given greater sanctity, and how protected arms may and may not be carried or stored. The authors argue, and illustrate with examples, how the states have widely already addressed these issues under their state constitutions, with striking uniformity in their conclusions.

This Article is empirically valuable because it is a repository for data on a number of issues related to the Second Amendment. It catalogues the exact number of states, with citations, that have adopted the reasonable regulation standard and the number of states that have upheld concealed carry bans. It also collects data on a number of other, related, characteristics of these states, such as cataloguing the states that consider the right to bear arms fundamental and cataloguing the number of states that have found

* U.S. District Court Judge for the District of New Mexico, 1996–2012, Senior status since 2012; New Mexico Court of Appeals Judge, 1991-96; J.D., University of Michigan, 1971; B.A., Albion College, 1969.

** Associate at Cozen O'Connor, J.D., Stanford Law School, 2010. I am especially indebted to Judge Black for his wisdom, partnership and mentorship over the years in working on this article. Also, deepest thanks to Jenny Martinez, Erwin Chemerinsky and Peter Westen for their patient mentorship over the years, and their invaluable comments on this article. Finally, a special thanks to the staff of the New Mexico Law Review for their excellent edits and support.

"self defense" to be one of the animating concerns under their right to bear arms. Additionally, this Article provides data for originalists on the number of states with constitutions at different points in time relevant to the historical analysis, not just at the time of the founding, and among those states, the number of states with right to bear arms provisions. Finally, it catalogues the number of states from that period with language similar to that used in the federal Second Amendment.

INTRODUCTION

This Article addresses, and answers affirmatively, one central question: can federal courts gain insights from the comparative use of state constitutions in interpreting the Federal Constitution? A great debate rages on in the legal community regarding how American courts and the people *should* interpret the U.S. Constitution, a debate which turns in large part on which methods of interpretation are valid, and which are not. Some, called originalists, prefer to rely on methods that illuminate the original, historical meaning of the Constitution. In contrast, others, whom the authors refer to as modernists, urge reliance on modes of interpretation that reflect modern American values. Others still follow a mix of these two views, or different views entirely. But scholars and jurists from all camps have at least one thing in common: they all are constantly searching for methods of interpretation that will provide objective answers that reflect American values, either past or present. The authors here argue that consulting state constitutional text and jurisprudence should satisfy jurists and scholars from both sides of the aisle.

Courts and scholars have focused little attention on the normative question of whether courts *should* adopt this form of comparative constitutional interpretation. In some contexts, for example Eighth Amendment jurisprudence, federal courts have looked first to the actions of U.S. states before turning abroad.[1] However, in many other contexts, the Supreme Court and lower courts have barely looked at state constitutions and how they have been interpreted in analyzing the Federal Constitution. The lack of reference to state constitutions is puzzling, especially in light of the Supreme Court's repeated references to foreign law when interpreting the Federal Constitution.[2] Turning next to academia, only recently have scholars begun looking to state constitutional provisions in analyzing the meaning of the

1. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 565, 576–78 (2005) (considering evidence of a national consensus through the actions of states before looking to the trend in the international community); Atkins v. Virginia, 536 U.S. 304, 314–17 (2002) (same). Note, however, that even here the Court looks primarily to state legislation rather than state constitutional decisions. But the Supreme Court historically, though not often in recent jurisprudence, has considered state constitutions in some other constitutional contexts as well, for example, the First Amendment context. *See, e.g.*, Roth v. United States, 354 U.S. 476, 482 & n.10 (1957).

2. See Joan L. Larsen, Importing Constitutional Norms from a Wider Civilization: Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 OHIO ST. L.J. 1283, 1288–97 (2004) (reviewing the court's varied uses of foreign law in interpreting the Federal Constitution).

Federal Constitution.[3] Indeed, this analytical approach also has been validated by the Supreme Court in *District of Columbia v. Heller*, where both the majority and Justice Stevens in dissent referred repeatedly to state constitutions in their analysis of the Second Amendment.[4] However, there is a dearth of normative analysis as to *whether* and *why* courts *should* or *should not* turn to state constitutions in analyzing the meaning and scope of the Federal Constitution.[5]

To illustrate the potential insights that reference to state constitutions may provide, the authors focus on the Second Amendment to the U.S. Constitution. We conclude that state provisions respecting the right to bear arms and corresponding jurisprudence can benefit interpretation of the Second Amendment in myriad ways. It can provide information that (a) facilitates moral assessments of which values the U.S. Constitution aims to reflect, (b) assists courts with empirical assessments because courts may look to the real world implications of state interpretations, (c) provides a library of rationales employed by state courts,[6] and (d) provides historical insight into the original meaning of language and concepts enshrined in the U.S. Constitution.

Turning to the Second Amendment, from a moral assessment standpoint, state court decisions suggest that nearly every jurisdiction to have considered the issues agree that: (a) legislation limiting the right to bear arms merits a specific level

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3. See, e.g., Thomas Y. Davies, Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law", 77 MISS. L.J. 1, 22–23, 87–137 (2007) (analyzing state search and seizure provisions from the founding era in analyzing the Framers' expectations with respect to the scope of the Federal Fourth Amendment); David B. Kopel, What State Constitutions Teach About the Second Amendment, 29 N. KY. L. REV. 827, 827–28 (2002) (analyzing substantively what lessons these state provisions may offer for courts interpreting the Federal Second Amendment); Stephen R. McAllister, Individual Rights Under a System of Dual Sovereignty: The Right to Keep and Bear Arms, 59 U. KAN. L. REV. 867 (2011) (describing the relationship between state and federal constitutional provisions and making predictions about how state constitutions may be used by courts in analyzing the Federal Second Amendment); Eugene Volokh, The Commonplace Second Amendment, 73 N.Y.U. L. REV. 793 (1998) (discussing how the content of state provisions on the right to bear arms should inform our understanding of the Federal Second Amendment).

4. 554 U.S. 570, 585, 601–603, 629 (2008) (majority opinion); *id.* at 641 n.5, 642–43 (Stevens, J., dissenting).

5. *See, e.g.*, Kopel, *supra* note 3, at 828 (assuming that state constitutional provisions on the right to bear arms are relevant to analyzing the Federal Second Amendment with only a very cursory explanation, and then analyzing substantively what lessons these state provisions may offer for courts interpreting the Federal Second Amendment); McAllister, *supra* note 3, at 867 (describing the relationship between state and federal constitutional provisions without any normative analysis of what kind of relationship they *should* have); Volokh, *supra* note 3, at 793–96 (assuming that state constitutions are relevant in analyzing the Federal Second Amendment without explanation and discussing how the content of state provisions on the right to bear arms should inform our understanding of the Federal Second Amendment); Eric R. Nitz, Note, *Comparing Apples to Apples: A Federalism-Based Theory for the Use of Founding-Era State Constitutions to Interpret the Constitution*, 100 GEO. L.J. 295, 296–99 (2011) (analyzing *when* early state constitutional provisions may be relevant in analyzing the Federal Constitution, but not *whether* or *why* they *should* be considered relevant, and not considering *whether*, *why*, or *when* modern state constitutional provisions should be considered in analyzing the Federal Constitution); *see also* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 487–90 (2004) (describing early state laws on gun rights (not constitutions) with only a normative explanation of why courts and commentators should look to early laws, but not to state law or state constitutions generally).

6. *See* Larsen, *supra* note 2, at 1289–90, 1295.

of scrutiny, the reasonable regulation standard, and (b) state legislatures can legitimately ban the concealed carry of even constitutionally protected weapons. Additionally, with respect to reason borrowing, state court decisions convincingly explain why jurisdictions have so uniformly come to these conclusions. Finally, with respect to historical insights, the text from early right-to-bear-arms provisions, as well as historical jurisprudence interpreting these state provisions, show that these conclusions are anchored in our nation's history.

In Part I, we review the potential insights generally available from comparative constitutional analysis to provide a context for the specific insights we identify in studying right-to-bear-arms jurisprudence. In Part II, we consider the state of development of the Court's Second Amendment jurisprudence and some important issues that remain open. Finally, in Part III, we attempt to illustrate with state interpretations of the right to bear arms how such state constitutional constructions could benefit federal courts in shaping and applying the Second Amendment.

I. THE CASE FOR COMPARATIVE CONSTITUTIONAL ANALYSIS

If we look to the debate over consulting foreign law to interpret the U.S. Constitution, it identifies some of the main strengths and weaknesses of comparative constitutional interpretation generally.[7] First we address four key strengths that comparative analysis can provide: (a) moral assessments of which values the U.S. Constitution aims to reflect, (b) empirical assessments of the real-world impact of differing legal interpretations, (c) reason borrowing,[8] and (d) historical insight into the original meaning of various constitutional provisions.

Turning first to the "moral fact-finding" value of comparative analysis, looking to the sheer number of states that interpret the law in a certain way can reveal patterns about the values that different jurisdictions have found reflected in particular constitutional provisions.[9] As Joan Larsen identifies, the Court has previously engaged in this use of comparative analysis to assess how other jurisdictions decide a particular legal issue.[10]

Turning next to the empirical value of comparative analysis, studying how other jurisdictions have interpreted constitutional provisions similar to our own

7. Various articles have contributed to this debate. *See, e.g.*, Stephen Breyer, *Keynote Address,* 97 AM. SOC'Y INT'L L. PROC. 265, 266 (2003) (noting that the Court has considered foreign law in Eighth Amendment, federalism, and right to die cases, amongst others); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience,* 51 DUKE L.J. 223, 254–71 (2001); Larsen, *supra* note 2, at 1286; Sandra Day O'Connor, *Keynote Address,* 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002); Austin L. Parrish, *Storm in a Teacup*: *The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637 (2007); *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L. J. CONST. L. 519 (2005) [hereinafter *Foreign Materials Debate*]; Ruth Bader Ginsburg, Remarks for the American Constitution Society, Looking Beyond our Borders: The Value of a Comparative Perspective in Constitutional Adjudication (Aug. 2, 2003) (transcript available in University of Cambridge Video & Audio Collections), http://sms.cam.ac.uk/media/1209836.

8. *See, e.g.*, Larsen, *supra* note 2.

9. *See id.* at 1295–96.

10. *Id.* at 1293.

provides our judges a valuable legal laboratory.[11] It exposes judges to the scope of potential solutions and the consequences of each alternative.[12] As Larsen explains, "[m]uch of constitutional law depends upon predictions about the likely effect of a rule."[13] Certainly level-of-scrutiny analysis, which asks whether a law is "rationally related," "important," or "necessary" to forwarding a particular governmental interest, turns on empirical assessments or, in the absence of empirical data, assumptions. The ability to look to distinct jurisdictions that already have such laws to determine what impact, if any, they have had on the identified governmental interest, should greatly assist our judges in making these difficult assessments.[14]

Third, comparative analysis can also assist with "reason borrowing." This concept simply describes a practice already very familiar within American jurisprudence: where one court, in addressing a novel issue, looks to the reasons given by the court of another jurisdiction in addressing that same issue, and adopts those reasons in its analysis.[15] Given the relative dearth of federal case law under the Second Amendment compared with the great abundance of such case law under state right-to-bear-arms provisions,[16] the reason-borrowing value of employing this method in the Second Amendment context is at its apex.[17]

Finally, comparative analysis of state analogues to federal constitutional provisions, especially those enacted during the relevant historical time periods, provides information about the meaning of the particular words chosen for a specific constitutional provision and the historically understood meaning of those terms. For the textualist, comparing the U.S. Constitution's provisions to state constitution counterparts, especially those enacted contemporaneously with the Federal Constitution, can inform the significance of word choice and structure. The Federal Constitution was adopted in 1787.[18] At one point, constitutions drafted before 1800 governed at least sixteen states: Connecticut, Delaware, Georgia, Kentucky, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina,

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11. *See* Larsen, *supra* note 2, at 1299–1300; Myron T. Steele & Peter I. Tsoflias, *Realigning the Constitutional Pendulum,* 77 ALB. L. REV. 1365, 1369–73 (2014); *Foreign Material Debate*, *supra* note 7, at 522–23.

12. *See* Breyer, *supra* note 7, at 266; *Foreign Materials Debate*, *supra* note 7, at 522–23; Larsen, *supra* note 2, at 1299–1300; *see also, e.g.*, Printz v. United States, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting) (referring to the experiences of foreign jurisdictions to illustrate how requiring state officials to administer federal law would not undermine federalist goals).

13. Larsen, *supra* note 2, at 1299.

14. *See, e.g.*, *id.* at 1289–91 (discussing the Court's use of comparative empirical assessments in *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

15. *See id.* at 1291–92.

16. Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 597, 599 (2006) (referring to the Second Amendment jurisprudence as a "constitutional ghost town" and state jurisprudence regarding the right to bear arms as a "bustling metropolis" (quoting CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 124 (2001))).

17. The difficulty that the federal courts have had in settling upon an analytical framework is exemplified by comparing the majority, concurring, and dissenting opinions in *Friedman v. City of Highland Park*, 784 F.3d 406, 410, 418 (7th Cir. 2015), *United States v. Chovan*, 735 F.3d 1127, 1138, 1142–43 (9th Cir. 2013), and *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 335–36, 346 (5th Cir. 2013).

18. *Primary Documents in American History: United States Constitution*, LIBRARY OF CONGRESS, http://www.loc.gov/rr/program/bib/ourdocs/Constitution.html (last visited March 6, 2016).

Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Virginia.[19] Further, the Fourteenth Amendment, through which our Bill of Rights has been incorporated, was enacted in 1868.[20] Thirty-seven states had constitutions by that point in time, creating a powerful, comprehensive database from which jurists can draw.[21] And by the end of the nineteenth century, forty-five states had constitutions, which may serve as informative reference points for how society viewed various liberty and property interests.[22] Thus, analyzing the language used in historical state analogues to federal constitutional provisions can assist jurists in discerning the original meaning of our Constitution's text.[23] To the extent that long-standing precedent interpreting a provision in a particular way also exists, this should also inform the accepted historical understanding of the term.[24]

Next we must ask whether the jurisdictions chosen for comparison are materially similar to the U.S. federal legal system such that the comparisons are apt. Critics of comparative constitutional analysis have emphasized the risk, when looking to foreign jurisdictions, of incomplete or inaccurate analysis.[25] They reason that fully understanding a court's decision requires knowledge of the jurisdiction's legal structure, culture, and history.[26] This argument is based on the view that as a democracy, only the views of the American people can inform the intended meaning of America's Constitution.[27]

However valid that concern may be when looking to foreign law, it has little force with respect to comparative analysis of the constitutional decisions of the Union's own states. First, at least with respect to the states that emerged around the

19. Connecticut, Delaware, Georgia, Kentucky, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Virginia. *See infra* Appendix, Table 1.

20. U.S. CONST. amend. XIV.

21. *See infra* Appendix, Table 2.

22. *See infra* Appendix, Table 2; *see also* District of Columbia v. Heller, 554 U.S. 570, 614–19 (2008) (the Supreme Court majority painstakingly reviewing nineteenth century views on the right to bear arms in interpreting the meaning of the Second Amendment).

23. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–21 (1999) (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann, ed., 1997)); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 578–79 (1998).

24. *See* McDonald v. City of Chicago, 561 U.S. 742, 828 (2010) (Thomas, J., concurring in part) ("When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted."); Greenberg & Litman, *supra* note 23, at 574–77.

25. Larsen, *supra* note 2, at 1301; *see also Foreign Materials Debate*, *supra* note 7, at 528–29 (Scalia implicitly notes the importance of understand context in analyzing foreign law); Alberto R. Gonzales, *Legal Implications of a Rising China: Remarks at the University of Chicago Law School*, 7 CHI. J. INT'L L. 289, 296 (2006) (noting the risk of erroneous interpretations of foreign law).

26. Larsen, *supra* note 2, at 1300–1301; *see also Foreign Materials Debate*, *supra* note 7, at 528–29 (Scalia notes that there is danger in using foreign law if the interpreter does not understand the surrounding jurisprudence).

27. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (emphasizing that only *American* conceptions of decency matters, not views in other nations), *abrogated by* Roper v. Simmons, 543 U.S. 551, 574–75 (2005); Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 200–201 (2005) (statement of J. Roberts); *Foreign Materials Debate*, *supra* note 7, at 533–34; *Gonzales*, *supra* note 25, at 299–300.

time of the founding,[28] or that were in existence at the time that the Fourteenth Amendment was enacted,[29] those states and the nation as a whole will often share common histories and linguistic understandings at the relevant periods of enactment. Moreover, the similarities between state and national legal histories and cultures, even with respect to newer states, will often outweigh the differences because all fifty states have developed within a shared national legal culture. Finally, the fact that state courts look to each other frequently in construing their own constitutions suggests that these courts have found the similarities sufficiently great to make comparative analysis meaningful.

Because of the four valuable insights provided by comparative analysis, our federal courts generally should find it profitable to look to state constitutions and jurisprudence in interpreting the Federal Constitution.[30] We conclude that state constitutional decisions provide a legal laboratory that courts can look to for guidance. In viewing state constitutional decisions as a legal laboratory, the concerns of skeptics that our democratic Constitution should reflect the experiences and values of our nation's people are satisfied.

II. THE COURT'S SECOND AMENDMENT JURISPRUDENCE

In order to provide critical context for our Second Amendment example of how state constitutional provisions and jurisprudence can assist courts in discerning the meaning of the U.S. Constitution, in this Part we provide background on the Court's evolving jurisprudence regarding the Second Amendment. We then identify some of the legal issues in the Second Amendment context that remain open in the wake of the Court's two leading cases.

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28. Such states include Connecticut, Delaware, Georgia, Kentucky, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Virginia. *See infra* Appendix, Table 1. *See generally The Avalon Project: Documents in Law, History, and Diplomacy, Colonial Charters, Grants, and Related Documents*, YALE L. SCH., http://avalon.law.yale.edu/subject_menus/statech.asp (last visited Mar. 4, 2016).

29. These states include all states listed above, *supra* note 28, as well as Alabama, Arkansas, California, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, Ohio, Oregon, Texas, West Virginia, and Wisconsin. *See infra* Appendix, Table 2. Several additional states came into existence by the end of the nineteenth century, and thus their constitutions may provide insight into how individuals around the time that the Fourteenth Amendment was enacted viewed the right to bear arms. *See infra* Appendix, Table 2 (listing Colorado, Idaho, Montana, North Dakota, South Dakota, Utah, Washington, and Wyoming as states in this category).

30. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977) ("Prior to the adoption of the [F]ederal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more of the state constitutions."); A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation,* 77 N.C. L. REV. 409, 469–72 (1999) (providing a detailed and persuasive analysis of the normative value of state constitutions).

A. The U.S. Supreme Court's Evolving Federal Second Amendment Jurisprudence

The first seminal cases addressing the Second Amendment are *United States v. Cruikshank*,[31] and *Presser v. Illinois*.[32] In *Cruikshank*, criminal defendants raised a Second Amendment challenge to a state law that made it unlawful for multiple individuals to, in disguise, conspire to "injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any [federal constitutional or statutory] right. . . . "[33] The defendants in *Cruikshank* had allegedly banded together and conspired to "injure, oppress, threaten, and intimidate" two African American citizens, with intent, in part, to deprive them of their right to bear arms.[34] The Court struck down the indictment relying on this alleged act, on the basis that the Second Amendment right to bear arms did not apply to the states, and thus the Second Amendment did not secure this right to individuals.[35]

Subsequently, in *Presser*, a defendant challenged a state law that made it unlawful for bodies of men, other than the state militia, to associate as a military organization, and to have drills or parades in public with arms, absent a license by the Illinois governor.[36] The Court relied on the proposition in *Cruikshank* that "the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States."[37] Thus, *Presser* stood squarely for the proposition that the Second Amendment does not apply to state action.[38]

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31. 92 U.S. 542 (1876) (distinguishing rather than explicitly overruling *Cruikshank* because the *Cruikshank* Court had relied on the Privileges & Immunities Clause in holding that the Second Amendment did not apply to the states, but effectively overruling *Cruikshank* by then holding that the Second Amendment applies to the states through the Fourteenth Amendment Due Process Clause), *abrogated by* McDonald v. City of Chicago, 561 U.S. 742, 758–59, 791 (2010).

32. 116 U.S. 252 (1886).

33. 92 U.S. at 548.

34. Id.

35. *Id.* at 553, 556–57. Admittedly, this logic seems faulty; from the fact that a federal right does not apply to state action (as distinguished from federal action), it does not follow that the federal right no longer exists as applied to U.S. citizens. The challenged law aimed to protect the right to enjoy federal constitutional rights and give individuals a remedy for violation of these rights, which, by definition, would include the Federal Second Amendment unless it were not interpreted to be an individual right. The *Cruikshank* Court never appeared to go as far as declaring the Second Amendment to not be an individual right. Thus, the Court's basis for dismissing these counts of the indictment was arguably flawed on its own terms. *See* Anders Walker, *From Ballots to Bullets:* District of Columbia v. Heller *and the New Civil Rights,* 69 LA. L. REV. 509, 528–29 (2009).

36. 116 U.S. at 264–65.

37. *Id.* at 265.

