WHAT STATE CONSTITUTIONS TEACH ABOUT THE SECOND AMENDMENT

by David B. Kopel[*]

I. INTRODUCTION

It is well-settled that state constitutions can serve as an aid to interpreting the federal Bill of Rights.[1] Regarding the Second Amendment, state constitutions are especially helpful. First, right to arms provisions are contained in forty-four state constitutions.[2] Few parts of the Bill of Rights have as many state analogues as does the Second Amendment.[3] Second, the state language has been written or amended from 1776 until the present,[4] so we can see how arms rights have or have not changed in a wide variety of American linguistic communities. Third, state arms guarantees have been created or amended by special conventions, by state legislatures, and by initiative and referenda. Thus, we can see how arms rights language is created by both elite and non-elite types of lawmakers.

A great deal of ink has been spilled trying to discern the intent of the authors of the Second Amendment. If we simply look at how the same words in the Second Amendment have been used in state constitutions, we find that these words have had a stable, consistent meaning throughout American history. From 1776 until the present, the words have guaranteed a right of individuals to own

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[1] *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 966 (1991) (using state constitutions as aid in interpreting cruel and unusual punishment); Benton v. Maryland, 395 U.S. 784, 795-96 (1969) (using state constitutions to interpret guarantee against double jeopardy).

[2] Those states who have provided a right to arms guarantee are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. The states that have not included an arms right provision in their state constitutions are: California, Iowa, Maryland, Minnesota, New Jersey and New York. All past and present state constitution arms rights guarantees may be found at Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions,at* http://www.law.ucla.edu/faculty/volokh/beararms/statecon.htm (last visited Feb. 20, 2002).

[3] For example, the rights of free exercise of religion and of freedom from religious discrimination are protected by only 34 state constitutions. *See* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES App. 4A-12 (1993).

[4] *See* Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions, at* http://www.law.ucla.edu/faculty/volokh/beararms/statecon.htm (last visited Feb. 20, 2002).

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and carry guns.

At least regarding gun rights, modern Americans speak the same language as the founders. Since 1963, the people of Alaska, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Louisiana, Maine, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Utah, Virginia, West Virginia, and Wisconsin have chosen, either through their legislature or through a direct vote, to add a right to arms to their state constitution, to re-adopt the right to arms, or to strengthen an existing right. In every state where the people have had the opportunity to vote directly, they have voted for the right to arms by overwhelming margins.

In this article, I examine each of the state constitutions that contain an arms rights guarantee. For each state, I detail how the state arms right has been interpreted and what implications about the Second Amendment may be drawn from the language of the state provision.

Throughout the analysis, several key questions recur:

- When the Second Amendment was written and adopted, was the language chosen already familiar as guaranteeing and individual's right to keep and bear arms, or was the language familiar as protecting the power of states over their own militias?

- Is the phrase "bear arms" a term of art referring exclusively to bearing arms while in militia service, or is the phrase used in its more ordinary sense to encompass bearing arms for a variety of purposes, such as personal or family defense or sporting purposes?

- When states adopted the Second Amendment verbatim in their own state constitutions, what did this particular language do?

- What is the effect when concerns about standing armies are expressed contemporaneously or even in the same sentence as arms rights language?

- What is the implication when states create explicit exceptions to the right to arms, such as excepting the concealed carrying of weapons, or excepting large assemblies of armed men, or reserving the power to create certain types of gun laws?

II. STATE CONSTITUTIONS CONTEMPORANEOUS WITH THE SECOND AMENDMENT

The Second Amendment to the United States Constitution was written in 1789 and sent by Congress to the States for ratification.[5] Ratification was

[5] *See U.S. Constitution: Amendments*, *at* http://caselaw.lp.findlaw.com/data/constitution/

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achieved in 1791.[6] Four state constitutions from the very early Republic--Pennsylvania, Vermont, North Carolina and Kentucky--provide important evidence about the meaning of the right to arms in the period surrounding the adoption of the Second Amendment.