38. The Supreme Court acknowledged as much in *McDonald v. City of Chicago*, but has disagreed on whether the precedent remains relevant, focusing on the constitutional basis for denying incorporation against the states. *Compare McDonald v. City of Chicago*, 561 U.S. 742, 758–59, 791 (2010) (distinguishing rather than explicitly overruling *Cruikshank* on the basis that the *Cruikshank* Court had relied on the Privileges & Immunities Clause, rather than the Fourteenth Amendment Due Process Clause, in holding that the Second Amendment did not apply to the states) *with id.* at 859 (Stevens, J., dissenting) (arguing that the "incorporation question was squarely . . . resolved in the late 19th century" by citing to, *inter alia*, *Cruikshank* and *Presser*). The Privileges & Immunities Clause has recently been advanced and rejected as a constitutional bar to state limitations on an out-of-state resident's claim to a Colorado

Several decades later in 1939, in *United States v. Miller*, the Court tested a challenged gun control regulation against the standard of whether the targeted activity, possession or use of a shotgun with a barrel less than eighteen inches long, "ha[d] some reasonable relationship to the preservation or efficiency of a well regulated militia."[39] Thus, the Court's test in *Miller* was that any gun control regulation would be upheld *as long as it did not* target activity that had a reasonable relationship to the preservation or efficiency of a well-regulated militia. The Court explained that the Second Amendment's guarantees were made "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [the militia]," and stressed that this Amendment "must be interpreted and applied with that end in view."[40]

Two recent cases addressing the Second Amendment may have in practical effect, if not formally, overruled this historic case law. First, in *District of Columbia v. Heller*, the Court interpreted the Second Amendment as creating an individual right belonging to all Americans that extends not just to supporting service in state militias, but also to facilitating self defense.[41] It relied on this self-defense purpose in striking down the ban on handguns, reasoning that the "handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for" purposes of self defense.[42] One can read this holding as implicitly, if not explicitly, overruling *United States v. Miller* insofar as *Miller* construed the Second Amendment to only protect gun possession and use for *purposes* of participation in a militia, and relied on that construction in upholding the conviction at issue. However, the majority in *Heller* stressed that it in no way intended to overrule *Miller*, reading *Miller* not as limiting the protected *purposes* for carrying weapons under the Second Amendment, but rather as limiting protected *weapons* under the Second Amendment to those that had a reasonable relationship to the preservation or efficiency of a well-regulated militia.[43] Thus, this *Miller* test may still retain its vitality.

The *Heller* Court also made several observations about the potential scope of the Second Amendment throughout its opinion. For example, it interpreted the term "arms" to include modern weapons, including those "that were not specifically designed for military use and were not employed in a military capacity,"[44] as long as they were "the sorts of weapons . . . 'in common use at the time'" of the events.[45] Synthesizing all of language in the operative clause of the Amendment, the Court concluded that this clause "guarantee[s] the individual right to possess and carry

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concealed carry permit. *See* Peterson v. Martinez, 707 F.3d 1197, 1201 (10th Cir. 2013); *see also* Fern L. Kletter, Annotation, *Restrictions on Ownership Possession or Sale of Weapons Infringing Federal Constitutional Right to Travel,* 3 A.L.R. Fed. 3d 8 (2015).

39. 307 U.S. 174, 178 (1939).

40. Id.

41. 554 U.S. 570, 581, 592, 628 (2008).

42. *Id.* at 628.

43. *Id.* at 621–22.

44. *Id.* at 581–82.

45. *Id.* at 627 (quoting *Miller*, 307 U.S. at 179). This rationale has its rationale in early nineteenth century state court interpretations.

weapons in case of confrontation."[46] However, it stressed that the term "arms," consistent with *Miller*[47] "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[48] The Court also clarified that the Amendment does not enshrine "a right to keep and carry *any* weapon whatsoever in *any* manner whatsoever and for *whatever* purpose."[49] It then made clear that, among other potentially legitimate gun regulations, "nothing 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 and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[50]

The second recent, watershed case in the Second Amendment field is *McDonald v. City of Chicago*.[51] In this case, a plurality of the Court held that the Second Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment.[52] This case, in its practical effect, even if not in form, abrogated *Cruikshank* and *Presser* insofar as those cases had explicitly held that the Second Amendment did not constrain state action, and *McDonald* explicitly has established the opposite.

B. Issues Which Heller Left Unanswered

While *Heller* provides some guidance in interpreting the Second Amendment under the Court's new framework, many questions remain unanswered in its wake. For instance, the Court has not yet answered what level of scrutiny should apply to Second Amendment regulations.[53] Additional questions include exactly what kinds of "arms" will fall within the protection of the Amendment, in what kinds of places should the right be given greater sanctity, and how protected arms may and may not be carried or stored.[54] These issues deserve thoughtful answers. Much scholarship only briefly analyzes state constitutional provisions and case law with an eye to how it could inform these questions.[55] Thus, in the next Part, we discuss how

46. *Id.* at 592.

47. 307 U.S. 174.

48. *Heller*, 554 U.S. at 625–26 (noting also that this observation is consistent with early state court interpretations of the right to bear arms).

49. *Id.* at 626 (emphasis added) (referencing early Nineteenth Century state cases).

50. *Id.* at 626–27, 627 n.26.

51. 561 U.S. 742, 749–50, 767–69, 778 (2010).

52. *See id.* at 805–807 (Thomas, J., concurring in part and concurring in the judgment) (preferring the Privileges and Immunities Clause of the Fourteenth Amendment as the vehicle of incorporation, but arriving at the same legal conclusion).

53. *See, e.g.*, *Heller*, 554 U.S. at 628, 629 & n.27 (refraining from applying any particular level of scrutiny, reasoning that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, [the ordinances at sue] would fail constitutional muster").

54. *See id.* at 626–27, 627 n.26, 720–22 (Breyer, J., dissenting).

55. *See, e.g.*, Cornell & DeDino, *supra* note 5, at 525 ("Modern Second Amendment scholarship and recent jurisprudence have devoted considerable energy to debating the individual or collective nature of this right. Hardly any attention has been devoted to elaborating a functional Second Amendment jurisprudence."); Winkler, *supra* note 16, at 597 ("The debate over the meaning of the Second Amendment has focused primarily on a first-order question: does the amendment protect an individual right to bear arms or a collective right of states to maintain militias free from federal interference?"); *see also, e.g.*,

consulting state constitutions and their authoritative interpretations can help answer some of these questions and thereby inform future interpretations of the Second Amendment.

III. THE LESSONS OF STATE CONSTITUTIONALISM

A. The Level of Scrutiny that State Courts Have Applied under State Constitutions to the Right to Bear Arms

The first issue we explore is the level of scrutiny that should apply to regulations under the Second Amendment. The vast majority of jurisdictions have adopted the same standard on regulating firearms: they will uphold "reasonable regulations" designed to protect the public safety and welfare. Forty-three states have a right-to-bear-arms provision that protects an individual right in their state constitutions.[56] Over half of these states have expressly adopted the reasonable regulation test; this test is articulated differently in different jurisdictions.[57] At least

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Kopel, *supra* note 3, at 847–49 (focusing mainly on whether state constitutions indicate that the right to bear arms is individual versus collective); George A. Nation III, *The New Constitutional Right to Guns: Exploring the Illegitimate Birth and Acceptable Limitations of this New Right*, 40 RUTGERS L.J. 353 (2009) (addressing the possible level of scrutiny to be applied, the scope of the term "arms," and place restrictions on the right, but without substantial consideration of state constitutional analysis and reasoning with respect to these issues); Volokh, *supra* note 3, at 810–11 (speculating briefly about "[w]hat arms may be kept and borne" under the Second Amendment); Nitz, *supra* note 5, at 324–28 (arguing that state constitutions are not relevant to the Second Amendment).

56. *See infra* Appendix, Table 3. Two additional states, namely Maryland and Massachusetts, have provisions regulating militias and/or the right to bear arms, but have held that this does not include an individual right. *See* Scherr v. Handgun Permit Review Bd., 880 A.2d 1137, 1156 (Md. Ct. Spec. App. 2005); Commonwealth v. Depina, 922 N.E.2d 778, 790 (Mass. 2010) ("There is no right under . . . [the] Massachusetts Constitution for a private citizen to keep and bear arms. . . . " (quoting Chief of Police v. Moyer, 453 N.E.2d 461 (Mass. App. Ct. 1983))); *see also infra* Appendix, Table 3.

57. *See* Hyde v. Birmingham, 392 So. 2d 1226, 1227 (Ala. Crim. App. 1980) ("It is well-settled . . . that this right of a citizen to bear arms in defense of himself and the state is subject to reasonable regulation. . . . "); City of Tucson v. Rineer, 971 P.2d 207, 213 (Ariz. Ct. App. 1998) (citing Dano v. Collins, 802 P.2d 1021, 1023 (Ariz. Ct. App. 1990)); Robertson v. City of Denver, 874 P.2d 325, 328–31 (Colo. 1994) (holding that the trial court erred in reviewing ordinance regulating the exercise of the right to bear arms under the strict scrutiny standard the right to bear arms may be regulated by the state under its police power in a reasonable manner); People v. Blue, 544 P.2d 385, 390–31 (Colo. 1975) ("When rights come into conflict, one must of necessity yield. The conflicting rights involved here are the individual's right to bear arms and the state's right . . . to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people."); Benjamin v. Bailey, 662 A.2d 1226, 1232 (Conn. 1995); Rabbitt v. Leonard, 413 A.2d 489, 493 (Conn. Super. Ct. 1979) (holding that the right to bear arms is subject to reasonable exercise of governmental power); Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972) (holding that "the right to keep and bear arms is . . . subject to the right of the people . . . to enact valid police regulations to promote the health, morals, safety and general welfare of the people"); Carson v. State, 247 S.E.2d 68, 72 (Ga. 1978) (holding that the question in each case being "whether the particular regulation involved is legitimate and reasonably within the police power, or whether it is arbitrary, and, under the name of regulation, amounts to a deprivation of the constitutional right" to keep and bear arms); State v. Mendoza, 920 P.2d 357, 368 (Haw. 1996) (holding that "the right to bear arms may be regulated by the state in a reasonable manner"), *overruling on other grounds recognized in* Lowe v. Kealoha, No. 28973, 2010 Haw. App. LEXIS 866, at *2 n.3 (Dec. 22, 2010); Matthews v. State, 148 N.E.2d 334, 338 (Ind. 1958) (applying the reasonable regulation test to the right to bear arms); Redington v. State, 992 N.E.2d 823, 833 (Ind. Ct. App. 2013); Posey v. Commonwealth, 185 S.W.3d 170, 179 (Ky. 2006) ("[W]e find nothing to support [the] suggestion that . . . [the state right to bear arms provision]

divests the legislature of power to reasonably regulate the area of firearms possession."); State v. Brown, 571 A.2d 816, 817 (Me. 1990) (holding that the State was entitled to reasonably regulate possession and use of firearms); People v. Swint, 572 N.W.2d 666, 675 (Mich. Ct. App. 1997) (upholding a gun control statute as "a reasonable . . . exercise" of governmental power); James v. State, 97-CA-01497-STC (¶ 9), 731 So. 2d 1135 (Miss. 1999) (applying the reasonable regulation standard and finding the challenged statute "constitutional as a reasonable exercise of police power"); State v. Comeau, 448 N.W.2d 595, 598 (Neb. 1989) (holding that "reasonable regulation of the possession of arms is not prohibited by the [right to bear arms] amendment"); Bleiler v. Chief, Dover Police Dep't, 927 A.2d 1216, 1223 (N.H. 2007); State v. Rivera, 1993-NMCA-011, ¶ 7, 853 P.2d 126 ("An act is within the state's police power if it is reasonably related to the public health, welfare, and safety." (quoting People v. Garcia, 595 P.2d 228, 230 (Colo. 1979))), *abrogated by* State v. Murillo, 2015-NMCA-046, 347 P.3d 284; State v. Dawson, 159 S.E.2d 1, 9, 10 (N.C. 1968) ("The right of individuals to bear arms is not absolute" and "a citizen's right to carry arms is subject to reasonable regulation."); State v. Fennell, 382 S.E.2d 231, 233 (N.C. Ct. App. 1989) ("[W]e hold that this regulation is reasonable and bears a fair relation to the preservation of the public peace and safety."); State v. Ricehill, 415 N.W.2d 481, 483 (N.D. 1987) ("Instead, we believe our Constitution's protection of the right to keep and bear arms is not absolute; although it prevents the negation of the right to keep and bear arms, that right nevertheless remains subject to reasonable regulation. . . . "); Arnold v. City of Cleveland, 616 N.E.2d 163, 172 (Ohio 1993) ("[T]he right to bear arms is not an unlimited right and is subject to reasonable regulation. . . . "); State *ex rel.* Okla. State Bureau of Investigation v. Warren, 1998 OK 133, ¶ 13, 975 P.2d 900, 902–903 ("An individual's right to keep and bear arms under [the North Dakota] Constitution is not absolute, but remains subject to reasonable regulation. . . . "); State v. Christian, 307 P.3d 429, 437 (Or. 2013) ("We have consistently acknowledged the legislature's authority to enact reasonable regulations to promote public safety as long as the enactment does not unduly frustrate the individual right to bear arms for the purpose of self-defense as guaranteed by Article I, section 27."); Mosby v. Devine, 851 A.2d 1031, 1044 (R.I. 2004) ("[T]he right to possess a handgun, whether a fundamental liberty interest or not, is not absolute and is subject to reasonable regulation."); Wilson v. State, 44 S.W.3d 602, 605 (Tex. App. 2001) (holding that a gun regulation did not unconstitutionally violate the right to keep and bear arms because it bore a rational relation to the valid state interest in preventing crime); City of Seattle v. Montana, 919 P.2d 1218, 1223 (Wash. 1996) ("We have consistently held that the right to bear arms in art. I, § 24 is not absolute, but instead is subject to 'reasonable regulation' by the State. . . . " (quoting Morris v. Blaker, 821 P.2d 482 (Wash. 1992))); Rohrbaugh v. State*,* 607 S.E.2d 404, 413–14 (W. Va. 2004) ("The West Virginia legislature may, through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State. . . . [and upholding the challenged statute because] [t]he restrictions contained therein are a proper exercise of the Legislature's police power to protect the citizenry of this State and impose reasonable limitations on the right to keep and bear arms to achieve this end."); State *ex rel.* Princeton v. Buckner, 377 S.E.2d 139, 146 (W. Va. 1988) (holding that the right to bear arms is not absolute and is subject to reasonable regulation); State v. Cole, 665 N.W.2d 328, 337 (Wis. 2003) (finding the right to keep and bear arms to be a fundamental constitutional right, but rejecting a strict scrutiny analysis in favor of a reasonableness test: "[T]he proper question is whether the statute is a reasonable exercise of police power."); State v. Thomas, 683 N.W.2d 497, 503 (Wis. Ct. App. 2004) ("[T]he right to bear arms is a qualified right, subject to reasonable restrictions under the state's police power."); Carfield v. State, 649 P.2d 865, 872 (Wyo. 1982) (holding that the "statute [at issue,] which has for its purpose the prevention of the use of firearms in connection with violent crimes[,] is a legitimate exercise of the police power of the state and is not unreasonable"); *see also* State v. Rupp, 282 N.W.2d 125, 130 (Iowa 1979) (interpreting the federal Second Amendment as a right subject to reasonable regulation); People v. Zerillo, 189 N.W. 927, 928 (Mich. 1922) (recognizing under Michigan's right to bear arms "the right of the legislature, under the police power, to regulate the carrying of firearms"); *In re* Application of Atkinson, 291 N.W.2d 396, 399 (Minn. 1980) (finding that even if the state constitution protects some kind of non-enumerated right to bear arms, that right to bear arms is subject to reasonable regulations); State v. Angelo, 130 A. 458, 459 (N.J. 1925) (same); State v. Whitaker, 689 S.E.2d 395, 399 (N.C. Ct. App. 2009) (rejecting application of strict scrutiny to this right and holding that "[t]he right to keep and bear arms afforded by the North Carolina Constitution is subject to regulations which are 'reasonable and not prohibitive' and which 'bear a fair

six other states have implicitly applied this standard without expressly saying so.[58] Further, at least seven more states have not yet adopted any discernable standard at all.[59] Just four states have adopted a different standard: two have adopted intermediate scrutiny, and two have recently adopted strict scrutiny.[60] Notably, both the Louisiana Supreme Court in *Eberhardt* and other recent cases and the Missouri Supreme Court in *Merritt upheld* the gun control regulations at issue as *passing* strict scrutiny, which suggests that these courts have applied a more lenient version of strict scrutiny to the right to bear arms than to other rights.[61] The Louisiana Supreme Court found that "a long history, a substantial consensus, and simple common sense" were enough to pass constitutional muster.[62] Indeed, the Court expressly adopted a reasonable regulation rationale and looked to other reasonable regulation jurisdictions in supporting its holding: "We are satisfied that it is reasonable for the legislature in the interest of public welfare and safety to regulate the possession of

relation to the preservation of the public peace and safety'" (quoting State v. Fennell, 382 S.E.2d 231, 233 (N.C. Ct. App. 1989))).

58. Jones v. City of Little Rock, 862 S.W.2d 273, 275 (Ark. 1993); State v. Hart, 157 P.2d 72, 73 (Idaho 1945); Junction City v. Mevis, 601 P.2d 1145, 1151–52 (Kan. 1979) ("Once a subject is found to be within the scope of the state's police power, the only limitations upon the exercise of such power are that the regulations must have reference in fact to the welfare of society and must be fairly designed to protect the public against the evils which might otherwise occur. . . . [T]he fixed rule and basic standard by which the validity of all exercises of the police power is tested is that the police power of the state extends only to such measures as are reasonable and that all police regulation must be reasonable under all circumstances."); Minich v. County of Jefferson, 919 A.2d 356, 361 (Pa. Commw. Ct. 2007) (applying the reasonable regulation standard); State v. Callicutt, 69 Tenn. 714, 716 (1878) (upholding a gun control law, stating, "[These acts,] which have been passed for the suppression of the . . . dangerous practice of carrying arms, . . . do not in fact abridge, the constitutional right" to bear arms, because they were "passed with a view 'to prevent crime.'"); State v. Duranleau, 260 A.2d 383, 386 (Vt. 1969) (holding that "the right to bear arms is [not] unlimited and undefinable" and finding a gun control statute valid because it had a reasonable purpose, stemming from the legislature's "power to deal with matters of public morals, health, safety and welfare").

59. *See, e.g.*, James v. Musselshell County, No. DV-95-74, 1998 Mont. Dist. LEXIS 737, at *3 (Dec. 11, 1998) ("Although citizens of this country may have some right to bear arms, exercise of this right is not without limitation."); State v. Bolin, 662 S.E.2d 38, 39 n.2 (S.C. 2008) (citing to cases applying the reasonable regulation standard); State v. Johnson, 56 S.E. 544, 545 (S.C. 1907) (finding that the city counsel acted within the police power in enacting the gun control ordinance at issue); State v. Willis, 100 P.3d 1218, 1222 (Utah 2004) (holding that the legislature has "authority to . . . regulate the lawful 'use' of arms" under the state constitution); Digiacinto v. Rector of George Mason Univ., 704 S.E.2d 365, 368–70 (Va. 2011) (upholding a gun control law without articulating the level of scrutiny applied); *infra* Appendix, Table 3 (documenting that neither Nevada nor South Dakota have established a standard). Illinois also has not yet settled on a standard. *Compare* City of Chicago v. Taylor, 774 N.E.2d 22, 29 (Ill. App. Ct. 2002) (applying rational basis review), *with* People v. Montyce H., 2011 IL App (1st) 101788, ¶ 31, 959 N.E.2d 221 (applying intermediate scrutiny), *appeal denied, judgment vacated*, 4 N.E.3d 1112 (Ill. 2014), *abrogated by* People v. Aguilar, 2013 IL 112116, 2 N.E.3d 321.

60. *See* Gibson v. State, 930 P.2d 1300, 1302 (ALASKA CT. APP. 1997) (intermediate scrutiny); Doe v. Wilmington Hous. Auth., 88 A.3d 654, 666 (Del. 2014) (intermediate scrutiny); State v. Eberhardt, 2013-2306, p. 5 (La. 7/1/14), 145 So. 3d 377, 381 (strict scrutiny); State v. Merritt, 467 S.W.3d 808, 810 (Mo. 2015) (strict scrutiny).

61. *Eberhardt*, 2013-2306, p. 12; State v. Webb, 2013-1681, pp. 17–18 (La. 5/7/14), 144 So. 3d 971, 977; State *In re* J.M., 2013-1717, p. 13 (La. 1/28/14), 144 So. 3d 853, 863; State v. Draughter, 2013-0914, p. 17 (La. 12/10/13), 130 So. 3d 855, 867; *Merritt*, 467 S.W.3d at 816.

62. *Eberhardt*, 2013-2306, p. 12 (quoting State *In re* J.M., 2013-1717, p. 9 (La. 1/28/14), 144 So. 3d 853, 861).

firearms, for a limited period of time, by citizens who have committed certain specified serious felonies. Courts of other states having statutes and constitutional provisions comparable to our own have similarly concluded that such regulation is constitutionally permissible as a reasonable and legitimate exercise of police power."[63] As the only four states among 43 to adopt intermediate or strict scrutiny, these two standards are the exception rather than the rule. Indeed, their application is even more extreme when one considers that four states do not regulate gun control legislation at all under their state constitutions, making the reasonable regulation standard the balance between these two extreme positions. It is therefore unsurprising that the overwhelming majority of jurisdictions that have adopted any standard have adopted the reasonable regulation standard.[64] Thus, the dozens of states applying the reasonable regulation standard represent the predominant judicial approach based on the broad experience of these states.[65]

The reasonable regulation standard takes on slightly different meanings in different jurisdictions. In the majority of jurisdictions that have explained the meaning of this test, legislation is permissible insofar as it bears a rational relationship to public health, safety, morals, or general welfare.[66] In contrast, at least one jurisdiction, Rhode Island, states the test as "whether the statute is a reasonable limitation of the right to bear arms, rather than a reasonable means of promoting the

63. *Id.*

64. David Kopel and Clayton Cramer, two scholars who have also reviewed this issue, incorrectly suggest that "[s]tate courts [generally] have applied various techniques of strict scrutiny to the right to arms." David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms,* 50 SANTA CLARA L. REV. 1113, 1116, 1119 (2010). However, their article, which preceded the recent adoptions in Missouri and Louisiana, cited only to four jurisdictions, Kansas, West Virginia, Oregon, and Colorado, all of which actually apply the reasonable regulation standard, either implicitly or explicitly. *Compare id.* at 1116 n.13 (referring to the "cases discussed at notes 265–66, 450–55, 483, 523–30," which refer to cases from four jurisdictions: Kansas, West Virginia, Oregon, and Colorado), *with supra* notes 58 and 59; *infra* Appendix, Table 3 (entries for Colorado, Kansas, Oregon, and West Virginia). Their sweeping conclusion is thus unsupported.

65. *See generally* Winkler, *supra* note 16, at 597–602 (discussing the trend towards states adopting the reasonable regulation standard).

66. State v. Mendoza, 920 P.2d 357, 368 (Haw. 1996) ("The appropriate inquiry is whether [the statute] bears a rational relationship to a legitimate government interest."), *overruling on other grounds recognized in* Lowe v. Kealoha, 2010 Haw. App. LEXIS 866 (Dec. 22, 2010); Redington v. State, 922 N.E.2d 823, 832 (Ind. Ct. App. 2013); Posey v. Commonwealth, 185 S.W.3d 170, 181 (Ky. 2006) (holding that "reasonable regulation" means not irrational or arbitrary); State v. Brown, 571 A.2d 816, 820–21 (Me. 1990) (applying a rational relationship standard in applying the reasonable regulation test); James v. State, 97-CA-01497-SCT (¶ 9), 731 So. 2d 1135 (Miss. 1999) (recognizing the state's power to regulate weapons as "the right of government to promote public health, safety, morals, general welfare, peace, and order, and public comfort and convenience"); State v. Whitaker, 689 S.E.2d 395, 399 (N.C. Ct. App. 2009) (rejecting application of strict scrutiny to this right and holding that "[t]he right to keep and bear arms afforded by the North Carolina Constitution is subject to regulations which are 'reasonable and not prohibitive' and which 'bear a fair relation to the preservation of the public peace and safety.'" (quoting State v. Fennell, 382 S.E.2d 231, 233 (N.C. Ct. App. 1989))); State *ex rel.* Okla. State Bureau of Investigation v. Warren, 1998 OK 133, ¶ 16, 975 P.2d 900, 903 (holding that "[e]xercise of the state's police power must be upheld unless it bears no relation to public health, safety, morals, or general welfare"); Wilson v. State, 44 S.W.3d 602, 605 (Tex. App. 2001) (holding that a statute did not unconstitutionally violate the right to keep and bear arms because it bore a rational relation to the valid state interest in preventing crime).

public welfare."[67] Finally, at least a few jurisdictions have combined these two standards, providing that "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."[68] In these jurisdictions, the question is both whether the law (1) "promotes public safety, health or welfare" *and* (2) "bears a reasonable and substantial relation to accomplishing the purpose pursued."[69] Regardless of which variation a given state employs, most jurisdictions grant substantial deference to the legislature's judgment in enacting the regulation at issue.[70]

Kopel and Cramer criticize those reasonable regulation cases that have applied a rational relationship test in enforcing the reasonable regulation standard as "unhelpful" because they involve "'balancing . . . [,]'" reasoning that they do not provide "any standards" for what makes a regulation reasonable, or how courts should balance the interests at issue.[71] They also suggest that balancing is

67. Mosby v. Devine, 851 A.2d 1031, 1044 (R.I. 2004).

68. State v. Cole, 2003 WI 112, ¶ 27, 665 N.W.2d 328; *accord* Arnold v. City of Cleveland, 616 N.E.2d 163, 172 n.12 (Ohio 1993) ("[W]e believe that reasonable gun control legislation is that which is fair, proper, moderate, suitable under the circumstances and not excessive."); City of Seattle v. Montana, 919 P.2d 1218, 1222–23, 1224 (Wash. 1996).

69. *Montana*, 919 P.2d at 1222–23.

70. *See* Winkler, *supra* note 16, at 598, 599, 602; *see also, e.g.*, Klein v. Leis, 99 Ohio St. 3d 537, 2003-Ohio-4779, 795 N.E.2d 633, at ¶ 14 ("In reviewing the reasonableness of [legislation], 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. Further, unless there is a clear and palpable abuse of power, a court will not substitute its judgment for legislative discretion." (quoting *Arnold*, 616 N.E.2d at 172–73 (internal quotation marks omitted))).

71. Kopel & Cramer, *supra* note 64, at 1116 n.17. They cite to four cases to support this proposition, but each of these four cases fails to provide anything but the weakest support for their sweeping critique. For example, the first case on which they rely, *Dunne v. People*, 94 Ill. 120, 140–41 (1879), did not involve a challenge to a law under any right to bear arms provision. The court made clear that nobody argued that "the act in question contravene[d] any provision of [the Illinois] constitution," *see id.* at 124, and the only U.S. Constitutional provisions raised were Article I, Section 8, Clause 15, granting Congress power to organize, arm, and discipline the militia, and Article I, Section 10, Clause 2. *See id.* at 125, 138; *see also id.* at 124, 125, 131, 138 (identifying the only two grounds raised to challenge the legislation as (1) a U.S. constitutional provision and (2) a federal statute, and then analyzing the law in light of (1) Article I, Section 8, Clause 15 of the U.S. Constitution, (2) federal law regulating militias, and (3) Article I, Section 10, Clause 2 of the U.S. Constitution). The court also made clear that nobody argued that the statutory provision making it unlawful for men to organize and parade with arms without a license was "in conflict with any paramount law of the United States," and consequently the validity of the provision "pertain[ed] alone to [the state's] domestic polity." *See id.* at 140. It then very specifically declared that "[t]he right of the citizen to 'bear arms' for the defense of his person and property is not involved, even remotely, in this discussion." *Id.* The discussion that followed then analyzed whether the state had *ex ante* power as a matter of policy to enact the statute, and the language quoted by Kopel and Cramer came from this part of the court's discussion. Consequently, the language quoted by Kopel and Cramer quite obviously has no relation to establishing the level of scrutiny as applied to the right to bear arms, and thus any concerns about the breadth of this language are irrelevant to this question.

The second case on which they rely, *People ex rel. Darling v. Warden of City Prison*, 139 N.Y.S. 277 (App. Div. 1913), is also irrelevant for at least two reasons. First, it comes out of a jurisdiction, New York, that has no state right to bear arms provision. Second, this case did not purport to apply the reasonable regulation test. It considered the validity of the challenged law against a state statute, the Civil Rights Law, under which it identified a right to keep and bear arms. *See id.* at 284. It held that under *Presser v. Illinois*, gun control regulations should stand unless the regulation had the effect of wholly "prohibit[ing]

inappropriate under *Heller* because the *Heller* majority "found interest balancing" to be inappropriate, reasoning that no core enumerated right is subject to balancing.[72] Yet, the *Heller* majority made clear that it was not referring to any of the usual levels of scrutiny, strict scrutiny, intermediate scrutiny, or rational basis, but rather were referring to a different kind of test where a judge, "on a case-by-case basis," asks "whether the statute burdens a protected interest . . . to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[73] Of course even the traditional levels of scrutiny such as strict scrutiny involve balancing (e.g. whether a compelling governmental interest exists and the law is narrowly tailored to produce the least infringement possible such that the interest "outweighs" the infringement on rights). Consequently, the reasonable regulation test cannot be condemned on the basis that it involves balancing, because any level of scrutiny would require as much. Instead, *Heller* should be read in a much more common-sense manner as rejecting the applicability of case-by-case balancing that provides no guidance about what standards must be satisfied for courts to find that the balance strikes in favor of one party rather than the other.[74]

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the people from keeping and bearing arms. . . . " *Id.* It then applied this *Presser* test and found that "[i]n the statute at bar the Legislature ha[d] not prohibited the keeping of arms," but rather had merely regulated this right. *Id.* at 285 ("[T]he Legislature has passed a regulative, not a prohibitory, act."). Thus, this case does not illustrate the application of the reasonable relationship test, and consequently is irrelevant. Finally, on its own terms this case law does not apply a "vague" standard "without providing any standards for what makes something reasonable," Kopel & Cramer, *supra* note 64, at 1116, but rather made the standard clear: regulations are permissible, prohibitions are not. While the Court in *Heller* may have rejected that distinction, this does not bring into question the general body of case law applying the reasonable regulation test because *People ex rel. Darling* itself does not apply this reasonable regulation test, but rather applies the test established in *Presser*.

The third case to which they cite, *Dunston v. State*, 27 So. 333, 334 (Ala. 1900), contains two brief paragraphs. Nowhere is any right to bear arms provision mentioned in this opinion. *See id.* at 334. Rather, the court appeared to be analyzing the scope of the statute, rather than applying a level of scrutiny to determine whether the statute comported with some constitutional provision. *See id.* Thus, this case too sheds no light on the workability of the reasonable regulation standard.

Finally, Kopel and Cramer cite to *Carroll v. State*, 28 Ark. 99, 101 (1872), the only case actually analyzing the validity of a regulation under a state constitutional right to bear arms provision. This case indeed does implicitly apply the reasonable regulation test, using the language of "regulations . . . necessary for the good of society. . . . " *Id.* Kopel and Cramer criticize this court mostly for the brevity of its analysis. However, many early cases issued brief opinions in disposing of cases. A more serious critique would look at modern case law applying the reasonable regulation test, and ask whether that case law provides clear guidelines with respect to how this test should apply. We think the three variations on the reasonable regulation test, laid out above in this Part, are as clear as any of the three traditional levels of scrutiny: rational basis, intermediate scrutiny, and strict scrutiny. Thus, we find this concern unconvincing, and entirely unsupported.

72. Kopel & Cramer, *supra* note 64, at 1117 (citing District of Columbia v. Heller, 553 U.S. 570, 634 (2008)).

73. *Heller*, 533 U.S. at 634.

74. The balancing test in *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) provides one illustration of such a case-by-case balancing test. In contrast to *Mathews*, under the reasonable regulation standard, the courts have made clear that the balance weighs categorically in favor of upholding gun control regulation at least as long as the regulation forwards a proper purpose (i.e. health, safety, or welfare) and the scope of the regulation bears a "reasonable relationship" to that purpose. Such a construction bears a much closer resemblance to traditional level of scrutiny analysis than to an *ad hoc Mathews* balancing assessment. Indeed, Judge Easterbrook recently adopted this approach to analyzing a firearm regulation in *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 410 (7th Cir. 2014) ("[I]nstead of trying to

The Colorado Court of Appeals recently recognized this in rejecting the very argument advanced by Kopel and Cramer. In *Rocky Mt. Gun Owners v. Hickenlooper*, 2016 COA 45M, *2016 Colo. App. LEXIS 524,* at *5232-33 (Colo. Ct. App. 2016), the Rocky Mountain Gun Owners and National Association for Gun Rights also argued that *Heller and McDonald* prohibited application of traditional "police power" review of newly enacted gun regulation. The Court rejected these argument reasoning that "[n]ot all restrictions on fundamental rights are analyzed under a strict scrutiny standard of review." The court then observed that "[i]n neither *Heller* nor *McDonald* did a majority of the United States Supreme Court identify a particular standard under which the validity of restrictions on the Second Amendment's right to bear arms would be assessed. Other states in which the right to bear arms is recognized as a 'fundamental' right under their state constitutions analyze restrictions on that right under the *Robertson* 'reasonable exercise of police power' test."

A final concern with considering the applicability of this case law to the Second Amendment is that the *Heller* majority indicated in a footnote that traditional rational basis scrutiny, under which laws may be upheld as long as they forward any *conceivable* rational state interest, would be an inappropriate level of scrutiny for laws and actions that infringe on the Second Amendment.[75] While the first variation of the reasonable regulation level of scrutiny might ultimately be rejected by the Court if it follows this path when it squarely faces this issue, the second two iterations of this level of scrutiny require substantially more than a showing that a law forwards some conceivable government interest. Thus, this observation provides no real obstacle to considering this powerful trend.

1. Why the Comparison between the Second Amendment and State Right-to-Bear-Arms Provisions is Apt

There are multiple reasons why originalists and non-originalists alike should take this precedent seriously. First, the comparison between the state and federal provisions is apt because the state and federal provisions alike share features that are key to the level of scrutiny determination, including the kind of scrutiny applied to other fundamental rights, the recognized importance of the right to bear arms, and the governmental interests involved that might counsel in favor of one kind of level of scrutiny versus another.

Turning to the first feature, the states that adopted the reasonable regulation standard of review for the right to bear arms are overwhelmingly jurisdictions that apply strict scrutiny to other rights enshrined in their state constitutions.[76] Thus, these

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decide what "level" of scrutiny applies, and how it works, inquiries that do not resolve any concrete dispute, we think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia,' . . . and whether law-abiding citizens retain adequate means of self-defense.")

75. *Heller*, 554 U.S. at 628 n.27.

76. In this footnote we identify at least one case from every jurisdiction that applies the reasonable regulation standard (implicitly or explicitly) which acknowledges that strict scrutiny applies to other rights under that jurisdiction's state constitution. *See, e.g.*, *Opinion of the Justices*, 624 So. 2d 107, 157, 159 (Ala. 1993) (holding that the right to education constitutes a fundamental right and further holding

"[b]ecause education is a fundamental right under the Alabama constitution, the stark inequities in educational opportunity offered schoolchildren in this state must be justified under strict scrutiny by a compelling state interest to pass constitutional muster"); Kenyon v. Hammer, 688 P.2d 961, 971, 975 (Ariz. 1984) (identifying the state constitutional right to recover damages for bodily injury as a fundamental right and holding that it consequently was subject to "strict scrutiny"); State v. Brown, 156 S.W.3d 722, 731 (Ark. 2004) (recognizing a fundamental right to privacy in the home implicit in the Arkansas Constitution and applying strict scrutiny to that right); Cent. Colo. Water Conservancy Dist. v. Simpson, 877 P.2d 335, 341 (Colo. 1994); Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 233 (Conn. 2008) ("[I]n Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized." (quoting Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977))); State v. J.P., 907 So. 2d 1101, 1109–10 (Fla. 2004) (finding the state constitutional rights to privacy and freedom of movement to be fundamental and applying strict scrutiny to laws that impaired the exercise of these rights); Fair v. State, 702 S.E.2d 420, (Ga. 2010) (applying strict scrutiny under the state's equal protection clause); McCloskey v. Honolulu Police Dep't, 799 P.2d 953, 956–57 (Haw. 1990) (recognizing that under the state constitutional right to privacy, government action that infringes on this right must meet strict scrutiny); Cummings v. Roth, No. 28272, 2009 Haw. App. LEXIS 780, at *21–24 (Dec. 22, 2009) (same); G.B. v. Dearborn Cty. Div. of Family & Children, 754 N.E.2d 1027, 1031–32 (Ind. Ct. App. 2001) (explaining that under the Indiana Constitution, infringement on fundamental rights protected by the Due Process Clause are subject to strict scrutiny); Jurado v. Popejoy Constr. Co., 853 P.2d 669, 675–77 (Kan. 1993) (applying strict scrutiny under the equal protection component of the Kansas Constitution); D.F. v. Codell, 127 S.W.3d 571, 575–77 (Ky. 2003) (acknowledging that the right to an adequate education is a fundamental right under the Kentucky Constitution and that strict scrutiny applies to laws that infringe upon the exercise of this right, but finding no such infringement by the statute at bar); State v. Maine State Troopers Ass'n., 491 A.2d 538, 542 (Me. 1985) (acknowledging that the right of free expression is a fundamental right under Maine's constitution and is subject to strict scrutiny); Musto v. Redford Twp., 357 N.W.2d 791, 792–93 (Mich. Ct. App. 1984) (identifying the right to travel as a fundamental right under both the state and Federal Constitution and recognizing that strict scrutiny applies to the right); Shoecraft v. Catholic Soc. Servs. Bureau, Inc., 385 N.W.2d 448, 451 (Neb. 1986) (acknowledging that the relationship between the parent and child is protected under the Nebraska and federal constitutions, and that infringements on this right are subject to strict scrutiny); Lamarche v. McCarthy, 965 A.2d 992, 999 (N.H. 2008) (declaring that the right to a jury trial is a fundamental right under the New Hampshire Constitution, and burdens on that right are subject to strict scrutiny); N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶¶ 36–43, 975 P.2d 841 (applying strict scrutiny, labeled a "searching judicial inquiry," to the fundamental right to equal treatment based on gender under New Mexico's Equal Rights Amendment); King v. Beaufort Cty. Bd. of Educ., 704 S.E.2d 259, 263 (N.C. 2010) (acknowledging that strict scrutiny applies to some infringements on the fundamental right to an adequate education under North Carolina's constitution); Stephenson v. Bartlett, 562 S.E.2d 377, 393 (N.C. 2002) (stating that the right to vote is a fundamental right under the North Carolina Constitution and applying strict scrutiny to an infringement on this right); Hoff v. Berg, 1999 ND 115, 595 N.W.2d 285 (holding that under North Dakota's Constitution, parents enjoy a fundamental right to care and custody of their children and infringements on this right are subject to strict scrutiny); Sorrell v. Thevenir, 633 N.E.2d 504, 510–11 (Ohio 1994) (applying strict scrutiny to a law that infringed on the state constitutional fundamental right to a jury trial in certain civil cases); Hewitt v. State Accident Ins. Fund Corp., 653 P.2d 970 (Or. 1982) (striking down a gender-biased statute under the state constitution's equal rights clause by finding that the statute targeted a suspect class and consequently merited strict scrutiny); Stenger v. Lehigh Valley Hosp. Ctr., 609 A.2d 796, 802–803 (Pa. 1992) (acknowledging right to privacy as protected under the Pennsylvania Constitution and applying strict scrutiny to an infringement on this right); DiStefano v. Haxton, C.A. No. WC 92-0589, 1994 WL 931006, at *4, *8 (R.I. Sup. Ct. Dec. 12, 1994) (reviewing jurisprudence under the Rhode Island Constitution's Substantive Due Process Clause, identifying the right of unrelated individuals to live together as a fundamental right under this constitution, and acknowledging that infringements on this right are subject to strict scrutiny); Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 7–8, 11–12, 15–16 (Tenn. 2000) (holding under the Tennessee Constitution that the fundamental right to privacy included a right to abortion that was subject to strict scrutiny); Brigham v. State, 692 A.2d 384, 390, 396 (Vt. 1997) (identifying the right to education as "integral" to Vermont's form of state government and concluding that laws that infringe upon this state

state constitutions are similarly situated to the federal Constitution insofar as our courts apply strict and intermediate scrutiny to many of the federal Constitution's other fundamental rights. Among these jurisdictions applying strict scrutiny to other rights, but not to the right to bear arms, some have explicitly considered the argument that strict or intermediate scrutiny should also apply to the right to bear arms, and have rejected this argument on the ground that the right to bear arms is a unique right that demands a different standard of review. Because these conclusions are thoughtful and well reasoned, these cases have significant reason-borrowing value, and jurists should take them seriously.