Pennsylvania: The present-day Pennsylvania Constitution, using language adopted in 1790, declares: "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned."[7]

Pennsylvania's first constitution, adopted in 1776, stated in its Declaration of Rights: "That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination, to, and governed by, the civil power."[8]

It is sometimes claimed that the phrase "bear arms" in the Second Amendment is a term of art referring only to bearing arms while serving in a militia.[9] Both in 1790 and 1776, the drafters in Pennsylvania used the language "bear arms in the [or 'for'] defence of themselves and the state."[10] This language has always been interpreted by Pennsylvania courts to protect the right of all Pennsylvanians, not just militiamen, to possess firearms.[11] The Pennsylvania language suggests that "bear arms" is *not* a term of art which means only militia usage and nothing else.

A recent opinion by Justice Ruth Bader Ginsburg suggests that "bear arms" continues to encompass carrying guns for diverse purposes.[12] Analyzing the statutory phrase "carries a firearm," she wrote:

> Surely a most familiar meaning is, as the Constitution's Second Amendment ("keep and bear Arms") and Black's Law Dictionary indicate, "wear, bear, or carry...upon the person or in the clothing or in a pocket, for the purpose...of being armed and ready for offensive or defense action in case of a conflict with another person."[13]

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amendments/html (last visited Feb. 21, 2002).

[6] *See id.*

[7] PA. CONST. art. 1, § 21.

[8] PA. CONST. of 1776, Declaration of Rights, cl. XIII.

[9] *See, e.g.*, David Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 MICH. L. REV. 588, 589 (2000).

[10] PA. CONST. of 1776, Declaration of Rights, cl. XIII; PA. CONST. art. 1, § 21.

[11] *See, e.g.*, Ortiz v. Commonwealth, 681 A.2d 152 (Pa. 1996) (declaring that the individual right to possess firearms was a matter of statewide concern; therefore, the legislature's preemption of local "assault weapon" ban was proper); Wright v. Commonwealth, 77 Pa. 470 (1875) (holding an act prohibiting carrying concealed weapons is consistent with the Pennsylvania Bill of Rights, which protects the right of citizens to bear arms in defense of themselves and the state).

[12] Muscarello v. U.S., 524 U.S. 125, 150 (1998) (Ginsburg, J., dissenting).

[13] *Id.*

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Vermont: Adopted in 1777, the Vermont Constitution closely tracks the Pennsylvania Constitution.[14] It states "That the people have a right to bear arms for the defence of themselves and the State -- and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power."[15]

Vermont, like Pennsylvania, contributed part of this language to the federal Second Amendment, evincing the state's interpretation that recognition of the people's right to bear arms was a recognition of an individual right. Vermont courts have been especially strict in protecting individual arms rights when interpreting the state constitution. For example, an 1892 decision declared that the government could not require licenses for the carrying of concealed weapons.[16]

One of the most important elements of Vermont's right to arms language is the juxtaposition of a right to bear arms with a denunciation of standing armies. The fact that Vermont=s right to bear arms has been interpreted as individual shows that concern about standing armies does not negate the guarantee of a fundamental personal right to arms.

North Carolina: Like Pennsylvania, North Carolina adopted an arms right in 1776.[17] The North Carolina Bill of Rights reads in part, "[t]hat the people have a right to bear arms, for the defence of the State; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power."[18]

The 1776 adoption of the phrase "the people have a right to bear arms" precedes James Madison's derivative use of a substantially similar phrase when he wrote the Second Amendment in 1789.[19] The 1776 North Carolina Constitution declares the right is "for the defence of the State," but delineates no other purpose.[20] This "right to bear arms" language is included *in the same sentence* as denunciations of and restrictions on standing armies. This language would be expected to lend strong support to arguments that the Second Amendment was intended exclusively to promote state militias so as to reduce the power of the federal standing army[21] and that the only purpose of the Second Amendment is collective defense, not individual arms possession for personal defense.[22]

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[14] *See* Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions, at* http://www.law.ucla.edu/faculty/volokh/beararms/statecon.htm (last visited Feb. 20, 2002).