For example, in choosing to apply a reasonableness standard rather than strict scrutiny to the right to bear arms, the New Hampshire Supreme Court reasoned that "[n]ot every restriction of a right classified as fundamental incurs 'strict' scrutiny."[77] This observation readily extends to federal constitutional rights too.[78]

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constitutional right "bear[] a . . . heavy burden of justification" and is subject to a "searching scrutiny" equivalent to strict scrutiny analysis, but striking down the law regardless of the level of scrutiny because it failed to satisfy even rational basis review); Munns v. Martin, 930 P.2d 318, 321 (Wash. 1997) (applying strict scrutiny to an ordinance that allegedly infringed on free exercise rights under the Washington Constitution); State *ex rel.* Boley v. Tennant, 724 S.E.2d 783, 788 & n.11 (W. Va. 2012) (acknowledging that under the West Virginia Constitution the right to become a candidate for public office is a fundamental right and constitutionally suspect infringements on that right was analyzed under strict scrutiny); Vincent v. Voight, 2000 WI 93, ¶¶ 3, 81, 83, 614 N.W.2d 388 (reaffirming that the right to an equal opportunity for a sound basic education constitutes a fundamental right under the Wisconsin Constitution and acknowledging that infringements on that right, as opposed to the wealth-based classifications at issue, would be reviewed under strict scrutiny); Buse v. Smith, 247 N.W.2d 141, 155 (Wis. 1976) (also holding that the right to equal opportunity for education is a fundamental right under the Wisconsin Constitution and subjecting a classification that infringed on that right to strict scrutiny); *see also* Leliefeld v. Johnson, 659 P.2d 111, 126–27 (Idaho 1983) (acknowledging under a challenge to both the federal and state equal protection clauses that strict scrutiny applies to fundamental rights); Miss. Comm'n on Judicial Performance v. Wilkerson, 2002-JP-02105-SCT (¶ 7 n.1), 876 So.2d 1006 (Miss. 2004) (acknowledging that the analysis under the federal and state freedom of speech provisions the analysis would be the same and that under both constitutions, infringements on the freedom of speech must withstand strict scrutiny); LaTray v. State *ex rel.* Dep't of Human Servs., 2001 OK CIV APP 92, 28 P.3d 1163 (applying strict scrutiny to infringements on the fundamental right of parents to the care and custody of their children as protected by both the state and federal constitutions); HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd., 235 S.W.3d 627, (Tex. 2007) (applying strict scrutiny under both the federal First Amendment and the Texas Constitution's free exercise clause to legislation that targeted religious practices); EBH v. Hot Springs Dep't of Family Servs., 33 P.3d 172, 178 (Wyo. 2001) (identifying the right to associate with one's family as a fundamental right under both the U.S. Constitution and Wyoming's Constitution and identifying strict scrutiny as the proper test for assessing infringements on this right). We opted to cite these last five jurisdictions separately for the sake of clarity because these cases applied strict scrutiny to rights under both the state *and* federal constitutional frameworks, rather than under just their state constitution.

77. Bleiler v. Chief, Dover Police Dep't, 927 A.2d 1216, 1221 (N.H. 2007) (quoting Richard H. Fallon, *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 315 (1993)).

78. *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, (1983) (O'Connor, J., dissenting), (observing that where the impact of a regulation does not sufficiently burden a right, then we do not apply strict scrutiny to the challenged law or act), *overruled by* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 838 (1992); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 688 (2007) (noting that "[m]ost provisions in the Bill of Rights do not trigger strict scrutiny, and the oft-repeated linkage between fundamental rights and strict scrutiny is more rhetoric than doctrinal reality").

The New Hampshire Court further reasoned that "[s]trict scrutiny, with its presumption of unconstitutionality, is a standard of review traditionally used in areas where courts deem any burdensome legislation to be 'immediately suspect.'"[79] It contrasted such legislation with gun control laws, which, "with [their] legislative motivation of public safety . . . is not inherently suspicious."[80] We have applied similar reasoning in justifying applying a level of scrutiny other than strict scrutiny to fundamental rights under the federal Constitution.[81]

Turning to the second shared feature, at least some states applying the reasonable regulation test, like the Supreme Court in *Heller*, have held that their state right-to-bear-arms provisions protect a fundamental right.[82] Again, because state courts have carefully analyzed why the importance of the right did not dictate application of strict or intermediate scrutiny, these cases have weighty reason-borrowing value that courts should consider. For example, in applying the reasonable relationship standard to the fundamental right to bear arms, the Ohio Supreme Court relied in part on the long tradition of gun control legislation in concluding that the reasonable relationship test was the proper standard of review for this unique right.[83] The New Hampshire Supreme Court also relied on the "long history of weapons regulations," which, it concluded, indicated that "such laws are not inherently invidious."[84] These considerations are important and should be persuasive under an originalist analysis.[85]

Finally, with respect to the third shared feature, the same kinds of governmental interests are implicated by the Second Amendment and state

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79. *Bleiler*, 927 A.2d at 1222 (quoting Winkler, *supra* note 16, at 599).

80. *See id.* at 1222.

81. *See, e.g.*, *Casey*, 505 U.S. at 876 (justifying the "undue burden" level of scrutiny rather than a strict scrutiny standard of review because "[t]he very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

82. *See, e.g.*, Rabbit v. Leonard, 413 A.2d 489, 491 (Conn. 1979); *Bleiler*, 927 A.2d at 1219–23 (assuming without deciding that the right to bear arms is a fundamental right and then applying the reasonableness test rather than strict scrutiny); Klein v. Leis, 99 Ohio St. 3d 537, 2003-Ohio-4779, 795 N.E.2d 633, at ¶¶ 7–15 (recognizing "the right to bear arms [as] fundamental," but applying the "reasonable regulation" standard to the gun control legislation); State v. Cole, 2003 WI 112, ¶ 23, 264 Wis. 2d 520, 665 N.W.2d 328 (finding the right to keep and bear arms to be a fundamental constitutional right, but rejecting a strict scrutiny analysis in favor of a reasonableness test: "[T]he proper question is whether the statute is a reasonable exercise of police power."); *see also* Robertson v. City of Denver, 874 P.2d 325, 330 n.10 (Colo. 1994) (holding that the trial court erred in reviewing an ordinance regulating the exercise of the right to bear arms under the strict scrutiny standard; providing that the right to bear arms may be regulated by the state under its police power in a reasonable manner); State v. Whitaker, 689 S.E.2d 395, 400–402 (N.C. Ct. App. 2009) (rejecting application of strict scrutiny to this right); Mosby v. Devine, 851 A.2d 1031, 1044 (R.I. 2004) (holding that "the right to possess a handgun, whether a fundamental liberty interest or not, is not absolute and is subject to reasonable regulation").

83. *Klein*, 2003-Ohio-4779, at ¶¶ 12–15.

84. *Bleiler*, 927 A.2d at 1222 (quoting Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 597, 600 (2006)).

85. *See* McDonald v. City of Chicago, 561 U.S. 742, 828 (2010) (Thomas, J., concurring in part) ("When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted."); Greenberg & Litman, *supra* note 23, at 574–77.

provisions regarding the right-to-bear-arms, namely concerns for public safety. The federal government has articulated its serious concern for the potential dangers of guns through previous legislation that it has enacted, for example the Gun Free School Zones Act.[86] If the "compelling interest" standard is to mean anything, then it must include the federal and state governmental interest in regulating activities that carry a great risk of life-threatening injuries and death in our society. Further, many state courts have explicitly considered this governmental interest in deciding to apply the reasonable regulation standard to this fundamental right. For example, the Wisconsin Supreme Court rejected the argument that strict scrutiny, or even intermediate scrutiny, should apply to the right to bear arms because of the fundamental nature of the right; it explained that application of the reasonable regulation standard was justified by compelling "interests of public safety" and the fact that other jurisdictions overwhelmingly also apply the reasonable regulation test.[87] Other jurisdictions have echoed the concern regarding the compelling public interest in regulating the use of weapons.[88] Thus, because the Second Amendment involves the same key features as state provisions regarding the right to bear arms, courts should take seriously the well-reasoned opinions that have held the reasonable regulation standard applicable to this right.

A skeptic might argue that the federal government is fundamentally different from state governments insofar as the federal government does not have the broad police power that states enjoy, but rather is a limited government of enumerated powers.[89] The authors acknowledge that this argument may carry some force as applied to now merely academic question answered in *Heller* of whether the Second Amendment protects a right to self-defense.[90]

However, we identify three reasons why this argument does not apply more broadly to the general relevance of any state right-to-bear-arms provision in interpreting the scope of the Second Amendment. First, in light of the U.S. Supreme Court's holding that the Second Amendment is "fully applicable" to state conduct,[91]

86. Pub. L. No. 101-647, § 922(q)(1)(A)–(B), 104 Stat. 4844 (codified as amended at 18 U.S.C. § 922 (2012)); *see also* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901(a)(2)–(3), 82 Stat. 225 (1968) (noting that "Congress hereby finds and declares . . . that the ease with which any person can acquire firearms other than a rifle or shotgun . . . is a significant factor in the prevalence of lawlessness and violent crime in the United States [and] that only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the business of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible . . . ").

87. *Cole*, 2003 WI 112, ¶¶ 21–22.

88. *E.g.*, Rabbit v. Leonard, 413 A.2d 489, 493 (Conn. 1979) (calling the governmental interest in this context "extraordinary"); Matthews v. State, 148 N.E.2d 334, 336 (Ind. 1958) (noting that "the regulation of the possession of firearms is closely related to the public safety and welfare"); Redington v. State, 992 N.E.2d 823, 831–33 (Ind. Ct. App. 2013) (recognizing that the regulation of firearms at issue was a valid exercise of the government's power "to promote the health, safety, comfort, morals, and welfare of the public" (quoting Price v. State, 622 N.E.2d 954, 959 (Ind. 1993))); Arnold v. City of Cleveland, 616 N.E.2d 163, 172 (Ohio 1993) (stating that "[l]egislative concern for public safety is not only a proper police power objective—it is a mandate. This court has established that firearm controls are within the ambit of the police power.").

89. *See, e.g.*, Nitz, *supra* note 5, at 314–15.

90. *See id.* at 325–28.

91. McDonald v. City of Chicago, 561 U.S 742, 750 (2010).

it would violate this precedent to conclude that the Amendment only regulates state conduct to the extent that the federal government has concurrent authority over the area regulated. The *McDonald* Court expressly stated that "it would be 'incongruous' to apply different standards" under a federal constitutional right based solely on whether the litigation involved state versus federal government action.[92] It further declared that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[93] Thus, interpreting the Second Amendment to mean one thing as applied to the federal government and another as applied to the states has been foreclosed.

Second, the only originalist interpretation of history consistent with the *McDonald* Court's rationale is that the framers of the Fourteenth Amendment intended the Second Amendment to be applied to the full breadth of state conduct. In *McDonald*, the Court reasoned that the passage of the Fourteenth Amendment fundamentally altered the meaning of the U.S. Constitution, that this alteration contemplated application of fundamental rights provisions to the states, and that the right to bear arms is and historically has been a fundamental right.[94] Thus, it follows from *McDonald* that the framers of the Fourteenth Amendment intended the Second Amendment to regulate the full breadth of government conduct, not just the limited powers that the federal government is authorized to exercise. Consequently, *McDonald* has also foreclosed any originalist argument that the differences in state versus federal power should be relevant with respect to how courts should interpret the Second Amendment.

Third, this conclusion not only finds support in controlling Supreme Court precedent, but also in logic. For example, with respect to levels of scrutiny, the fact that state governments and the federal government have differing kinds and breadths of power has no bearing on whether the same level of scrutiny should be applied to both state and federal right-to-bear-arms provisions. This is because the question of whether a regulation violates the right to bear arms does not require any assessment of whether the government actor had the constitutional or inherent authority to enact the regulation at issue. Instead, this analysis assesses an entirely separate issue: whether, *assuming arguendo* that the government had the authority to enact the regulation at issue, the regulation improperly infringes on the right to bear arms.[95] Thus, the question of whether the government had authority *ex ante* to enact a regulation is not before a court when it assesses whether that regulation violates the right to bear arms. Consequently, there is in fact no real risk that "[i]f the federal

92. *Id.* at 765.

93. *Id.* (quoting Malloy v. Hogan, 378 U.S. 1, 10 (1964)).

94. *See id.* at 754, 768–78.

95. *Cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (acknowledging the conceptual distinction between *ex ante* power to enact a regulation and *ex post* invalidity based on a conflict with a Bill of Rights provision: "Today, the restrictions on government power foremost in many Americans' minds are likely to be affirmative prohibitions, such as contained in the Bill of Rights. These affirmative prohibitions come into play, however, only where the Government possesses authority to act in the first place. If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.").

government lacks the authority animating the state provision, the interpreter [might infer] non-enumerated powers for the national government from the existence of state law."[96] Thus, courts should not be deterred from drawing comparisons between state right-to-bear-arms provisions and the Second Amendment based on the fact that states enjoy police powers that the federal government does not.

2. How the State Cases Scrutinizing Regulations Under the Right to Bear Arms Substantively Inform the Meaning of the Second Amendment

For those convinced that the comparison between state right-to-bear-arms provisions and the federal Second Amendment is apt, jurists should look seriously to state constitutional provisions on the right-to-bear-arms because this resource can provide important substantive insights. Turning first to the textual insights that these historical provisions provide, the language of right-to-bear-arms provisions in three jurisdictions from these historical periods that have applied the reasonable regulation standard is virtually identical to the language in the Second Amendment.[97] Further, the language of two additional jurisdictions whose provisions were enacted more recently also mirror the language of the Second Amendment.[98] Finally, the language of twenty-six states, many of whom enacted provisions by the end of the nineteenth century, is functionally equivalent to the text of the Second Amendment insofar as it communicates an intent to protect a right to "keep" or "bear arms" for purposes of self-defense and military use.[99]

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96. *See* Nitz, *supra* note 5, at 315.

97. *See, e.g.*, GA. CONST. art. I, § I, ¶ VIII ("The right of the people to keep and bear arms shall not be infringed. . . . "); N.C. CONST. art. I, § 30 ("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. . . . "); R.I. CONST. art. I, § 22 ("The right of the people to keep and bear arms shall not be infringed."); S.C. CONST. art. I, § 20 ("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.").

98. HAW. CONST. art. I, § 17 ("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."); ILL. CONST. art. I, § 22 ("[T]he right of the individual citizen to keep and bear arms shall not be infringed."); State v. Mendoza, 920 P.2d 357, 358 n.2 (Haw. 1996), *overruling on other grounds recognized in* Lowe v. Kealoha, No. 28973, 2010 Haw. App. LEXIS 866 (Dec. 22, 2010); State v. Whitaker, 689 S.E.2d 395 (N.C. Ct. App. 2009).

99. ALA. CONST. art. I, § 26 ("[That] every citizen has a right to bear arms in defense of himself and the state."); ARIZ. CONST. art. II, § 26 ("The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired. . . . "); COLO. CONST. art. II, § 13 ("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. . . . "); CONN. CONST. art. I, § 15 ("Every citizen has a right to bear arms in defense of himself and the state."); FLA. CONST. art. I, § 8(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. . . . "); IDAHO CONST. art. I, § 11 ("The people have the right to keep and bear arms, which right shall not be abridged. . . . "); IND. CONST. art. I, § 32 ("The people shall have a right to bear arms, for the defense of themselves and the State."); KAN. CONST. Bill of Rights § 4 ("A person has the right to keep and bear arms for the defense of self, family, home and state. . . . "); KY. CONST. Bill of Rights § 1, para. 7 ("All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . The right to bear arms in defense of themselves and of the State. . . . "); ME. CONST. art. I, § 16 ("Every citizen has a right to keep and bear arms and this right shall never be questioned."); MICH. CONST. art. I, § 6 ("Every person has a right to keep and bear arms for the defense of himself and the state."); MISS. CONST. art. III, § 12 ("The right of every citizen to keep and bear arms in defense of

The concern that may arise because of textual differences between the Second Amendment and state provisions is that the Second Amendment's text protects a broader right, and therefore courts should apply a higher level of scrutiny to laws that infringe this right. Yet, even states with very broadly written provisions have applied the reasonable regulation standard.[100] Indeed, two states have very recently recognized that since "rational regulation" is the governing standard, the relevant constitutional language must be specifically amended for courts to apply "strict scrutiny" to the right to bear arms.[101] Thus, this argument is meritless. While Kopel and Cramer argue that "the Second Amendment text differs from most of the state texts,"[102] and suggest that this might serve as a reason to interpret the Second Amendment differently from state provisions, Kopel and Cramer only cite to one state, Tennessee, to support this assertion.[103] That citation hardly supports the sweeping suggestion that the text materially differs from "most" states. They then derive from this *one* jurisdiction the conclusion that *multiple* "state constitutional guarantees articulate only a 'common defence' purpose for the right to arms,. . . . [while] [u]nder *Heller*, . . . the right of personal self-defense lies at the core of the

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his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question. . . . "); MONT. CONST. art. II, § 12 ("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. . . . "); N.H. CONST. pt. I, art. 2-a ("All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state."); OHIO CONST. art. I, § 4 ("The people have the right to bear arms for their defense and security. . . . "); 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. . . . "); OR. CONST. art. I, § 27 ("The people shall have the right to bear arms for the defence of themselves, and the State. . . . "); PA. CONST. art. I, § 21 ("The right of the citizens to bear arms in defense of themselves and the State shall not be questioned."); R.I. CONST. art. I, § 22 ("The right of the people to keep and bear arms shall not be infringed."); S.D. CONST. art. VI, § 24 ("The right of the citizens to bear arms in defense of themselves and the state shall not be denied."); TENN. CONST. art. I, § 26 ("That the citizens of this State have a right to keep and to bear arms for their common defense. . . . "); TEX. CONST. art. I, § 23 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State. . . . "); VT. CONST. ch. I, art. 16 ("That the people have a right to bear arms for the defence of themselves and the State. . . . "); VA. CONST. art. I, § 13 ("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. . . . "); WASH. CONST. art. I, § 24 ("The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired. . . . "); WYO. CONST. art. I, § 24 ("The right of citizens to bear arms in defense of themselves and of the state shall not be denied.").

100. *See, e.g.*, Posey v. Commonwealth, 185 S.W.3d 170, 179 (Ky. 2006) (applying the reasonable regulation test to Kentucky's right to bear arms provision); Holland v. Commonwealth, 294 S.W.2d 83, 85 (Ky. Ct. App. 1956) (calling Kentucky's provision one of the "broadest expression[ism] of the right to bear arms"); *see also, e.g.*, ME. CONST. art. I, § 16 ("Every citizen has a right to keep and bear arms and *this right shall never be questioned*." (emphasis added)); NEB. CONST. art. I, § 1 ("All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are . . . 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."); State v. Mowell, 672 N.W.2d 389, 401 (Neb. 2003) (applying the reasonable regulation standard to Nebraska's right to bear arms provision).

101. *See* State v. Eberhardt, 2014-0209, p. 5 (La. 7/1/14); 145 So. 3d 377, 381; State v. Merritt, 467 S.W.3d 808, 810 (Mo. 2015).

102. Kopel & Cramer, *supra* note 64, at 1115.

103. *See id.* at 1115 n.9 (referring the reader to the "text accompanying notes 91–96," which only discusses one case, *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840)).

[right].”[104] Not only do they fail to identify support for this generalization, there is no support for this proposition. Of the forty-three states with an *individual* right to bear arms, thirty-six states have explicitly acknowledged in the text of their right-to-bear-arms provision or in case law that self defense is one of the concerns underlying this right.[105] And the U.S. Supreme Court acknowledged as much in *McDonald v. City of Chicago*.[106] Moreover, the authors could find no state case law among the states that have recognized an individual right-to-bear-arms that had rejected self defense as a legitimate concern underlying this right.

Furthermore, Kopel and Cramer’s suggestion that technical differences in the language of the Second Amendment might merit different treatment ignores the functional equivalence of the language of most states with right-to-bear-arms provisions, as noted above.[107] Most states use synonyms that capture the same concepts as those identified in the Second Amendment, for example states may use the terms “abridged” or “impaired” instead of “infringed.” Consequently, Kopel and Cramer’s observation should have little persuasive force with respect to whether courts should consider state case law on the right to bear arms. Thus, application of a different standard cannot be justified on the basis that the Second Amendment uses unique language or targets a different kind of right dissimilar to the rights protected in these state provisions.

Turning now to the historical value of these state provisions, there is a very strong, pervasive, and long-held tradition of applying this reasonable regulation

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104. *Id.* at 1115.

105. See twenty-five of the right to bear arms provisions quoted in *supra* note 99 (except Tennessee) that explicitly include self-defense language such as “right to bear arms in defense of himself” or “in defense of his . . . person.” These states include Alabama, Arizona, Colorado, Connecticut, Florida, Idaho, Indiana, Kansas, Kentucky, Maine, Michigan, Mississippi, Montana, New Hampshire, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, and Wyoming. Eight additional states applying the reasonable regulation standard have recognized that a concern for self defense animates, among other concerns, their state right-to-bear-arms provisions in either the textual provision or case law. *See* NEV. CONST. art. 1, § 11(1) (“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.”); N.D. CONST. art. I, § 1 (“All individuals are by nature equally free and independent and have certain inalienable rights, among which are . . . to keep and bear arms for the defense of their person, family, property, and the state. . . . “); Kalodimos v. Morton Grove, 470 N.E.2d 266, 273 (Ill. 1984) (acknowledging that Illinois’s right-to-bear-arms provision was intended to protect the ability to engage in self-defense); State v. Comeau, 448 N.W.2d 595, 596 (Neb. 1989) (quoting Article I, Section 1 of Nebraska’s Constitution, which includes among the protected interests a right to “keep and bear arms for security or defense of self, family, home, and others . . . “); State *ex rel.* N.M. Voices for Children, Inc. v. Denko, 2004-NMSC-011, ¶ 5, 90 P.3d 458 (quoting Article II, Section 6 of the New Mexico Constitution, which provides for a right, *inter alia*, to “keep and bear arms for security and defense . . . “); Univ. of Utah v. Shurtleff, 2006 UT 51, ¶ 19, 144 P.3d 1109 (quoting Article I, Section 6 of the Utah Constitution, which provides a right to bear arms for “security and defense of self, family others, property, or the state . . . “); State *ex rel.* W. Va. Div. of Natural Res. v. Cline, 488 S.E.2d 376, 379 n.3 (W. Va. 1997) (quoting Article III, Section 22 of the West Virginia Constitution, which provides for a right, *inter alia*, “to keep and bear arms for the defense of self, family, home and state . . . “); State v. Hamdan, 2003 WI 113, ¶ 66, 264 Wis. 2d 433, 665 N.W.2d 785 (holding that the state right-to-bear-arms provision included a right to do so “to protect one’s person, family, or property against unlawful injury . . . “ (internal quotation marks omitted)). These states include Delaware, Illinois, Nebraska, Nevada, New Mexico, North Dakota, Utah, West Virginia, and Wisconsin.

106. 561 U.S. 742, 777 (2010).

107. *See supra* note 99 and accompanying text.

standard, because twenty-six states have explicitly adopted this approach, and six more have implicitly done so, and this trend stretches back to the early nineteenth century.[108] For example, in *State v. Reid* the Alabama Supreme Court upheld a statute that prohibited the "evil practice of carrying weapons secretly."[109] The Alabama Court determined the validity of the legislation by measuring the scope of the legislation against the nature of the evil addressed.[110] The Court then noted that the statutory limitation on bearing arms was of a type given "the Legislature the authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals."[111]

Similarly, the 1840 Tennessee Supreme Court recognized that the legislature had the right to protect the public safety by adopting reasonable regulations on how and when such arms might be carried.[112] Subsequently, in the 1870s, the Texas Supreme Court also affirmed gun control legislation against an attack under the language of the Texas constitution by explaining that gun control regulation has a long history in our nation.[113] A decade later, the Missouri Supreme Court followed the same course in *State v. Shelby*.[114] In *Shelby*, the defendant was indicted for carrying a deadly weapon while intoxicated. The Missouri Supreme Court, relying on *United States v. Cruickshank,*[115] first held that the Second Amendment did not apply.[116] The Court then observed that it was accepted by 1886 that the legislature could prohibit the carrying of deadly weapons into a school room or polling place and the court then upheld the carrying-while-intoxicated legislation against constitutional attack as a reasonable regulation designed to protect the safety of citizens.[117] Finally, in the 1890s, in *State v. Workman*, the West Virginia Supreme Court of Appeals upheld as reasonable, against a Second Amendment challenge, a statutory limitation on carrying dangerous or deadly weapons of the kind "usually employed in brawls, street-fights, duels, and affrays."[118]

Thus, well before the adoption of the Civil War Amendments, state courts were consistently upholding reasonable limitations on constitutional guarantees of the right "to bear arms."[119] This common sense form of viewing the right-to-bear-

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108. *See* Winkler, *supra* note 16, at 600 (identifying a case from 1886 that applied the reasonable regulation standard); *cf.* Commonwealth v. Blanding, 20 Mass. 304, 314 (1825) ("[T]he right to keep firearms . . . does not protect him who uses them for annoyance or destruction.").

109. 1 Ala. 612, 614 (1840).

110. *Id.* at 615.

111. *Id.* at 616.

112. Aymette v. State, 21 Tenn. (2 Hum.) 154, 159 (1840); *see also* Nunn v. State, 1 Ga. 243, 251 (1846) (holding that the legislature may prohibit the carrying of concealed weapons but not totally prohibit "bearing arms").

113. English v. State, 35 Tex. 473, 478–79 (1872).

114. 2 S.W. 468 (Mo. 1886).

115. 92 U.S 542 (1876).

116. *Shelby*, 2 S.W. at 469.

117. *Id.* Note, however, that this precedent has not been revisited by the Missouri Supreme Court since the recent adoption of strict scrutiny, and thus it remains unclear under its new standard whether this precedent remains good law.

118. 14 S.E. 9, 11–12 (W. Va. 1891).

119. Indeed, even by the time of the American Revolution, there was an established tradition of local regulation of both the classes of people and the types of arms that could possessed. *See* Lawrence

arms in light of the legislature's duty to protect the health and safety of the citizenry was repeatedly applied to limitations on the definition of "arms,"[120] the manner of carrying protected weapons,[121] and where protected arms could be carried.[122] Throughout the remainder of the nineteenth century, state courts generally continued to review legislative limitations on the possession and use of firearms in light of the purpose of the constitutional guarantee and whether the legislature had rationally exercised governmental power in limiting the constitutional right.[123]

We acknowledge that while significant case law applying the reasonable relationship standard existed in the nineteenth century, most of the precedent setting this level of scrutiny occurred during the twentieth century. Because levels of scrutiny were not developed until the twentieth century, under *Carolene Products*,[124] we argue that for originalists, the relatively younger age of the precedent should not be the controlling question, but rather whether the state in question had a right-to-

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Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 Wash. U. L. Rev. 1187 (2015).

120. *See, e.g.*, Fife v. State, 31 Ark. 455, 459–61 (1876) (holding that the right to bear arms refers to arms used for purposes of war, and that the legislature may prohibit wearing of such weapons as are not used in civilized warfare and would not contribute to the common defense); Commonwealth v. Murphy, 44 N.E. 138, 138–39 (Mass. 1896) (deciding whether a disabled rifle is an "arm"); Aymette v. State, 21 Tenn. (2 Hum.) 154, 158–59 (1840) ("The Legislature, therefore, have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence. . . . [Citizens] need not, for [the purpose of the common defense], the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons would be useless in war. They could not be employed advantageously in the common defence of the citizens. The right to keep and bear them is not, therefore, secured by the constitution."); State v. Duke, 42 Tex. 455, 458–59 (1874); English v. State, 35 Tex. 473, 476 (1872); *see also Ex parte* Thomas, 97 P. 260, 260 (Okla. 1908) (interpreting the word "arms" to "appl[y] solely to such arms as are recognized in civilized warfare, to wit, guns, swords, bayonets, horsemen's pistols, etc., and not [to] those used by a ruffian, brawler, or assassin, such as pocket pistols, dirks, sword canes, bowie knives, etc.").

121. *See, e.g.*, Owen v. State, 31 Ala. 387, 388–89 (1858); State v. Reid, 1 Ala. 612, 616 (1840); State v. Buzzard, 4 Ark. 18, 27–29 (1842); Stockdale v. State, 32 Ga. 225, 227–28 (1861); State v. Mitchell, 3 Blackf. 229, 229 (Ind. 1833); State v. Jumel, 13 La. Ann. 399, 399–400 (1858) (interpreting the constitutionality of a statute's proscribed mode of carry under the Second Amendment); *Aymette*, 21 Tenn. (2 Hum.) at 161–62 (in upholding a conviction under a concealed carry law, the court stated that "a prohibition to wear a spear concealed in a cane would in no degree circumscribe the right to bear arms in the defence of the State; for this weapon could in no degree contribute to its defence, and would be worse than useless in an army. . . . We think . . . the Legislature had the right to pass the law under which the plaintiff in error was convicted.").

122. *See, e.g.*, State v. Wilforth, 74 Mo. 528, 529–31 (1881) (upholding a statute against a Second Amendment challenge that prohibited carrying a concealed weapon into any school room or place where people are assembled for educational, literary, or social purposes); *cf.* State v. Huntly, 25 N.C. (3 Ired.) 418, 418, 422–23 (1843) (upholding a conviction of a person appearing in a public place armed with an unusual or dangerous weapon and uttering a threat).

123. *See, e.g.*, State v. Wilburn, 66 Tenn. 57, 58–63 (1872); Jennings v. State, 5 Tex. Ct. App. 298, 300–301 (1878).

124. United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938); *see also* John Galotto, *Strict Scrutiny for Gender, via* Croson, 93 COLUM. L. REV. 508, 513–15 (1993) (acknowledging *Carolene Products* as the seminal case giving rise to levels of scrutiny analysis); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny,* 48 AM. J. LEGAL HIST. 355, 356–57, 360 & n.38 (2006) (identifying *Carolene Products* as the case giving rise to the birth of strict scrutiny, and then arguing that this was first applied in the First Amendment context).

bear-arms *provision* (as opposed to case law setting the level of scrutiny) by the end of the nineteenth century, close to when the Fourteenth Amendment was adopted and thus when the Second Amendment was incorporated against the states. Twenty states that apply the reasonable regulation standard meet this criterion,[125] thereby creating a powerful database of jurisdictions with historically relevant provisions that have adopted this level of scrutiny.

Due respect for this long-held, well-established state jurisprudence would counsel in favor of applying the same level of scrutiny to the Second Amendment. The precedent at issue here has been in place for well over a century.[126] The U.S. Supreme Court has repeatedly and recently acknowledged that where a pervasive, long-held, undisturbed tradition has existed, our courts should not lightly disturb that tradition.[127] Additionally, the Second Amendment context is unique as far as federal constitutional interpretation is concerned because entire bodies of state case law on the right to bear arms have developed over the past two centuries in the absence of a similarly well-developed body of federal case law.[128] Thus, in this unique context, "the uniformity in the [decision to apply the reasonable regulation standard] lends particular authority to [this] decision[]."[129] Finally, the authors have not identified a

125. *See infra* Appendix, Table II (Alabama, Colorado, Connecticut, Florida, Georgia, Idaho, Kansas, Kentucky, Maine, Michigan, Mississippi, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Washington, and Wyoming). Also, notably some state provisions that came after the enactment of the Fourteenth Amendment were patterned on early provisions: Oregon's right to bear arms was patterned on the Indiana constitution's enumeration, which was patterned on the Ohio and Kentucky provisions, which were patterned on the Pennsylvania provision. State v. Hirsch, 114 P.3d 1104, 1116, 1118 (Or. 2005).

126. *See* Winkler, *supra* note 16, at 600 (identifying a case from 1886 that applied the reasonable regulation standard).

127. *See, e.g.*, Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347–48 (2011) ("[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional: Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness." (quoting Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002))); Wong v. Smith, 131 S. Ct. 10, 12 (2010) (Alito, J., dissenting to a denial of certiorari) (reasoning that the long, undisturbed common law tradition of permitting judges to comment on the evidence in a trial counsels that "federal courts should tread lightly" before finding this tradition to violate federal law); County of Allegheny v. ACLU, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part) ("A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.").

128. *See* Winkler, *supra* note 16; *see also* Kopel & Cramer, *supra* note 64, at 1114 (acknowledging that "federal courts have relatively little experience in Second Amendment cases" and that "nearly two centuries of state court cases interpreting state right to arms guarantees provide useful guidance").

129. Benjamin v. Bailey, 662 A.2d 1226, 1233 (Conn. 1995) (also noting that other jurisdictions "overwhelmingly have recognized that the right is not infringed by reasonable regulation by the state in the exercise of its police power to protect the health, safety and morals of the citizenry"); *see also* Robertson v. City of Denver, 874 P.2d 325, 330 n.10 (Colo. 1994) (noting that the court could not identify "even one published opinion where the strict scrutiny standard of review has been applied to a firearms regulation"); Bleiler v. Chief, Dover Police Dep't, 927 A.2d 1216, 1222 (N.H. 2007) (noting that "state courts universally reject strict scrutiny or any heightened level of review in favor of a standard that requires weapons laws to be only 'reasonable regulations' on the [right to bear arms]" (quoting Winkler, *supra* note 16, at 599)); Arnold v. City of Cleveland, 616 N.E.2d 163, 172 (Ohio 1993) (observing "[t]hat the right to bear arms is not an unlimited right and is subject to reasonable regulation is an accepted principle among other jurisdictions" and that "[t]he majority of the cases which have decided this issue

significant pattern of state constitutional amendments proposed or passed in an effort to upset this tradition. Consequently, this precedent constitutes a pervasive and long-held tradition that is entitled to deference. If courts were to apply any level of scrutiny higher than the reasonable regulation standard to the Second Amendment, this higher level of scrutiny will control the analysis, thereby eviscerating the well-established state case law on this issue. Thus, courts should "tread lightly" before applying any higher level of scrutiny than the reasonable regulation standard.[130]

Furthermore, federal and state courts alike, including the U.S. Supreme Court in its prior case law on the Second Amendment, have long applied this reasonable regulation standard, or a similar reasonable relationship test, to the Federal Second Amendment.[131] For example, the Texas Supreme Court in *English v. State* rejected a Second Amendment constitutional challenge to a state law prohibiting carrying common dangerous weapons.[132] The Texas Court looked at the original intent of the Second Amendment and concluded that concealed personal arms were not within the ambit of its protection.[133]

It is true that many nineteenth century state court opinions were premised on the concept that the Second Amendment did not apply to the states and therefore they either ignored the Second Amendment entirely or merely concluded, with little analysis, that its intent was consistent with the relevant state provision.[134] However, the vast majority of the state courts have expressly affirmed the power of the state to pass reasonable regulations consistent with the Second Amendment, following

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has taken the position that legislation which regulates or prohibits the possession or use of certain arms must be *reasonable* to be a valid exercise of the police power"); Mosby v. Devine, 851 A.2d 1031, 1044 (R.I. 2004) (commenting that "[n]umerous jurisdictions have recognized that the constitutional right to keep and bear arms under a state constitution is not absolute and that reasonable regulatory control by the Legislature to promote the safety and welfare of its citizens uniformly has been upheld"); Second Amendment Found. v. Renton, 668 P.2d 596, 598 (Wash. Ct. App. 1983) ("It should be noted that while 36 states have constitutional provisions concerning the right to bear arms, in none is the right deemed absolute."); City of Princeton v. Buckner, 377 S.E.2d 139, 146 (W. Va. 1988) ("[C]ourts have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the safety and welfare of its citizens."); State v. Cole, 2003 WI 112, ¶ 12, 264 Wis. 2d 520, 665 N.W.2d 328.

130. *Wong*, 131 S. Ct. at 12 (Alito, J., dissenting to a denial of certiorari).

131. *See, e.g.*, United States v. Miller, 307 U.S. 174, 178 (1938) (reasoning that "[i]n the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument"); State v. Rupp, 282 N.W.2d 125, 130 (Iowa 1979) (interpreting the Federal Second Amendment as a right subject to reasonable regulation); Hardison v. State, 437 P.2d 868, 871 (Nev. 1968) (applying the reasonable regulation standard to the Second Amendment); State v. Angelo, 130 A. 458, 459 (N.J. 1925) (per curiam) (recognizing that the federal right to bear arms is subject to reasonable regulations).

132. *See* English v. State, 35 Tex. 473, 476–77 (1872).

133. *Id.* at 476.

134. *See, e.g.*, State v. Shelby, 2 S.W. 468, 469 (Mo. 1886); State v. Newsom, 27 N.C. (5 Ired.) 250 (1844); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 171–75 (1871); State v. Duke, 42 Tex. 455, 457–58 (1874); *see also* District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (recognizing that "[f]or most of our history, the *Bill of Rights* was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens").

adoption of the Fourteenth Amendment.[135] Thus, this trend suggests that there is even long-standing precedential support for the proposition that the reasonable regulation standard applies to the Second Amendment.

While some U.S. courts of appeals since *District of Columbia v. Heller* have applied different levels of scrutiny than the reasonable regulation standard, intermediate and strict scrutiny, these decisions have not taken into account the long history in our nation of applying the reasonable regulation standard, including by the Supreme Court itself.[136] Because these decisions have not considered this crucial, informative resource, they should not carry the day.

A third kind of insight that this trend can provide, for jurists concerned with contemporary American values, is how strongly contemporary Americans generally believe this right should be enforced. The fact that jurisdictions so overwhelmingly apply the same level of scrutiny, and the fact that there has not been a pattern of state initiatives to amend these state rights to increase the level of scrutiny, indicates that most jurists and Americans view this level of scrutiny as the appropriate lens through which to analyze this right. The greater the number and percentage of states that adopt a certain interpretation of the right, the stronger the inference that this is how contemporary Americans understand this right. Because nearly every state to have addressed this issue squarely has adopted the reasonable regulation standard, this trend provides powerful evidence that Americans agree that this is the proper standard to regulate the right to bear arms.

We argue that state court decisions such as the ones reviewed in this Article better reflect modern American values than other kinds of evidence of undisturbed traditions of the people because judicial decision-makers have repeated opportunities to consciously reconsider historic positions through court decisions.[137] In contrast, often traditions continue unaltered precisely because no person or entity has responsibility for deciding their continued merit.

We also argue that *state* court decisions better reflect contemporary values than *federal* judicial decisions for two reasons. First, state judges are unique in that they face elections, rather than lifetime appointment, in approximately four-fifths of

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135. *See* discussion *supra* Part II; *cf.* United States v. Sheldon, 5 Blume Sup. Ct. Trans. 337, 346 (Mich. Terr. 1829) (dicta recognizing that the Constitution grants a right "to keep and bear arms. But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor.").

136. *See, e.g.*, United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013) (applying intermediate scrutiny); United States v. Carter, 669 F.3d 411, 414–17 (4th Cir. 2012) (applying intermediate scrutiny to the right at issue and intimating that it might apply strict scrutiny to laws that infringe more heavily on the "core" of the Second Amendment right); Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011) (applying strict scrutiny to the challenged ordinance); United States v. Reese, 627 F.3d 792, 800–802 (10th Cir. 2010) (applying intermediate scrutiny to the challenged ordinance); United States v. Marzzarella, 614 F.3d 85, 95–97 (3d Cir. 2010) (applying intermediate scrutiny to the law challenged under the Second Amendment). *But see* Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir. 2015) (applying a variation of the reasonable regulation standard); United States v. Decastro, 682 F.3d 160, 164–66 (2d Cir. 2012) (declining to apply heightened scrutiny to a law that did not impose a substantial burden on the ability of citizens to possess and use firearms lawfully for self-defense); United States v. Greeno, 679 F.3d 510, 518, 521 (6th Cir. 2012) (declining to apply heightened scrutiny to a law that it held to fall outside the scope of the Second Amendment).

137. Notably, the *Heller* majority appeared to implicitly recognize this point by affirming the validity of the "longstanding prohibitions" established by state courts with regard to the evolving definition of "arms." *See* 554 U.S. at 626–27.

the states.[138] Thus, many state judges are directly accountable to the people in their decision-making. Second, it is relatively easy in state government for the people to amend state constitutions, as compared with the process for amending the federal Constitution. In nearly half of the states, the people may propose constitutional amendments by ballot initiative.[139] Thus, state supreme court decisions not overturned by voter initiatives more likely evidence popular support for, or acquiescence in, those decisions. Thus, this method may help provide an objective measure of contemporary American values for modernist scholars concerned with interpreting the Constitution in light of modern values. In states where there is a line of evolving precedent, other judges will gain the benefit of the changing perspective and be able to evaluate it against the original interpretation.

Further, significant undisturbed state court decisions evidence modern values even in states lacking initiative mechanisms, since voters may amend their state constitutions far more easily than they can amend the federal Constitution.[140] Amending the federal Constitution obviously requires approval by two-thirds of both houses and ratification by three-fourths of the states.[141] In contrast, amending state constitutions usually calls for only a simple majority of those voting for ratification.[142] Other common structures require approval of two-thirds, three-fifths, or three-fourths of the legislature and then ratification by a majority of the voters.[143] In some states, voters may amend the constitution even more easily as they only need the legislature to pass an amendment by simple majority and then a majority of voters to approve it.[144] Unsurprisingly, the average number of state constitutional amendments far exceeds the number of amendments to the federal Constitution.[145]

Thus, the permanence of a constitutional provision after a state court's construction evidences ratification by the people. In this case, the fact that most states have adopted the reasonable regulation standard, and this level of scrutiny has only been apparently amended by the people through constitutional amendment in two

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138. *See infra* Appendix, Table III.

139. *See infra* Appendix, Table III.

140. In fact, in the two states with the greatest number of constitutional amendments as of 2006, South Carolina and Texas, with respectively 485 and 432 amendments each, the state constitutions do not provide for ballot initiatives. *See* ROBERT L. MADDEX, STATE CONSTITUTIONS OF THE UNITED States, at xxxvii (2d ed. 2006).

141. U.S. CONST. art. V.

142. *See infra* Appendix, Tables III & IV. States utilizing this structure or a similar procedure include Connecticut, Hawaii, Indiana, Iowa, Massachusetts, Nevada, New York, Pennsylvania, Vermont, Virginia, and Wisconsin.

143. *See infra* Appendix, Tables III & IV. The precise fraction of legislative support required varies by states. States employing this structure or a similar procedure include Alabama, Alaska, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Montana, Nebraska, New Jersey, North Carolina, Ohio, Texas, Utah, West Virginia, Washington, and Wyoming.

144. *See infra* Appendix, Tables III & IV. States using this system include Arizona, Arkansas, Minnesota, Missouri, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, and South Dakota.

145. The American people have amended the Federal Constitution just 27 times. *See* U.S. CONST. amend. XXVII. In contrast, states have amended their state constitutions an average of 139 times, as of 2006. *See* MADDEX, *supra* note 140, at xxxiii–vii (individual numbers provided by source were averaged). South Carolina alone has passed 485 amendments, the greatest number to date. *See* MADDEX, *supra* note 140, at xxxvii.

states,[146] evidences ratification of this level of scrutiny by the people. This observation is especially powerful because in several states, the state legislature or the people have amended their right-to-bear-arms provision numerous times.[147] Consequently, if Americans believed that their right to bear arms deserved more robust protection, history indicates that they would have taken action through their voting power.