[15] VT. CONST. ch. I, art. 16.

[16] State v. Rosenthal, 55 A. 610 (Vt. 1903).

[17] *See* Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions, at* http://www.law.ucla.edu/faculty/volokh/beararms/statecon.htm (last visited Feb. 20, 2002).

[18] N.C. CONST. of 1776, Bill of Rights, § XVII.

[19] 1 ANNALS OF CONG. 460 (Joseph Gales ed., 1789).

[20] N.C. CONST. of 1776, Bill of Rights, § XVII.

[21] Garry Wills, *Why We Have No Right to Keep and Bear Arms,* N.Y. REV. BOOKS, Sept. 21, 1995, at 62.

[22] *See, e.g.,* Love v. Pepersack, 47 F.3d 120,124 (4th Cir. 1995); Hickman v. Block, 81 F.3d 98, 101 (9th Cir. 1996); U.S. v. Wann, 530 F.2d 103, 106 (6th Cir. 1976); Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999) (all concluding the Second Amendment does not protect an individual right to bear arms).

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However, the North Carolina Constitution has always been, without dissent, construed to guarantee a right of ordinary citizens to carry weapons for personal protection.[23] The language of the state constitution, unlike the Second Amendment, explicitly denounces and controls standing armies and specifies only one purpose for the right to bear arms: "the defence of the state."[24] *A fortiori*, the 1776 North Carolina Constitution would protect, at most, people in active militia service, but in 1843, the North Carolina Supreme Court explained that "[f]or any lawful purpose – either of business or amusement – the citizen is at perfect liberty to carry his gun."[25]

In 1868, after the Civil War, North Carolina recreated its state constitution, adopting language which directly copied the federal Second Amendment.[26] The same constitutional clause also denounced standing armies: "A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power."[27]

Again, if the federal Second Amendment is only about controlling standing armies, then the 1868 North Carolina arms right should, *a fortiori*, only be about controlling standing armies, since standing army language appears in the very same sentence as the arms right. Yet the North Carolina provision has always been construed as protecting an individual right.[28]

The individual nature of the 1868 North Carolina guarantee, mimicking the Second Amendment, was underscored by an 1875 amendment: "Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice."[29] If the North Carolina arms right were only about controlling standing armies, or only about affirming the state militia, it would make no sense for North Carolina to carve out an exception in order to allow the legislature to ban or restrict the carrying of concealed weapons. The concealed weapons control is aimed at individuals, not at active militiamen, who can simply be ordered to carry their guns in the manner their commanding officers require. Again, the North Carolina constitution has always been interpreted to protect an individual right to arms.[30]

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[23] *See* State v. Kerner, 107 S.E. 222 (N.C. 1921) (upholding constitutional right to possess ordinary rifles, shotguns and handguns).

[24] N.C. CONST. of 1776, Bill of Rights, § XVII.

[25] State v. Huntley, 25 N.C. 418, 422 (1843). *See also* State v. Newsom, 27 N.C. (5 Ired.) 250, 251 (1844) (upholding gun licensing law for free people of color only because they, unlike citizens, were not parties to the social compact); State v. Kerner, 107 S.E. 222 (N.C. 1921) (upholding constitutional right to possess ordinary rifles, shotguns, and handguns).

[26] *See* Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions, at* http://www.law.ucla.edu/faculty/volokh/beararms/statecon.htm (last visited Feb. 20, 2002).

[27] N.C. CONST. of 1868, art. I, § 24.

[28] *See, e.g.*, State v. Kerner, 107 S.E. 222 (N.C. 1921) (pistol carrying license and bond requirement is unconstitutional); State v. Dawson, 159 S.E.3d 1, 9 (N.C. 1968) (stating the right is both individual and collective and is not infringed by punishment of persons who bear arms so as to deliberately disturb the peace).

[29] In 1971, the North Carolina Constitution was reorganized, and the words "General Assembly" replaced "legislature" in the clause about controlling concealed weapons. Art. 1, § 30 (1971).