Finally, for non-originalist judges, courts construing the federal Constitution's Bill of Rights may find state constitutional decisions particularly useful because state constitutional decisions may inform courts about the various approaches that modern courts and society have adopted with respect to a particular provision and the strength of the rationales utilized by other jurisdictions.[148] As Justice Breyer has explained, comparative analysis may inform courts facing federal constitutional issues about how to address those problems in the best possible way.[149] For discussion of the reason-borrowing value of state court decisions on the right to bear arms, see the discussion *supra* regarding state rationales for applying the reasonable regulation standard instead of strict scrutiny, despite identifying this right as fundamental.[150]

Turning to the laboratory value of looking comparatively to state jurisdictions, a West Virginia case from 1891 exemplifies how courts can employ comparative constitutional interpretation to inform the potential consequences of a particular interpretation. In *State v. Workman*, the West Virginia Supreme Court of

146. *See* State v. Eberhardt, 2014-0209, p. 5 (La. 7/1/14); 145 So. 3d 377, 381 (amending the right to bear arms provision to require courts to apply strict scrutiny); State v. Merritt, 467 S.W.3d 808, 810 (Mo. 2015) (same); *see also* State v. Willis, 2004 UT 93, ¶¶ 5–9, 100 P.3d 1218 (noting that before 1984, the state right to bear arms provision explicitly provided that "the Legislature may regulate the exercise of this right by law," but that the 1984 amendment changed the text to delete this provision and instead state the Legislature was not prevented "from defining the lawful use of arms").

147. *See, e.g.*, ALASKA CONST. art I, § 19 (enacted 1956 and amended 1994); DEL. CONST. art. I, § 20 (adopted 1987); FLA. CONST. art. I, § 8 (amended 1968 and 1990); IDAHO CONST. art. I, § 11 (amended 1978); ILL. CONST. art. I, § 22 (proposed and adopted 1970); KAN. CONST. Bill of Rights § 4 (enacted 1859 and amended 2010); LA. CONST. art. I, § 11 (amended 1974); ME. CONST. art. I, § 16 (amended 1987); MICH. CONST. art. I, § 6 (amended 1963); MO. CONST. art. I, § 23 (amended 1945); NEB. CONST. art. I, § 1 (amended 1988 to include a right to bear arms); NEV. CONST. art. I, § 11(1) (adopted 1982); N.H. CONST. pt. I, art. 2-a (adopted 1982); N.M. CONST. art. II, § 6 (amended 1971 and 1986); N.C. CONST. art. I, § 30 (amended 1971); N.D. CONST. art. I, § 1 (adopted 1984); UTAH. CONST. art. I, § 6 (amended 1984); VA. CONST. art. I, § 13 (amended1971); W. VA. CONST. art. III, § 22 (adopted 1986); WIS. CONST. art. I, § 25 (adopted 1998); *see also* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 208–17 (2006); *Louisiana Considers 'Right to Keep and Bear Arms' Amendment*, OPPOSING VIEWS, http://www.opposingviews.com/i/society/guns/louisiana-right-keep-and-bear-arms-amendment-now-eligible-consideration-state-house (describing a 2012 amendment to Louisiana's right to bear arms provision that would require courts to review gun control legislation under the "strict scrutiny" standard); *see also infra* Appendix, Table II (showing that in most states in existence by 1900, their right-to-bear-arms provision had undergone several amendments by 1868 or by the end of the 19th century).

148. *See* Larsen, *supra* note 2, at 1289–1290, 1291–92, 1295.

149. *Foreign Materials Debate*, *supra* note 7, at 522–23; *see also* Larsen, *supra* note 2, at 1299–1300 (noting that much of constitutional law depends upon predictions about the likely effect of a rule, which justifies reference to the decisions and experience of other jurisdictions to measure the accuracy of a prediction).

150. *See supra* Part III.A.1.

Appeals surveyed the experience of other states in upholding a statutory limitation on carrying certain "dangerous or deadly weapon[s]."[151] The court compared the West Virginia experience with that of Kentucky,[152] where such weapons were not regulated after *Bliss*. Demonstrating the laboratory effect advocated by the authors herein, the West Virginia Court concluded that the result of Kentucky's constitutional interpretation prohibiting any legislation limiting the right to bear arms was "a prolific harvest of murders, street-fight, and family feuds . . . to the degradation and terror of society, and the abasement of justice and civil order."[153] Modern courts may in a similar fashion look to the consequences of varying interpretations of the right to bear arms and the real-life consequences while assessing the propriety of a particular law under the right to bear arms.

In sum, because of the myriad powerful reasons to take state constitutional precedent seriously with respect to the issue of what level of scrutiny applies to the Second Amendment, we conclude that courts should follow the lead of the overwhelming majority of jurisdictions to have considered the issue and apply the reasonable regulation test. For the implications of adopting this standard, we refer the reader to prior scholarship that has already explored this issue.[154]

B. The Lessons of State Constitutional Provisions and Jurisprudence for Interpreting the Scope of the Terms "Keep and Bear"

Many jurisdictions have discussed the breadth and limitations on the ability of state governments to regulate where and in what manner individuals may "bear" arms. From an empirical perspective, out of the forty-three states with provisions protecting the right to bear arms, twenty of these states have expressly held either through the language of their state's right-to-bear-arms provision, or through case law, that the legislature may ban entirely the carrying of concealed weapons, and two additional states have implicitly held as much.[155] Further, since the 1822 Kentucky

151. 14 S.E. 9, 11–12 (W. Va. 1891).

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

153. *Workman*, 14 S.E. at 11.

154. *See, e.g.*, Winkler, *supra* note 16, at 598–613; Winkler, *supra* note 78**.**, at 688, 715–27 (discussing in depth "what Second Amendment doctrine might look like under [the reasonable regulation] test").

155. COLO. CONST. art. II, § 13 ("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."); IDAHO CONST. art. I, § 11 ("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. . . . "); KY. CONST. Bill of Rights § 1, para. 7 ("All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . [t]he 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."); LA. CONST. art. I, § 11 (amended 2012) ("The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person."); MISS. CONST. art. III, § 12 ("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."); MONT. CONST. art. II, § 12 ("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."); N.M. CONST. art. II, § 6 ("No law shall abridge

decision in *Bliss v. Commonwealth*, the authors have found no state decisions declaring such legislation to be constitutionally banned.[156]

1. *Why the Comparison between the Second Amendment and State Right-to-Bear-Arms Provisions is Apt with respect to the Scope of the Terms "Keep and Bear"*

There are several reasons why courts should find this trend persuasive in interpreting the Second Amendment. First, many state right-to-bear-arms provisions that have been read to permit concealed carry bans share key characteristics with the Second Amendment that make the comparison valid: that the right has been considered fundamental, that it has been read as animated in part by concerns for self defense, and that similar governmental concerns underlie regulations under both state and federal right-to-bear-arms provisions. Turning to the first shared feature, like *Heller*, several of the states that have upheld concealed carry bans also recognize their state constitution's right to bear arms to be a fundamental right.[157] In concluding that this does not prevent regulation of the right, these courts have emphasized that the right to bear arms "is not absolute and may be subject to restriction and

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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."); N.C. CONST. art. I, § 30 ("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."); State v. Reid, 1 Ala. 612, 616–22 (1840) (upholding a ban on carrying concealed weapons under the state constitution); State v. Moerman, 895 P.2d 1018, 1020–21, 1024 (Ariz. Ct. App. 1994) (same); Haile v. State, 38 Ark. 564, 566–67 (1882) (same); State v. Buzzard, 4 Ark. 18, 18–19, 28 (1842) (upholding a ban on concealed weapons under the Second Amendment); Carlton v. State, 58 So. 486, 488 (Fl. 1912) (upholding a ban on carrying concealed weapons under the state constitution); Stockdale v. State, 32 Ga. 225, 226–28 (1861) (same); State v. Hart, 157 P.2d 72, 73 (Idaho 1945) (same); State v. Mitchell, 3 Blackf. 229, 229 (Ind. 1833) (same); State v. Doile, 648 P.2d 262, 263–65 (Kan. Ct. App. 1982); Klein v. Leis, 99 Ohio St. 3d 537, 2003-Ohio-4779, 795 N.E.2d 633, at ¶¶ 3–19 (same); State v. Wann, No. 19866-5-II, 1996 Wash. App. LEXIS 817, at *4–6 (Dec. 30, 1996) (acknowledging that state law requires a permit to carry a concealed weapon and holding that this law did not violate the right to bear arms); City of Seattle v. Parker, 467 P.2d 858, 859, 862 (Wash. Ct. App. 1970) (enforcing a statute that made it a crime to carry a concealed weapon without a license); State v. Workman, 14 S.E. 9, 10–12 (W. Va. 1891) (upholding a conviction for violation of a ban on carrying concealed weapons); State v. Cole, 2003 WI 112, ¶¶ 1–2, 49–50, 264 Wis. 2d 520, 665 N.W.2d 328; King v. Wyo. Div. of Criminal Investigation, 2004 WY 52, ¶¶ 27–28, 89 P.3d 341, 352 (providing that there is no constitutional right to carry a concealed weapon); State v. McAdams, 714 P.2d 1236, 1236, 1237 (Wyo. 1986) (upholding a statute banning the carrying of concealed deadly weapons); *see also* Bay Cty. Concealed Weapons Licensing Bd. v. Gasta, 293 N.W.2d 707, 708 (Mich. Ct. App. 1980) (implicitly approving of regulations regarding concealed weapons by recognizing the authority of the Concealed Weapons Licensing Board based on the reasoning that the existence of this board "reflects the state's legitimate interest in limiting public access to weapons suitable for criminal purposes and confirms the notion that the constitutionally guaranteed right to bear arms is subject to a reasonable exercise of the police power"); Bleiler v. Chief, Dover Police Dep't, 927 A.2d 1216, 1218, 1223 (N.H. 2007) (upholding under the state constitution the decision of a police department to revoke an individual's permit to carry a concealed weapon).

156. *See Bliss*, 12 Ky. (2 Litt.) at 91–93.

157. *See, e.g.*, *Bleiler*, 927 A.2d at 1221; *Klein*, 2003-Ohio-4779, ¶ 7; Arnold v. City of Cleveland, 616 N.E.2d 163, 171 (Ohio 1993); *Cole*, 2003 WI 112, ¶¶ 10–11.

regulation."[158] Because other states have considered this feature carefully and concluded that it does not prevent legislatures from passing concealed carry bans, federal courts should consider this precedent carefully.

Turning to the second shared feature, many states upholding concealed carry bans have read their provisions to be animated by a concern for self defense,[159] just as the U.S. Supreme Court similarly recognized that the Second Amendment was animated by this concern.[160] In determining that this concern did not prevent legislatures from enacting concealed carry bans, courts have reasoned, for example, that it is not necessary to self defense that weapons be carried secretly, and in fact one is able to access his weapon more readily when it is not concealed.[161] Courts have similarly reasoned that these provisions were "intended to give the people the means of protecting themselves against oppression and public outrage, and . . . not designed as a shield for the individual man who is prone to load . . . his pockets with revolvers or dynamite, and make of himself a dangerous nuisance to society."[162] Because of the material similarities between the Second Amendment and provisions that have addressed the concealed carry issue, courts should take notice of these cases in assessing whether concealed carry bans comport with the Second Amendment.

Finally, the governmental concerns animating decisions to uphold concealed carry bans apply with equal force under the Second Amendment.[163] We discussed in Part III.A.1, *supra*, some of the compelling governmental concerns that animate gun control regulations generally, and those observations apply with equal force to concealed carry bans. As an illustration of some of the potential dangers of laws permitting concealed carrying of weapons, the lone shooter who executed the mass shooting involving Congresswoman Gabrielle Giffords was legally carrying a concealed weapon on that tragic day.[164] If his weapon had been exposed, as courts often reason, those in the parking lot may have been put on notice that he was armed more quickly and thus might have been better able to protect themselves and the victims of the shooting. At least twenty-nine other mass shootings in the United States since May 2007 involving concealed weapons have also been identified.[165]

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158. *Bleiler*, 927 A.2d at 1222 (quoting State v. Smith, 571 A.2d 279, 281 (N.H. 1990)); *see also, e.g.*, People v. Blue, 544 P.2d 385, 390–91 (Colo. 1975); Trinen v. City of Denver, 53 P.3d 754, 757 (Colo. App. 2002); People v. Swint, 572 N.W.2d 666, 676 (Mich. Ct. App. 1997); State v. Ricehill, 415 N.W.2d 481, 483 (N.D. 1987); *Arnold*, 616 N.E.2d at 172; Carfield v. State, 649 P.2d 865, 871–72 (Wyo. 1982).

159. *See supra* note 105.

160. *See* District of Columbia v. Heller, 554 U.S. 570, 628 (2008) (noting that "the inherent right to self-defense has been central to the Second Amendment right").

161. State v. Reid, 1 Ala. 612, 621 (1840).

162. Carlton v. State, 58 So. 486, 488 (Fl. 1912); *see also* Haile v. State, 38 Ark. 564, 566 (1882).

163. *See supra* Part III.A.1.

164. *See* Violence Policy Center, *Tucson Attack Most Recent Mass Shooting Involving Legal Concealed Weapons Holder*, YUBANET.COM, (Feb. 11, 2011, 10:11 AM), http://yubanet.com/usa/Tucson-Attack-Most-Recent-Mass-Shooting-Involving-Legal-Concealed-Weapons-Holder.php#.UA8SGqBCY1R.

165. *Concealed Carry Killers*, VIOLENCE POLICY CENTER, http://concealedcarrykillers.org/ (last visited Mar. 8, 2016) (documenting, *inter alia*, all of the mass shootings committed by concealed carry killers).

Courts have considered these and other compelling concerns in upholding concealed carry bans.[166]

Therefore, because state constitutional right-to-bear-arms provisions are materially similar to the Second Amendment with respect to the issue of how governments may regulate the manner of bearing arms, courts should look to this precedent when faced with challenges to concealed carry bans.

2. How the State Cases Interpreting the Scope of the Terms "Keep and Bear" Substantively Inform the Meaning of the Second Amendment

The case law upholding concealed carry bans can provide numerous insights. First, jurists concerned with modern values should find the precedent upholding concealed carry bans persuasive because the strength of the trend, with twenty-three states permitting such bans and no states categorically prohibiting them.[167] This strong trend indicates that contemporary Americans do not consider the ability to carry concealed weapons central to the right to bear arms. This trend should consequently provide significant guidance to jurists who find modern values persuasive in assessing the meaning of a constitutional right. As further evidence that modern Americans support these bans, the authors have not identified any pattern of constitutional amendments or initiatives by state citizens aimed at overturning the case law upholding these bans. Thus, this trend deserves serious consideration.

Additionally, for originalist jurists primarily concerned with the meaning of the text of the Second Amendment, there is no textual basis in the Second Amendment to arrive at a different conclusion from the one adopted by these state courts.[168] The operative words in assessing whether concealed carry bans violate the right to bear arms are what is the scope of the term "bear arms" in the phrase "the right . . . to . . . bear arms."[169] Every single one of the jurisdictions that have upheld concealed carry laws uses the same "bear arms" language in the Second Amendment.[170] And every single one of those jurisdictions that had a right-to-bear-arms provision by the end of the nineteenth century had the "bear arms" language in

166. *See infra* Part III.B.2.

167. For an example of a case considering the intent of modern citizens with respect to the scope of the right to bear arms, see *State v. Cole*, 2003 WI 112, ¶ 44, 264 Wis. 2d 520, 665 N.W.2d 328. The court acknowledged that "indications of the will of the people are valuable" and looked to public opinion polls at the time the right to bear arms provision was enacted, which showed that "almost eighty percent of Wisconsinites opposed legalizing carrying of concealed weapons." *Id.*

168. *Cf.* Digiacinto v. Rector of George Mason Univ., 704 S.E.2d 365, 369 (Va. 2011) (stating that provisions of the Virginia constitution that are substantively similar to those in the United States Constitution should be afforded the same meaning).

169. U.S. CONST. amend II.

170. *See* ALA. CONST. art. I, § 26; ARIZ. CONST. art. II, § 26; ARK. CONST. art. II, § 5; COLO. CONST. art. II, § 13; FLA. CONST. art. I, § 8; GA. CONST. art. I, § I, para. VIII; IDAHO CONST. art. I, § 11; IND. CONST. art. I, § 32; KAN. CONST. Bill of Rights § 4; KY. CONST. Bill of Rights § 1, para. 7; LA. CONST. art. I, § 11; MICH. CONST. art. I, § 6; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; N.H. CONST. pt. I, art. 2-a.; N.M. CONST. art. II, § 6; N.C. CONST. art. I, § 30; OHIO CONST. art. I, § 4; WASH. CONST. art. I, § 24; W. VA. CONST. art. III, § 22; WIS. CONST. art. I, § 25; WYO. CONST. art. I, § 24.

their constitutional provisions at that time as well.[171] Thus, these jurisdictions share a similar textual basis in analyzing whether concealed carry bans pass constitutional muster.

Third, this case law upholding the government's ability to ban concealed weapons also has historical value for originalists. As the Supreme Court in the *Heller* majority opinion acknowledged, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."[172] Indeed, several jurisdictions established that state governments could ban the carrying of concealed weapons as early as the mid-nineteenth century, before or close to the time that the Fourteenth Amendment was adopted.[173] For example, the 1833 Indiana Supreme Court held a state prohibition on carrying concealed weapons constitutional.[174]

Similarly, in 1840 the Tennessee Supreme Court was presented the question of whether a statute which prohibited the wearing of a concealed Bowie knife violated the state right to bear arms.[175] The Tennessee Court first interpreted the terms "to bear arms" to "have reference to their military use, and were not employed to mean wearing them about the person as a part of the dress."[176] Using what might now be called "Scalia originalism," the Tennessee Supreme Court then recognized that the common understanding that the right "to bear arms" was for the "common defense, such that "[protected] *arms* . . . are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment. . . . "'[177] The Court on this basis upheld the ban on carrying these concealed weapons.[178] This pattern suggests a strong, well-established tradition of regulating concealed weapons. Further, because this pattern occurred before the adoption of the Fourteenth

171. *See* ALA. CONST. of 1819, art. I, § 23; ARK. CONST. of 1868, art. I, § 5; COLO. CONST. of 1876, art. II, § 13; FLA. CONST. of 1885, Declaration of Rights § 20; FLA. CONST. of 1868, Declaration of Rights § 22; GA. CONST. of 1877, art. I, § 1, para. XXII; GA. CONST. of 1868, art. I, § 14; IDAHO CONST. art. I, § 11; IND. CONST. art. I, § 32; KAN. CONST. Bill of Rights § 4; KY. CONST. of 1850, art. XIII, § 25; LA. CONST. of 1879, Bill of Rights art. III; MICH. CONST. of 1850, art. XVIII, § 7; MISS. CONST. art. III, § 12; MISS. CONST. of 1868, art. I, § 15; MO. CONST. of 1875, art. II, § 17; MO. CONST. of 1865, art. I, § 8; MONT. CONST. of 1889, art. III, § 13; N.C. CONST. of 1868, art. I, § 24; OHIO CONST. art. I, § 4; WASH. CONST. art. I, § 24; WYO. CONST. art. I, § 24.

172. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

173. *See, e.g.*, KY. CONST. of 1850, art. XIII, § 25 ("That the rights of the citizens to bear arms in defense of themselves and the State shall not be questioned; but the general assembly may pass laws to prevent persons from carrying concealed arms."); State v. Reid, 1 Ala. 612, 616–22 (1840); Haile v. State, 38 Ark. 564, 566–67 (1882); State v. Buzzard, 4 Ark. 18, 28 (1842); Stockdale v. State, 32 Ga. 225, 226–28 (1861); State v. Mitchell, 3 Blackf. 229, 229 (Ind. 1833); State v. Jumel, 3 La. Ann. 399, 399–400 (1858). A few more jurisdictions arrived at this same conclusion by the early twentieth century. *See* Carlton v. State, 58 So. 486, 488 (Fla. 1912); State v. Nieto, 130 N.E. 663, 663–64 (Ohio 1920).

174. *Mitchell*, 3 Blackf. at 229.

175. State v. Aymette, 21 Tenn. (2 Hum.) 154, 155–56 (cited in *Heller*, 554 U.S. at 613–14). Notably, this right has obvious self-contained limitations (i.e. "free white men") which historical evolution of constitutional interpretation has since found unreasonable.

176. *Aymette*, 21 Tenn. (2 Hum.) at 158.

177. *Id.* This is, of course is consistent with the Supreme Court interpretation in *United States v. Miller*, 307 U.S. 174 (1939), as well as with the *Heller* majority's recognition that limitations historically support "prohibiting the carrying of 'dangerous and unusual weapons."' 554 U.S. at 627 (quoting 4 Blackstone 148–49 (1769)).

178. *Aymette*, 21 Tenn. (2 Hum.) at 159, 161–62.

Amendment, this provides some evidence that the framers were aware of these state regulations and did not mean to disturb them in incorporating the Second Amendment against the states.