[30] *See, e.g.*, Kerner, 107 S.E. 222 (N.C. 1921); *see also* State v. Dawson, 159 S.E.2d 1, 9 (N.C.

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Therefore, from the North Carolina Constitution, we see:

- Concerns about standing armies do not negate the individual nature of the arms right.
- A reference to "the defence of the state" does not negate the individual nature of the arms right.
- The creation of an exception to allow restrictions on concealed carry underscores the nature of the arms right.
- The exact wording of the Second Amendment is interpreted as recognizing an individual right in North Carolina state courts.

These themes will be continually supported by examination of other state constitutions.

Kentucky: The 1792 Kentucky constitution was nearly contemporaneous with the Second Amendment, which was ratified in 1791.[31] Kentucky declared: "That the right of the citizens to bear arms in defence of themselves and the State, shall not be questioned."[32]

The year after the Second Amendment became the law of the land, Kentucky's constitutional drafters used the phrase "bear arms" to include bearing arms for personal and collective defense: "in defence of themselves *and* the state."[33] This language suggests that "bear arms" was not commonly understood as encompassing only militia service.

In 1822, a Kentucky Supreme Court decision declared a law against carrying concealed weapons invalid.[34] This led to an 1850 revision in the Kentucky Constitution to allow restrictions on concealed carry.[35] This was also the basis for the restrictions on concealed carry written into many state constitutions. The final form of the Kentucky arms right was enacted in 1891:

> All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:
>
> > First: The right of enjoying and defending their lives and liberties. . . .
> > Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.[36]

1968); State v. Fennell, 382 S.E.2d 231, 233 (N.C. 1989).

[31] *See U.S. Constitution: Amendments, at* http://caselaw.lp.findlaw.com/data/constitution/amendments.html (last visited Feb. 21, 2002).

[32] KY. CONST. of 1792, art. XII, § 23.

[33] *Id.* (emphasis added).

[34] *See* Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92 (1822).

[35] KY. CONST. of 1850, art. XIII, § 25.

[36] KY. CONST. Bill of Rights § 1.

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III. IS THE SECOND AMENDMENT MAINLY ABOUT FEDERALISM?

Having examined some very early states' right to arms guarantees, let us now jump ahead to 1959 and to the last states that joined the Union.[37]

Alaska and Hawaii: Both Alaska and Hawaii copied the Second Amendment verbatim into their state constitutions.[38] The arms right provision in both states reads: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."[39]

It is sometimes argued that the Second Amendment right belongs only to state militias, to protect them from disarmament by the federal government.[40] The guarantees made by the Alaska and Hawaii Constitutions contradict this argument. If the argument were true, then it would be preposterous for the people of Alaska and Hawaii to place in their constitution language which is *identical* to the Second Amendment. Because of the Supremacy Clause in the United States Constitution,[41] nothing in the Alaska or Hawaii Constitutions could prevent the federal government from disarming a state militia. The obvious reason that the people of Alaska and Hawaii placed the exact language of the Second Amendment in their state constitutions was to keep the state governments from disarming the people of their respective state. The people of Alaska and Hawaii chose these precise words because they understood those words as used in the United States Constitution to prevent the United States government from disarming the people of the United States.

In 1994, the people of Alaska added additional protection to their arms right by specifically labeling the right "individual," by specifically prohibiting local governments from restricting the right, and by changing "infringed" to "denied or infringed."[42] The people of Alaska may have been acting with a great abundance of caution, since the 1994 addition merely restated what was already in the 1959 Constitution: that the arms right limited the power of local government as well as state government,[43] that the right was individual, and that

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[37] *Order in Which States Joined the Union, at* http://www.brittanica.com/eb/article?eu=121257 &tocid=214534 (last visited Feb. 20, 2002).

[38] Both states made slight alterations in punctuation and capitalization to conform to modern usage.

[39] ALASKA CONST. of 1959, art. I, § 19; HAW. CONST. art. I, § 17.

[40] Yassky, *supra* note 9, at 609-10.