Also, many of the more modern cases have relied on historical rationales in arriving at their conclusions. Some courts have looked to history for evidence of a tradition of concealed carry bans. For example, in *State v. Moerman*, the Arizona Court of Appeals relied, in part, on the fact that concealed carry bans were in place around the time that the state provision was enacted.[179] Other courts have looked to history for evidence of the intended scope of their state's right-to-bear-arms provision.[180] It then concluded that the state provision was "not intended to afford citizens the means of prosecuting, more successfully, their private broils in a free government."[181] Thus, these state decisions provide helpful insights into how early Americans understood the right to bear arms, and these insights indicate that concealed carry bans comport with the right to bear arms.

Fourth, these rulings reflect thoughtful decision-making, and thus are valuable repositories for reason borrowing. The relative importance of protecting this right in various places and settings is a factor that has undergirded the decision of some courts to uphold concealed carry bans.[182] As the Wisconsin Supreme Court has explained in upholding a concealed carry ban in the context of a weapon carried in a motor vehicle: "there are two places in which a citizen's . . . right to keep and bear arms for purposes of security is at its apex: in the . . . home or in his or her privately-owned business. . . . [T]he individual's . . . right to bear arms . . . will not . . . be particularly strong outside those two locations."[183]

Another concern that has driven several decisions to uphold concealed carry regulations is the governmental interest at issue. Courts have reasoned that the governmental concerns underlying concealed carry bans are compelling. As the Arizona Court of Appeals reasoned, concealed carry bans "protect[] the public by preventing an individual from having on hand a deadly weapon of which the public

179. 895 P.2d 1018, 1022 (Ariz. Ct. App. 1994); *accord* King v. Wyo. Div. of Criminal Investigation, 2004 WY 52, ¶ 27, 89 P.3d 341, 351 (Wyo. 2004) (same); *see also* Klein v. Leis, 99 Ohio St. 3d 537, 2003-Ohio-4779, 795 N.E.2d 633, at ¶ 12 (in upholding a concealed carry ban, relying in part on the fact that had "been part of our legal heritage since 1859" and had not been fundamentally modified since then); State v. Cole, 2003 WI 112, ¶¶ 8, 37, 264 Wis. 2d 520, 665 N.W.2d 328 (observing that "[t]he Wisconsin Legislature first passed a concealed weapons law in 1872" and noting that the legislators at the time of the framing contemplated that gun control legislation would survive the passage of the right to bear arms).

180. *See, e.g.*, State v. Reid, 1 Ala. 612, 615 (1840); Haile v. State, 38 Ark. 564, 566 (1882).

181. *Haile*, 38 Ark. at 566.

182. *E.g.*, *id.* ("The Legislature, by the law in question, has sought to steer between [its interest in promoting peace in society] 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."); *see also* State v. Doile, 648 P.2d 262, 263–65 (Kan. Ct. App. 1982).

183. State v. Fisher, 2006 WI 44, ¶ 27, 90 Wis. 2d 121, 714 N.W.2d 495. For other cases recognizing that the right to bear arms is at its apex in the home and at one's personal business, see *Matthews v. State*, 148 N.E.2d 334, 338 (Ind. 1958), *In re Colby H.*, 766 A.2d 639, 646–50 (Md. 2001), *People v. Buckmire*, 638 N.Y.S.2d 883, 885 (1995), *Arnold v. Cleveland*, 616 N.E.2d 163, 169–70 (Ohio 1993), and *Gilio v. State*, 2001 OK CIV APP 122, ¶ 21, 33 P.3d 937, 941.

is unaware, and which an individual may use in a sudden heat of passion."[184] In a similar vein, some courts have focused on the consequences if concealed carry bans were not permitted.[185]

Finally, from an empirical perspective, at least twenty-nine mass shootings in the United States involving concealed weapons have been identified.[186] This trend indicates that absolutely protecting the right to carry concealed weapons in public can create alarming security risks for the American people. Courts have considered these and other compelling concerns in upholding concealed carry bans.[187] Based on all of the valuable insights that state court decisions on laws banning the carrying of concealed weapons may provide, a careful examination of this trend indicates that concealed carry bans should be deemed to fall well within the scope of permissible regulations under the Second Amendment.

CONCLUSION

Though the methodology debate is decades old, there is still merit in searching for valuable resources that may enhance ability of jurists to better interpret the Federal Constitution. One type of underutilized resource in analyzing the Federal Constitution is state constitutional law. State constitutional decisions provide the legal laboratory for cautious courts to consult for guidance. Simultaneously, these materials should satisfy concerns of comparative constitutional law skeptics that our democratic Constitution should reflect the choices and values of our nation's people. This resource can particularly benefit analysis of the Federal Constitution's Second Amendment because there is such a well-established body of state case law on the right to bear arms, and there are many questions that remain unanswered, questions that implicate the rights, safety, and security of our nation's people.

Further, the Second Amendment context clearly demonstrates the value of considering historical state court analysis of both the federal and state

184. State v. Moerman, 895 P.2d 1018, 1022 (Ariz. Ct. App. 1994) (quoting Dano v. Collins, 802 P.2d 1021, 1023 (Ariz. Ct. App. 1990)); *see also* Bleiler v. Chief, Dover Police Dep't., 927 A.2d 1216, 1218, 1223 (N.H. 2007) (acknowledging "the compelling state interest in protecting the public from the hazards involved with guns" in upholding a municipality's decision to revoke an individual's permit to carry concealed weapons); State v. Cole, 2003 WI 112, ¶ 43, 264 Wis. 2d 520, 665 N.W.2d 328 (relying, in part, on the "danger of widespread presence of weapons in public places" if the legislature could not ban the carrying of concealed weapons (citation omitted)).

185. *See, e.g.*, Haile v. State, 38 Ark. 564, 566 (1882); *see also Bleiler*, 927 A.2d at 1223 (reasoning that regulation of carrying concealed weapons is justified by "the danger of [the] widespread presence of [concealed] weapons in public places and police protection against attack in these places" (quoting *Cole*, 2003 WI 112, ¶ 43)); *Cole*, 2003 WI 112, ¶ 43 (quoting a 1953 Kentucky case for the preposition that under English common law the practice of carrying concealed weapons was banned because "persons becoming suddenly angered and having such a weapon in their pocket, would be likely to use it, which in their sober moments they would not have done, and which could not have been done had the weapon been upon their person" (quoting Williams v. Commonwealth, 261 S.W.2d 807, 807–808 (Ky. 1953)).

186. *More than 800 Deaths at the Hands of Concealed Carry Killers Since 2007, VPC Research Shows*, VIOLENCE POLICY CENTER, http://www.vpc.org/press/more-than-800-deaths-at-the-hands-of-concealed-carry-killers-since-2007-vpc-research-shows/ (last visited Mar. 12, 2016) (documenting, *inter alia*, all of the mass shootings committed by concealed carry killers).

187. *See infra* Part III.B.2.

constitutions.[188] As illustrated above, interpreting state constitutional right-to-bear-arms provisions, like the Second Amendment, may involve textual analysis, historical analysis, and reference to precedent and policy concerns. State jurisprudence on the right to bear arms may contribute to our evolving federal Second Amendment jurisprudence by providing an objective measure of how greatly Americans value this right and the values that most states have sought to primarily forward through the constitutional right to bear arms. They also can inform the consequences of various interpretations. Because of these valuable insights, these resources should prove useful to jurists charged with the task of interpreting the Federal Constitution's Second Amendment.

As a final note, the benefits of consulting state constitutions can extend to areas of constitutional jurisprudence well beyond the Second Amendment context. These resources offer potential utility in informing textual and historical interpretations of both many of the Federal Constitution's Bill of Rights provisions. The inclusion or exclusion of particular rights in state constitutions also can serve as evidence of how greatly contemporary Americans value the right at issue. Further state constitutional interpretations can also inform the likely consequences of a particular construction with respect to any provision that the federal and state constitutions share. Therefore, courts should study state constitutional doctrine for any area of constitutional law in which the parties debate the meaning of the text, the purposes of a provision, the values of the people, and the potential consequences of an interpretation.

188. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 585, 600–603, 611–14 (2008); *id.* at 648–49 (Stevens, J., dissenting).

APPENDIX: SUMMARY TABLES OF STATE CONSTITUTIONS

TABLE I: COMPARISON ON FOUNDING ERA STATE CONSTITUTIONS

States in Existence by 1787	States in Existence by 1803	When Right to Bear Arms Provision Was Enacted & Citation
Connecticut		NONE EXISTED
Delaware		NONE EXISTED
Georgia		NONE EXISTED
	Kentucky	1792 Ky. Const. of 1792, Art. XII, cl. 23.
Maryland		NONE EXISTED
Massachusetts		1780 Mass. Const. Pt. 1, Art. 17.
New Hampshire		NONE EXISTED
New Jersey		NONE EXISTED
New York		NONE EXISTED
North Carolina		1776 N.C. Declaration of Rights § XVII.
	Ohio	1802 Ohio Const. of 1802, Art. VIII, § 20.
Pennsylvania		1790 Pa. Declaration of Rights, cl. XIII.
Rhode Island		NONE EXISTED
South Carolina		NONE EXISTED

States in Existence by 1787	**States in Existence by 1803**	**When Right to Bear Arms Provision Was Enacted & Citation**
	Tennessee	1796 Tenn. Const. of 1796, Art. XI, § 26.
	Vermont	1777 Vt. Const. Ch. I, Art. 16.
Virginia		NONE EXISTED
Total # of States with a Constitution by 1787: 13	Total # of States with a Constitution by 1803: 17	Total # of States with a Right to Bear Arms Provision by 1787: 2 out of 13. Total # of States with a Right to Bear Arms Provision by 1803: 7 out of 17.

TABLE II: ORIGINALIST ANALYSIS–COMPARISON OF STATE CONSTITUTIONAL PROVISIONS ON THE RIGHT TO BEAR ARMS EXISTING IN 1868 (DURING THE PASSAGE OF THE 14TH AMENDMENT) AND BY 1900

States in Existence with Constitution by 1868	**States in Existence with Constitution by 1900**	**Right to Bear Arms Provision (Year Enacted & Citation)**	**Language of the Gun Ownership Provision & Nature of the Right**
Alabama		–Ala. Const. of 1819, Art. I, § 23 ("Every citizen has a right to bear arms in defence of himself and the state.") –Ala. Const. of 1861, Art. I, § 23 (same language as in 1819) –Ala. Const. of 1865, Art. I., § 27 (same language, but added "That" before "every") –Ala. Const. of 1868, Art. I, § 28 (same language as in 1865)	"That every citizen has a right to bear arms in defence of himself and the state." Ala. Const. of 1868, Art. I, § 28.
Arkansas (Relevant constitutions in 1861, 1864, & 1868)		–Ark. Const. of 1861, Art. II. § 21 ("That the free white men and Indians of have the right to keep and bear arms for	"The citizens of this state shall have the right to keep and bear arms, for their common defense." Ark. Const. of 1868, Art. II, § 5.[3]

3. *Id.* at 278.

States in Existence with Constitution by 1868	States in Existence with Constitution by 1900	Right to Bear Arms Provision (Year Enacted & Citation)	Language of the Gun Ownership Provision & Nature of the Right
Arkansas, cont.		their individual or common defence."[1] –Ark. Const. of 1864, Art. II, § 21 ("That the free white men of this state shall have a right to keep and bear arms for their common defence."[2] –Ark. Const. of 1868	
California		NONE EXISTED	
	Colorado	–Colo. Const. of 1876, Art. II, § 13	"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 thereto legallysummoned, shall be called into question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."

1. URIAH M. ROSE, THE CONSTITUTION OF THE STATE OF ARKANSAS 215 (1891).
2. *Id.* at 247.

States in Existence with Constitution by 1868	States in Existence with Constitution by 1900	Right to Bear Arms Provision (Year Enacted & Citation)	Language of the Gun Ownership Provision & Nature of the Right
Connecticut		–Conn. Const. of 1818, Art. I, § 15	"Every citizen has a right to bear arms in defence of himself and the state."
Delaware (Relevant constitutions in 1776, 1792, 1831, and 1897)		NONE EXISTED[4]	
Florida (Relevant constitutions in 1838, 1861, 1865, 1868, & 1885)		–Fla. Const. of 1838, Art. I, § 21 ("That the free white men of this State shall have the right to keep and to bear arms, for their common defense.") –Fla. Const. of 1861, Art. I, § 21 (same) –Fla. Const. of 1865 (provision excluded) –Fla. Const. of 1868, Art I., § 22 (reinstated with egalitarian language)	"The people shall have the right to bear arms in defence of themselves and of the lawful authority of the State." Fl. Const. of 1868, D.O.R., § 22. "The right of the people to bear arms in defense 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." Fla. Const. of 1885, D.O.R. § 20.
Georgia (Relevant constitutions		NONE EXISTED UNTIL 1861	"A well-regulated militia being necessary to the

4. RANDY JAMES HOLLAND, THE DELAWARE STATE CONSTITUTION: A REFERENCE GUIDE 1-19 (2002).

States in Existence with Constitution by 1868	States in Existence with Constitution by 1900	Right to Bear Arms Provision (Year Enacted & Citation)	Language of the Gun Ownership Provision & Nature of the Right
in 1777, 1789, 1798, 1861, 1865, 1868, & 1877) Georgia, cont.		–Ga. Const. of 1861, Art. I, § 6 ("The right of the people to keep and bear arms shall not be infringed.") –Ga. Const. of 1865, Art. I, § 4 ("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.")	security of a free people, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne." Ga. Const. of 1868, Art. I, § 14. Ga. Const. of 1877, Art. I, § 1, Para. XXII (same except excludes the prefatory clause)
	Idaho	–Idaho Const. of 1890, Art. I, § 11.	"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

States in Existence with Constitution by 1868	States in Existence with Constitution by 1900	Right to Bear Arms Provision (Year Enacted & Citation)	Language of the Gun Ownership Provision & Nature of the Right
	Idaho, cont.		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. . . . "
Illinois (Relevant constitutions in 1818, 1848, & 1870)		NONE EXISTED	
Indiana (Relevant constitutions in 1816, 1851)		–Ind. Const. of 1816, Art. I, § 20 ("That the people have a right to bear arms for the defence of themselves. . ." –Ind. Const. of 1851, Art. I, § 32.	"The people shall have a right to bear arms, for the defense of themselves and the State." Ind. Const. of 1851, Art. I, § 32.
Iowa		NONE EXISTED	
Kansas		–Kan. Const. of 1859, Bill of Rights, § 4.	"The people have the right to bear arms for their defense and security. . ."

States in Existence with Constitution by 1868	States in Existence with Constitution by 1900	Right to Bear Arms Provision (Year Enacted & Citation)	Language of the Gun Ownership Provision & Nature of the Right
Kentucky (Relevant constitutions in 1792, 1799, & 1850)		–Ky. Const. of 1792, Art. XII, § 23 ("The rights of the citizens to bear arms in defense of themselves and the State shall not be questioned.") –Ky. Const. of 1799, Art. X, § 23 (same). –Ky. Const. of 1850, Art. XIII, § 25.	"That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned; but the general assembly may pass laws to prevent persons from carrying concealed arms."
Louisiana (Relevant constitutions in 1812, 1845, 1852, 1864, 1868, 1879, & 1898)		NONE EXISTED until 1879 –La. Const. of 1879, B.O.R., Art. III. –La. Const. of 1898, B.O.R. Art. 8. (same language as in 1879)	"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 abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed." La. Const. of 1879, B.O.R., Art. III
Maine		–Me. Const. of 1819, Art. I, § 16.	"Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned."

States in Existence with Constitution by 1868	**States in Existence with Constitution by 1900**	**Right to Bear Arms Provision (Year Enacted & Citation)**	**Language of the Gun Ownership Provision & Nature of the Right**
Maryland (Relevant constitutions in 1776, 1851, 1864, & 1867)		NONE EXISTED	
Massachusetts		–Mass. Const. of 1780, Pt. 1, Art. 17.	"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. . . . "
Michigan		–Mich. Const. of 1850, art. XVIII, § 7.	"Every person has a right to bear arms for the defence of himself and the state."
Minnesota		NONE EXISTED	
Mississippi (Relevant constitutions in 1817, 1832, 1868, & 1890)		–Miss. Const. of 1817, Art. I, § 23 ("Every citizen has a right to bear arms in defence of himself and of the State.") –Miss. Const. of 1832, Art. I, § 23 (same language)	"All persons shall have a right to keep and bear arms for their defence." Miss. Const. of 1868, Art. I, § 15. "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

States in Existence with Constitution by 1868	States in Existence with Constitution by 1900	Right to Bear Arms Provision (Year Enacted & Citation)	Language of the Gun Ownership Provision & Nature of the Right
Mississippi, cont.		–Miss. Const. of 1868, Art. I, § 15. –Miss. Const. of 1890, Art. III, § 12.	legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons." Miss. Const. of 1890, Art. III, § 12.
Missouri (Relevant constitutions in 1820, 1865, & 1875)		–Mo. Const. of 1820, Art. VIII, § 3 ("that [the people's] right to bear arms, in defense of themselves and of the state, cannot be questioned.") –Mo. Const. of 1865, Art. I, § 8. –Mo. Const. of 1875, Art. II, § 17	"[T]hat [the people's] right to bear arms in defence of themselves and of the lawful authority of the State cannot be questioned." Mo. Const. of 1865, Art. I, § 8. "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 into question; but nothing herein contained is intended to justify the practice of wearing concealed weapons." Mo. Const. of 1875, Art. II, § 17.

States in Existence with Constitution by 1868	States in Existence with Constitution by 1900	Right to Bear Arms Provision (Year Enacted & Citation)	Language of the Gun Ownership Provision & Nature of the Right
	Montana	–Mont. Const. of 1889, Art. III, § 13.	"The right of any person to keep or bear arms in defense of his own home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called into question, but nothing herein contained shall be held to permit the carrying of concealed weapons."
Nebraska (Relevant constitutions in 1866, 1871, & 1875)		NONE EXISTED	
Nevada		NONE EXISTED	
New Hampshire (Relevant constitutions in 1776 & 1784)		NONE EXISTED	
New Jersey (Relevant constitutions in 1776, & 1844)		NONE EXISTED	

States in Existence with Constitution by 1868	States in Existence with Constitution by 1900	Right to Bear Arms Provision (Year Enacted & Citation)	Language of the Gun Ownership Provision & Nature of the Right
New York (Relevant constitutions in 1777, 1821, 1846, & 1894)		NONE EXISTED	
North Carolina (Relevant constitutions in 1776 & 1868)		–N.C. Const. of 1776, D.O.R. XVII ("That the people have a right to bear arms, for the defence of the State . . . ") –N.C. Const. of 1868, Art. I, § 24.	"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. . . . " N.C. Const. of 1868, Art. I, § 24.
	North Dakota	NONE EXISTED	
Ohio (Relevant constitutions in 1802 & 1851)		–Ohio Const. of 1851, Art. I, § 4.	"The people have the right to bear arms for their defense and security. . . . "
Oregon		–Or. Const. of 1857, Art. I, § 27.	"The people shall have the right to bear arms for the defence of themselves, and the State. . . . "
Pennsylvania (Relevant constitutions in 1776, 1790, 1838, & 1874)		–Pa. Const. of 1776, Ch. 1, XIII ("That the people have a right bear arms for the defence of themselves	"The right of the citizens to bear arms, in defence of themselves and the State, shall not be questioned." Pa.

States in Existence with Constitution by 1868	States in Existence with Constitution by 1900	Right to Bear Arms Provision (Year Enacted & Citation)	Language of the Gun Ownership Provision & Nature of the Right
Pennsylvania, cont.		and the state. . .") – Pa. Const. of 1790, Art. IX, § XXI ("That the right of the citizens to bear arms, in defence of themselves and the state, shall not be questioned.") –Pa. Const. of 1838, Art. 1, § XXI (same as 1790)	Const. of 1838, Art. I, § XXI Pa. Const. of 1874, Art. I, § 21 (substantially the same as 1838).
Rhode Island		–R.I. Const. of 1842, Aart. I, § 22.	"The right of the people to keep and bear arms shall not be infringed."
South Carolina (Relevant constitutions in 1776, 1778, 1790, 1861, 1865, 1868, & 1895)		NONE EXISTED UNTIL 1868. –S.C. Const. of 1868, Art. I, § 28. –S.C. Const. of 1895, Art. I, § 26.	"The people have a right to keep and bear arms for the common defence. . . . " S.C. Const. of 1868, Art. I, § 28. "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." S.C. Const. of 1895, Art. I, § 26.