[41] U.S. CONST. art. VI, § 2. This section provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be mad, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

[42] ALASKA CONST. art. I, § 19. "The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State." *Id.*

[43] A local government is the creature of a state government, therefore, it cannot perform an act

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the right could not be "denied."[44]

Hawaii simply interprets its state constitutional right to arms[45] and gets the same result. Hawaiians have an individual right to arms, which may not be denied by the state or by local governments.[46] Of course, Hawaii has extensive gun controls, while Alaska has very few.[47] The issue for this article, however, is not whether any particular gun control is constitutional, but simply whether the text of state constitutions suggests that the federal Second Amendment protects a meaningful individual right.

South Carolina: Like North Carolina, Alaska, and Hawaii, the state of South Carolina adopted the Second Amendment verbatim.[48] South Carolina also copied North Carolina's language denouncing standing armies: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it."[49]

In South Carolina, the state constitutional right to arms, with the exact same language as the Second Amendment, is read just as it is in Alaska, Hawaii, and North Carolina: as guaranteeing a right of individuals to bear arms. If Second Amendment language were about state's rights, rather than about individual rights, then surely one would expect the state's rights interpretation to prevail in South Carolina, the state which affirmed state's rights by seceding and thereby starting the Civil War--providing the South Carolina militia with an opportunity to assert its independence from federal control. Yet even in South Carolina, the precise language of the Second Amendment is recognized as guaranteeing individual rights, not militia independence.

IV. STABILITY ACROSS TIME AND PLACE

Having examined constitutions from very old states to the newest states, let us now look at the constitutions of the rest of the states. We will proceed mostly, in alphabetical order, although some states will be combined where profitable. We will find great diversity of geography and time, and will we find consistent support for the themes established in Parts I and II.

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which the state government cannot.

[44] ALASKA CONST. art I, § 19.

[45] The same as Alaska's 1959 language, without the 1994 Alaska addition.

[46] State v. Mendoza, 920 P.2d 357, 363 n. 9 (Haw. 1996) (The court did not decide the question of what type of right the arms guarantee was, but noted that interpreting the arms right as both collective and individual, subject to state police power, would be consistent with the majority of other state constitutions); Morgan v. State, 943 P.2d 1208 (Alaska Ct. App. 1997) (holding right is not violated by prohibition on gun possession by citizens on probation).

[47] *See generally* ALASKA STAT. § 18.65.700-790 (Michie 2000), HAW. REV. STAT. § 134-51 (1993)

[48] *See* State v. Mendoza, 920 P.2d 357, 360 (Haw. 1996).

[49] S.C. CONST. art. 1, § 20. (The South Carolina language makes some minor punctuation changes to the Second Amendment and to the North Carolina constitution).

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Alabama: The Alabama Constitution, adopted in 1819, guarantees "[t]hat every citizen has a right to bear arms in defense of himself and the state"[50]

Alabama's guarantee refers to community protection (such as might be provided in militia service) with the phrase "bear arms in defense of the state."[51] Alabama also refers to personal protection: "bear arms in defense of himself."[52] Thus, one can bear arms "in defense...of the state" *or* "in defense of himself." Bearing arms can include community protection or personal protection.[53]

Arizona and Washington: These states were among the last to be admitted to the Union.[54] Their right to arms language is identical: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men."[55]

The Washington and Arizona Constitutions make explicit a principle which has been considered implicit in the Second Amendment: protection of an individual right "to bear arms" does not forbid the government from controlling large assemblies of armed men.[56] Just a few years before the Washington Constitution was adopted, the U.S. Supreme Court upheld a state ban on armed parades in public, even as the Court plainly treated the Second Amendment as an individual right protected against federal infringement.[57]

Arkansas: "The citizens of this State shall have the right to keep and bear arms for their common defense.[58] As in many states, Arkansas's state constitution is narrower than the Second Amendment, because it guarantees the right only "for

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[50] ALA. CONST. art. I, § 26 ("defence" changed to "defense" in 1901).

[51] *Id.*

[52] *Id.*

[53] *See* Owen v. State, 31 Ala. 387 (1858) (recognizing that restriction on individual concealed carrying of weapons raises a constitutional issue, but finding restriction to be constitutional); State v. Reid, 1 Ala. 12 (1840) (declaring legislature has broad discretion in determining how arms may be borne; yet "A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional").

[54] *See Order in Which States Joined the Union, at* http://www.brittanica.com/eb/article?eu=121257&tocid=214534 (last visited Feb. 20, 2002).

[55] WASH. CONST. art. I, § 24; ARIZ. CONST. art. II, § 26. (The Arizona version does not have commas around "or the state" and capitalizes "State"). For application, see City of Tucson v. Rineer, 971 P.2d 207 (Ariz. Ct. App. 1998) (holding city's restrictions on weapons in parks do not violate the right); City of Renton, 668 P.2d 596 (Wash. Ct. App. 1983) (upholding restriction on possession of arms in places where alcohol is served).

[56] *See* Presser v. Illinois, 116 U.S. 252 (1886).

[57] Presser v. Illinois, 116 U.S. 252, 264-66 (1886). For analysis of *Presser*, see David B. Kopel, Cynthia Leonardatos and Stephen P. Halbrook, *Miller versus Texas: Police Violence, Race Relations, Capital Punishment, and Gun-toting in Texas in the Nineteenth Century—and Today*, 9 J. L. & POL. 737, 758-61 (2001); Stephen. Halbrook, *The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. 943 (1999).

[58] ARK. CONST. art. II, § 5 (modifying 1836 version by extending the right to citizens, rather than only whites).

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their common defense."

An 1842 case interpreted the state constitution narrowly, holding that it protected only the kind of people who might serve the militia, i.e. free males, and only the kind of weapons suitable for militia use.[59] A concurring opinion stated that "[T]he provision of the Federal Constitution [and of the state Constitution] . . . is but an assertion of that general right of sovereignty belonging to independent nations, to regulate their military force."[60]

This concurrence was never followed in Arkansas, and does not appear to have been cited in any court for the remainder of the nineteenth century. Subsequent Arkansas case law has interpreted the state constitution to guarantee all law-abiding Arkansans the right to own firearms.[61] Arkansas courts apply the "common defense" language so that the right only includes the *type* of arms that might be useful for militia service.[62] For example, in *Fife v. State*,[63] an 1876 decision, the Arkansas Supreme Court held that large military-sized pistols are within the scope of the arms right, but small concealable handguns are not.[64]

Thus, the Arkansas courts effectuate every word of the state constitution: the right belongs to every "citizen" but the right includes only ownership of the type of firearms useable for the "common defense." The *Fife* case is one of many state cases whose precedent was followed in *United States v. Miller*,[65] which allowed for a Second Amendment claim on behalf of two individual citizens (Jack Miller and Frank Layton, who were not in any militia), while holding that the Second Amendment does not extend to firearms which are unsuitable for militia use.[66]

Colorado: "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons[67]

Again, the phrase "keep and bear arms" is used for more than militia use. The Colorado Constitution shows that a person may "keep and bear arms in defense of his home, person, or property."[68] The Colorado provision includes the concealed carry exception.[69] The right is unquestionably individual.[70]

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[59] State v. Buzzard, 4 Ark. 18, 27 (1842).
[60] *Id.* at 32 (Dickinson, J., concurring).
[61] Fife v. State, 31 Ark. 455, 460-461 (1876); *see also* Wilson v. State, 33 Ark. 557 (1878).
[62] *See id.*
[63] 31 Ark. 455 (1876).
[64] *Id.* at 460-61; *see also* Wilson v. State, 33 Ark. 557 (1878) (holding a statute making it a misdemeanor to carry a pistol except on a person's own property or when traveling was an unwarranted restriction on right to bear arms).
[65] 307 U.S. 174 (1939).
[66] *Id.* at 178. For more on *Miller*, see David B. Kopel, *The Supreme Court's Thirty-five* Other *Second Amendment Cases*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999).
[67] COLO. CONST. art. II, § 13.
[68] *Id.*
[69] *Id.*
[70] *See, e.g.,* Douglass v. Kelton, 610 P.2d 1067 (Colo. 1980) (noting that individual right does not include concealed carry); Hilberg v. F.W. Woolworth Co., 761 P.2d 236 (Colo. Ct. App. 1988) (ruling against civil liability for firearms retailer, noting "The right to bear arms is guaranteed by