States in Existence with Constitution by 1868	States in Existence with Constitution by 1900	Right to Bear Arms Provision (Year Enacted & Citation)	Language of the Gun Ownership Provision & Nature of the Right
	South Dakota	–S.D. Const. of 1889, Art. VI, § 24	"The right of the citizens to bear arms in defense of themselves and the state shall not be denied."
Tennessee (Relevant constitutions in 1796, 1835, & 1870)		–Tenn. Const. of 1796, D.O.R., § 26 ("That the free men of this State have a right to keep and to bear arms for their common defence.") –Tenn. Const. of 1835, Art. I, § XXVI (same language). –Tenn. Const. of 1870, Art I, § 26	"That the free white men of this State have a right to keep and to bear arms for their common defence." Tenn. Const. of 1835, Art. I, § 26. "… But the Legislature shall have power by law to regulate the wearing of arms with a view to prevent crime." Tenn. Const. of 1870, Art I, § 26
Texas (Relevant constitutions in 1827, 1836, 1845, 1866, 1869, & 1876)		NONE EXISTED UNTIL 1845. "Every citizen shall have the right to keep and bear arms, in the lawful defence of himself or the State." Tex. Const. of 1845, Art. I, § 13. –Tex. Const. of 1866, Art. I, §	"Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulations as the Legislature may prescribe." Tex. Const. of 1869, Art. I, § 23. "Every citizen shall have the right to keep and bear arms in the lawful

States in Existence with Constitution by 1868	States in Existence with Constitution by 1900	Right to Bear Arms Provision (Year Enacted & Citation)	Language of the Gun Ownership Provision & Nature of the Right
Texas, cont.		13 (same as 1845). –Tex. Const. of 1836, D.O.R., 14th (same as 1845 except uses "Republic" instead of "State")	defence 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. of 1876, Art I, § 23
	Utah	Utah Const. of 1895, Art. I, § 6.	"The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law."
Vermont (Relevant constitutions in 1777, 1786, & 1793)		–Vt. Const. of 1777, Ch. I, Art. XV. –Vt. Const. of 1786, Ch. I, Art. XVIII (same language as in 1777). –Vt. Const. of 1793, Ch. I, Art. 16th (same language as in 1777).	"That the people have a right to bear arms for the defence of themselves and the State. . . . " Vt. Const. of 1793, Ch. I, Art. 16th.
Virginia (Relevant constitutions in 1776, 1830, 1851, 1864, & 1870)		NONE EXISTED UNTIL 1870. –Va. Const. of 1870, Art. I, § 13.	"That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural,

States in Existence with Constitution by 1868	States in Existence with Constitution by 1900	Right to Bear Arms Provision (Year Enacted & Citation)	Language of the Gun Ownership Provision & Nature of the Right
Virginia, cont.			and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed. . . . "
	Washington	–Wash. Const. of 1889, Art. I, § 24	"The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired. . . . "
West Virginia (Relevant constitutions in 1863 & 1872)		NONE EXISTED	
Wisconsin		NONE EXISTED	
	Wyoming	–Wyo. Const. of 1889, Art. I, § 24.	"The right of citizens to bear arms in defense of themselves and of the State shall not be denied."
Totals:		States with a Provision by 1868: 22 of 37 States with a Provision by 1900: 31 of 45	

TABLE III: MODERNIST ANALYSIS–COMPARISON OF CURRENT CONSTITUTIONS

State	Right to Bear Arms Provision	Amendment Process (see Table IV)	Initiative Power	Election of Judges	Right to Bear Arms Provision Standard of Review
Alabama	Ala. Const. Art. I, § 26	MOST RIGOROUS Art. XVIII, § 284	NO	YES Art. VI, § 152	Reasonable regulation standard. *Hyde v. Birmingham*, 392 So. 2d 1226, 1227 (Ala. Crim. App. 1980)
Alaska	Alaska Const. Art. I, § 19	MOST RIGOROUS Art. 13, § 1	YES Art. 11, §§ 1-3, 6	YES Art. IV, § 5, 6.	Intermediate scrutiny. *Gibson v. State*, 930 P.2d 1300, 1302 (Alaska App. 1997).
Arizona	Ariz. Const. Art. II, § 26	LEAST RIGOROUS Art. 21, § 1	YES Art. 4, Part 1, § 2	YES Art. VI, § 12	Reasonable regulation standard. *City of Tucson v. Rineer*, 971 P.2d 207, 212, 213 (Ariz. Ct. App. 1998) (quoting *Dano v. Collins*, 802 P.2d 1021, 1023 (Ariz. App. 1990)).
Arkansas	Ark. Const. Art. II, § 5.	LEAST RIGOROUS Art. 19, § 22	YES Art. 5, § 1	YES Art. 7, § 29	Implicit reasonable regulation standard. Jones v. State, 862 S.W.2d 273, 275 (Ark. 1993).
California	NO	MOST RIGOROUS Art. XVIII, §§ 1, 4	YES Art. II, § 8	YES Art. 6, § 16	

State	Right to Bear Arms Provision	Amendment Process (see Table IV)	Initiative Power	Election of Judges	Right to Bear Arms Provision Standard of Review
Colorado	Colo. Const. Art. II, § 13.	MOST RIGOROUS Art. XIX, § 2	YES Art. V, § 1	YES Art VI, § 20	Reasonable regulation standard. *Robertson v. City & County of Denver*, 874 P.2d 325 (Colo. 1994); *People v. Blue*, 544 P.2d 385 (Colo. 1975).
Connecticut	Conn. Const. Art. I, § 15.	INTER-MEDIATE Art. XII	NO	NO Art. 5, § 2	Reasonable regulation standard. *Benjamin v. Bailey*, 662 A.2d 1226, 1232 (Conn. 1995).
Delaware	Del. Const. Art. I, § 20.	MOST RIGOROUS Art. 16, § 1, but requires 2/3 voter ratification	NO	NO Art. 4, § 3	Intermediate Scrutiny. *Doe v. Wilmington Housing Authority*, 88 A.3d 654, 666-67 (Del. 2014).
Florida	Fl. Const. Art. I, § 8.	MOST RIGOROUS Art. XI, §§ 1, 5, but requires 60% voter ratification	YES Art. XI, § 3	YES Art. V, § 10	Reasonable regulation standard. *Rinzler v. Carson*, 262 So. 2d 661, 665 (Fl. 1972).
Georgia	Ga. Const. Art. I, § I, ¶ VIII.	MOST RIGOROUS Art. X, § 1, Para. II	NO	YES Art. VI, § 7	Reasonable regulation standard. *Carson v. State*, 247 S.E.2d 68 (Ga. 1978).

State	Right to Bear Arms Provision	Amendment Process (see Table IV)	Initiative Power	Election of Judges	Right to Bear Arms Provision Standard of Review
Hawai'i	Haw. Const. Art. I, § 17.	INTER-MEDIATE Art. XVII, § 3	NO	NO Art. VI, § 3	Reasonable regulation standard. *State v. Mendoza*, 920 P.2d 357 (Haw. 1996).
Idaho	Idaho Const. Art. I, § 11.	MOST RIGOROUS Art. XX, § 1	YES Art. III, § 1	YES Art. V, § 6	Implicit reasonable regulation standard. *State v. Hart*, 157 P.2d 72, 73 (Idaho 1945) (acknowledging that the legislature has the right to regulate the exercise of the right to bear arms and upholding a concealed carry law because such provisions "generally [have been] held to be a reasonable exercise of the police power").
Illinois	Ill. Const. Art. I, § 22.	MOST RIGOROUS Art. XIV, § 1	YES Art. XIV, § 3	YES Art. IV, §§ 10, 12	Unclear. *Compare City of Chicago v. Taylor*, 774 N.E.2d 22 (Ill. App. 2002) (applying rational basis review), *with People v. Montyce H.*, 2011 Ill. App. LEXIS 1184 (Nov. 18,

State	Right to Bear Arms Provision	Amendment Process (see Table IV)	Initiative Power	Election of Judges	Right to Bear Arms Provision Standard of Review
Illinois, cont.					2011) (applying intermediate scrutiny).
Indiana	Ind. Const. Art. I, § 32.	INTER-MEDIATE Art. 16, § 1	NO	YES Art. 7, §§ 10, 11	Reasonable regulation standard. *Matthews v. State*, 148 N.E.2d 334, 338 (Ind. 1958).
Iowa	NO.	INTER-MEDIATE Art. X, § 1	NO	YES Art. 5, § 17	Reasonable regulation standard. *State v. Rupp*, 282 N.W.2d 125, 130 (Iowa 1979) (interpreting the Federal Second Amendment as a right subject to reasonable regulation).
Kansas	Kan. Const. B.O.R. § 4.	MOST RIGOROUS Art. 14, § 1	NO	YES Art. 3, § 5	Implicit reasonable regulation standard. *Junction City v. Mevis*, 601 P.2d 1145, 1151-52 (Kan. 1979).
Kentucky	Ky. Const. B.O.R. § 1, ¶ 7.	MOST RIGOROUS Part II, § 256	NO	YES Part I, § 117	Reasonable regulation standard. *Posey v.Commonwealth*, 185 S.W.3d 170, 179 (Ky. 2006).

State	Right to Bear Arms Provision	Amendment Process (see Table IV)	Initiative Power	Election of Judges	Right to Bear Arms Provision Standard of Review
Louisiana	La. Const. Art. I, § 11	MOST RIGOROUS Art. XIII, § 1	NO	YES Art. V, § 22	Strict scrutiny standard. *State v. Eberhardt*, 145 So.3d 377, 381 (La. 2014).
Maine	Me. Const. Art. I, § 16.	MOST RIGOROUS Art. X, § 4	NO	NO Art. VI, § 4	Reasonable regulation standard. *State v. Brown*, 571 A.2d 816, 817-19 (Me. 1990).
Maryland	Md. D.O.R. Art. 28.	MOST RIGOROUS Art. XIV, § 1	NO	YES Art. IV, Part I, § 3[5]	Does not create an individual right. *Scherr v. Handgun Permit Review Bd.*, 880 A.2d 1137 (Md. App. 2005).
Mass.	Mass. Const. Pt. 1, Art. XVII.	INTER-MEDIATE Art. IV, §§ 4, 5	YES Art. LXXXI, §§ 1-2	NO Art. III, § 1	Does not create an individual right. *Chief of Police v. Moyer*, 453 N.E.2d 461 (Mass. App. 1983).
Michigan	Mich. Const. Art. I, § 6.	MOST RIGOROUS Art. XII, § 1	YES Art. II, § 9	YES Art. VI, § 2	Reasonable regulation standard. *People v. Brown*, 235 N.W. 245 (Mich. 1931); *see also People v Swint*, 572 N.W.2d 666, 675 (Mich. Ct. App. 1997).

5. Maryland State Archives, Constitution of Maryland, http://www.msa.md.gov/msa/mdmanual/43const/html/ const.html (last visited May 17, 2009).

State	Right to Bear Arms Provision	Amendment Process (see Table IV)	Initiative Power	Election of Judges	Right to Bear Arms Provision Standard of Review
Minnesota	NO	LEAST RIGOROUS Art. IX, § 1	NO	YES Art. VI, § 7	Reasonable regulation standard. *In re Application of Atkinson*, 291 N.W.2d 396, 399 (Minn. 1980) (finding that even if the state constitution protects a non-enumerated right to bear arms, that right is subject to reasonable regulations).
Mississippi	Miss. Const. Art. III, § 12.	MOST RIGOROUS Art. XV, § 2	YES Art. XV, § 3	YES Art. VI, § 153	Reasonable regulation standard. *James v. State*, 731 So. 2d 1135, 1137 (Miss. 1999).
Missouri	Mo. Const. Art. I, § 23	LEAST RIGOROUS Art. XII, § 2	YES Art. III, §§ 49-50	YES Art. V, § 25	Strict scrutiny standard. *State v. Merritt*, 467 S.W.3d 808, 810 (Mo. 2015).
Montana	Mont. Const. Art. II § 12.	MOST RIGOROUS Art. XIV, § 8	YES Art. XIV, § 9	YES Art. VII, § 8	Unclear. *James v. Musselshell County*, No. DV-95-74, 1998 Mont. Dist. LEXIS 737, at *3 ("Although citizens of this country may have some right to bear arms, exercise of this right is not without limitation. . . . ").

State	Right to Bear Arms Provision	Amendment Process (see Table IV)	Initiative Power	Election of Judges	Right to Bear Arms Provision Standard of Review
Nebraska	Neb. Const. Art. I, §1 "All persons are by nature free and independent, and have certain inherent and inalienable rights; . . . "	MOST RIGOROUS Art. XVI, § 1	YES Art. III, § 2	YES Art. V, § 21	Reasonable regulation standard. *State v. Comeau*, 448 N.W.2d 595, 598-99 (Neb. 1989).
Nevada	Nev. Const. Art. 1, § 11(1).	INTER-MEDIATE Art. XVI, § 1	YES Art. XIX, § 1	YES Art. VI, § 22	Unclear. *Pohlabel v. State*, 268 P.3d 1264, 1269-72 (Nev. 2012) (upholding a ban on possession of firearms by felons without announcing a level of scrutiny).
New Hampshire	N.H. Const. Pt. I, Art. 2-a.	MOST RIGOROUS Part II, Art. 100, but requires 2/3 voter ratification	NO	NO Part I, Art. 35	Reasonable regulation standard. *Bleiler v. Chief, Dover Police Dep't*, 927 A.2d 1216, 1219-23 (N.H. 2007).
New Jersey	NO	MOST RIGOROUS Art. 9, § 1	NO	NO Art. VI, § 6	Reasonable regulation standard. *State v. Angelo*, 130 A. 458, 459 (N.J. 1925).
New Mexico	N.M. Const. Art. II, § 6.	LEAST RIGOROUS Art. XIX, § 1	NO	YES Art. VI, § 33	Reasonable relationship standard. *State v. Rivera*, 853 P.2d 126, 129 (N.M. Ct. App. 1993).

State	Right to Bear Arms Provision	Amendment Process (see Table IV)	Initiative Power	Election of Judges	Right to Bear Arms Provision Standard of Review
New York	NO	INTER-MEDIATE Art. XIX, § 1	NO	YES Art. VI, § 6, except Court of appeals	
North Carolina	N.C. Const. Art. I, § 30.	MOST RIGOROUS Art. XIII, § 4	NO	YES Art. IV, § 16	Reasonable regulation standard. *State v. Dawson*, 159 S.E.2d 1, 9, 10 (N.C. 1968); *Britt v. State*, 681 S.E.2d 320, 322-23 (N.C. 2009) (finding reasonable regulation test violated); *see also State v. Whitaker*, 201 N.C. App. 190, 689 S.E.2d 395 (2009) (rejecting application of strict scrutiny to this right).
North Dakota	N.D. Const. Art. I, §1.	LEAST RIGOROUS Art. IV, § 16	YES Art. III, § 1	YES Art. VI, § 7	Reasonable regulation standard. *State v. Ricehill*, 415 N.W.2d 481, 483 (N.D. 1987).

State	Right to Bear Arms Provision	Amendment Process (see Table IV)	Initiative Power	Election of Judges	Right to Bear Arms Provision Standard of Review
Ohio	Ohio Const. Art. I, § 4.	MOST RIGOROUS Art. XVI, § 1	YES Art. II, § 1	YES Art. IV, § 6	Reasonable regulation standard. *Arnold v. City of Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993); *Klein v. Leis*, 795 N.E.2d 633, 636-38 (Ohio 2003) (applying the standard even though the right is fundamental); *see also State v. Nieto*, 130 N.E. 663 (Ohio 1920).
Oklahoma	Okla. Const. Art. II, § 26.	LEAST RIGOROUS Art. XXIV, § 1	YES Art. V, § 2	YES Art. VII, § 3	Reasonable regulation standard. *State ex rel. Okla. State Bureau of Investigation v. Warren*, 975 P.2d 900, 902-03 (Okla. 1998).
Oregon	Or. Const. Art. I, § 27	LEAST RIGOROUS Art. XXVII, § 1	YES Art. IV, § 1	YES Art. VII, § 1	Implicit reasonable regulation standard. *State v. Hirsch*, 114 P.3d 1104, 1117-18, 1135 (Or. 2005); *see also State v. Smoot*, 775 P.2d 344, 345 (Or. App. 1989) (upholding a regulation reasoning that the law was "reasonably related to public safety").

State	Right to Bear Arms Provision	Amendment Process (see Table IV)	Initiative Power	Election of Judges	Right to Bear Arms Provision Standard of Review
Pennsylvania	Pa. Const. Art. I, § 21.	INTER-MEDIATE Art. XI, § 1	NO	YES Art. V, § 13	Implicit reasonable regulation standard. *Minich v. County of Jefferson*, 919 A.2d 356, 361 (Pa. Commw. Ct. 2007).
Rhode Island	R.I. Const. Art. I, § 22.	LEAST RIGOROUS Art. XIV, § 1	NO	NO Art. X, §§ 4,5	Reasonable regulation standard. *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004).
South Carolina	S.C. Const., Art. I, § 20.	MOST RIGOROUS Art. XVI, § 1; elected legislature must also ratify	NO	YES Art. V, § 3	Unclear. *State v. Bolin*, 662 S.E.2d 38, 39 n.2 (S.C. 2008).
South Dakota	S.D. Const. Art. VI, § 24.	LEAST RIGOROUS Art. XXIII, §§ 1, 3	YES Art. III, § 1	YES Art. V, § 7	Unclear. (No relevant case law found)
Tennessee	Tenn. Const. Art. I, § 26.	INTER-MEDIATE Art. XI, § 3, but the second voting legislature must approve by 2/3	NO	YES Art. VI, § 3	Implicit reasonable regulation standard. *State v. Callicutt*, 69 Tenn. 714, 716 (1878) (upholding gun control laws because the laws were passed with a view "to prevent crime").
Texas	Tex. Const. Art. I, § 23.	MOST RIGOROUS Art. XVII, § 1	NO	YES Art. V, § 2	Reasonable regulation standard. *Wilson v. State*, 44 S.W.3d 602, 605 (Tex. App. 2001).

State	Right to Bear Arms Provision	Amendment Process (see Table IV)	Initiative Power	Election of Judges	Right to Bear Arms Provision Standard of Review
Utah	Utah Const. Art. I, § 6.	MOST RIGOROUS Art. XXIII, § 1	NO	YES Art. VIII, § 2	Unclear. *State v. Willis*, 100 P.3d 1218, 1222 (Utah 2004) (upholding a ban on possession of firearms by felons without announcing a level of scrutiny); *State v. Vlacil*, 645 P.2d 677, 683 (Utah 1982) (Stewart, J., concurring) ("It is conceded by all that the State has the power under Article I, § 6 of the Utah Constitution to enact reasonable regulations for the control of firearms.").
Vermont	Vt. Const. Ch. I, Art. 16	INTER-MEDIATE Ch. II, § 72, but it must receive 2/3 vote from the senate in the first round	NO	YES Ch. II, § 34	Implicit reasonable regulation standard. *State v. Duranleau*, 260 A.2d 383, 386 (Vt. 1969).
Virginia	Va. Const. Art. I, § 13.	INTER-MEDIATE Art. XII, § 1	NO	YES Art. VI, § 7	Unclear. *Digiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 368-70 (Va. 2011).

State	Right to Bear Arms Provision	Amendment Process (see Table IV)	Initiative Power	Election of Judges	Right to Bear Arms Provision Standard of Review
Washington	Wash. Const. Art. I, § 24.	MOST RIGOROUS Art. XXIII, § 1	YES Art. II, § 1	YES Art. IV, § 3	Reasonable regulation standard. *City of Seattle v. Montana*, 919 P.2d 1218 (Wash. 1996); *see also State v. Gohl*, 90 P. 259 (Wash. 1907).
West Virginia	W. Va. Const. Art. III, § 22.	MOST RIGOROUS Art. XIV, § 2	NO	YES Art. VIII, § 2	Reasonable regulation standard. *Rohrbaugh v. State*, 607 S.E.2d 404, 413-414 (W. Va. 2004); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 146 (W. Va. 1988).
Wisconsin	Wis. Const. Art. I, § 25.	INTER-MEDIATE Art. XII, § 1	NO	YES Art. VII, § 4	Reasonable regulation standard. *State v. Cole*, 665 N.W.2d 328, 337 (Wis. 2003).
Wyoming	Wyo. Const. Art. I, § 24.	MOST RIGOROUS Art. XX	YES Art. III, § 52	YES Art. V, § 4	Reasonable regulation standard. *Carfield v. State*, 649 P.2d 865, 871-72 (Wyo. 1982).
Totals:	States with Right to Bear Arms Provisions: 45 of 50 States with Individual Right to Bear Arms: 43 of 50	States with: Most Rigorous Process: 28 Intermediate Process: 12 Least Rigorous Process: 10	States with Initiative Powers: 22 of 50	States with Judicial Elections: 42 of 50	States applying Reasonable Regulation Standard: 34 Intermediate Scrutiny: 1 Allowing Any Regulation: 4 Unclear: 8

TABLE IV: AMENDMENT PROCESSES

Process Type	Description
LEAST RIGOROUS STRUCTURE: Majority Vote & Majority Ratification	(1) A majority of the legislature (both houses if there are two) must approve the proposed amendment; and (2) a majority of the voters must then ratify the proposed amendment in the next election
INTERMEDIATE STRUCTURE: 3 Majority Votes	(1) A majority of the legislature (both houses if there are two) must approve the proposed amendment; (2) the proposed amendment must then be re-approved by the next-elected legislature; and (3) a majority of the voters must then ratify it in the next election
MOST RIGOROUS STRUCTURE: Supermajority Vote & Majority Ratification	(1) Either 2/3, 3/5, or 3/4 of the legislature (both houses if there are two) must approve the proposed amendment; and (2) a majority of the voters must then ratify the proposed amendment in the next election