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Connecticut: "Every citizen has a right to bear arms in defense of himself and the state."[71] Connecticut too uses "bear arms" to encompass personal defense.[72]

Delaware: "A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use."[73] As Delaware shows, "bear arms" can include "hunting and recreational use" as well as defense of "self, family, home and State."[74]

Florida: As enacted in 1968, Florida's provision states: "(a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law."[75] Earlier versions were:

> 1838: "That the free white men of this State shall have a right to keep and to bear arms for their common defence."[76]
> 1868: "The people shall have the right to bear arms in defence of themselves and of the lawful authority of the State."[77]
> 1885: "The right of the people to bear arms in defence of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne."[78]

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the Constitution of the United States and the Colorado Constitution, subject to the valid exercise of police power"); City of Lakewood v. Pillow, 501 P.2d 744 (Colo. 1972) (restrictions on firearms sale, possession, and carrying were too broad); People v. Nakamura, 62 P.2d 246 (Colo. 1936) (prohibition of firearm possession by lawful aliens is unconstitutional).

[71] CONN. CONST. art. I, § 15.

[72] *See, e.g.*, State v. Wilchinski, 700 A.2d 1 (Conn. 1997) (adopting a narrow construction of home gun storage law, so as to avoid constitutional issue); Benjamin v. Bailey, 662 A.2d 1226 (Conn. 1995) (declaring state constitution guarantees right to possess arms for personal defense, but right is not violated by ban on "assault weapons").

[73] DEL. CONST. art. I, § 20.

[74] *Id.*

[75] FLA. CONST. art. I, § 8. Sections (b)-(d) were adopted in 1990. These sections provide:

> (b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, "purchase" means the transfer of money or other valuable consideration to the retailer, and "handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.
> (c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.
> (d) This restriction shall not apply to a trade in of another handgun.

Id.

[76] FLA. CONST. of 1838, art. I, § 21.

[77] FLA. CONST. of 1868, art. I, § 22.

[78] FLA. CONST. of 1885, art. I, § 20.

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The people of Florida have repeatedly used "right of the people to keep and bear arms" to protect the right of every individual citizen of Florida to possess a firearm.[79] If the Second Amendment does nothing more than protect state militias from federal interference, it is impossible to explain why language based on the Second Amendment appears again and again in state constitutional language throughout the nineteenth and twentieth centuries.

Georgia: "The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne."[80]

Again, language nearly identical to the Second Amendment is used to guarantee a right of individuals.[81] Before Georgia had its own right to arms guarantee, the Georgia Supreme Court used the Second Amendment to declare a state handgun ban illegal.[82] The Georgia Court explained that the Second Amendment protects:

> The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of free State.[83]

The *Nunn* decision was consistent with *every* nineteenth century Supreme Court case, *every* state court case[84] and *every* legal treatise that discussed the Second Amendment. Throughout the nineteenth century, it was undisputed that the Second Amendment guaranteed an individual right of every citizen to own and carry firearms.[85]

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[79] Decisions affirming the individual right, while upholding particular controls, include: Rinzler v. Carson, 262 So.2d 661 (Fla. 1972) (prohibiting machine guns); Nelson v. State, 195 So.2d 853 (Fla. 1967) (Banning possession of certain weapons by convicted felons); Davis v. State, 146 So.2d 892 (Fla. 1962) (requiring a license to carry certain weapons); Carlton v. State, 58 So. 480 (1912) (restricting concealed carry).

[80] GA. CONST. art. I, § 1, cl. VIII. *Cf.* Hill v. State, 53 Ga. 472 (1874) (interpreting 1868 state constitutional language as an individual right, but the legislature may ban the bearing of arms in courthouses).

[81] *See* Rhodes v. R.G. Industries, Inc. 325 S.E.2d 465 (Ga. Ct. App. 1984) (dismissing strict liability action against handgun manufacturers because the Second Amendment guarantees the right of people to keep and bear arms, as does the Georgia Constitution).

[82] Nunn v. State, 1 Ga. 243, 251 (1846)

[83] *Id.*; *see also* AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 154-56 (1998)(explaining *Nunn* as part of a group of antebellum decisions applying the Bill of Rights to the states). Chief Justice Joseph Henry Lumpkin, author of the *Nunn* opinion, is recognized as one of the leading State Supreme Court judges of the nineteenth century. For more information on his career see Judge Lumpkin In Memoriam, 36 Ga. 19 (1867); 6 DICTIONARY OF AMERICAN BIOGRAPHY 502 (Dumas Malone ed. 1933); THE STORY OF GEORGIA 243 (Am. Historical Soc'y 1938).

[84] Except for the lone concurring opinion from State v. Buzzard, 4 Ark. 18 (1842).

[85] *See* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV.

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Idaho: "The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony."[86]

Once more, language which tracks the Second Amendment is used to protect an individual right.[87]

Illinois: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."[88]

This is another modern usage of language from the Second Amendment to protect the rights of individual citizens, and another usage of "bear arms" outside an exclusively military context.[89]

Indiana: "The people shall have a right to bear arms, for the defense of themselves and the State."[90] The earlier version dated from 1816: "That the people have a right to bear arms for the defense of themselves and the State, and that the military shall be kept in strict subordination to the civil power."[91]

As the 1816 Indiana Constitution shows, one major rationale for the right to arms in the early republic was concern about the dangers of standing armies.[92] That is why the people of Indiana put the right to arms provision in the same section as a restriction on standing armies. But it would be erroneous to conclude that the right to arms only includes people who are in a militia which might fight a standing army. Even with the anti-standing army language, Indiana's Constitution, which tracks the Second Amendment, was always construed to protect a right of all citizens of Indiana, not just militiamen, to own and carry firearms--subject, of course, to reasonable restrictions.[93] The same is true of the

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1359 (1998).

[86] IDAHO CONST. art. I, § 11.

[87] *In re* Brickey, 70 P. 609 (Idaho 1902); *see also* State v. Hart, 157 P.2d 72 (Idaho 1945); State v. Woodward, 74 P.2d 92 (Idaho 1937).

[88] ILL. CONST. art. I, § 22.

[89] *See, e.g.*, Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (Ill. 1984) (relying on special circumstances of legislative history of the Illinois provision, the court held the individual right is not violated by handgun ban).

[90] IND. CONST. art. I, § 32.

[91] IND. CONST. of 1816, art. I, § 20.

[92] *See generally* Garry Wills, *supra* note 21.

[93] *See, e.g.*, Kellogg v. City of Gary, 562 N.E.2d 685 (Ind. 1990); Gaddis v. State, 680 N.E.2d 860 (Ind. Ct. App. 1997) (right includes the substantive right to carry a handgun with a license); Mcintyre v. State, 83 N.E. 1005 (Ind. 1908) (upholding restrictions on concealed weapons and

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constitutions of North Carolina, Ohio, South Carolina, and Vermont, all of which use a single constitutional section to denounce standing armies and to protect a right of every citizen to possess arms.[94]

Louisiana: "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."[95]

Louisiana is one of many states to use language almost identical to the Second Amendment, while including an explicit provision to allow regulation of the carrying of concealed weapons.[96] These arms-carrying restrictions show that Second Amendment language was understood to include ordinary citizens walking around with firearms for personal protection or hunting.[97] That is why the legislature was given authority to control the carrying of weapons -- to control ordinary people carrying guns.[98]

Maine: Maine's 1819 Constitution stated: "Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned."[99]

In *State v. Friel*, decided in 1986, the Maine Supreme Court read the 1819 language as guaranteeing only a "collective" right.[100] Like "collective property" in a Communist country, the "collective" right to arms favored by the *Friel* court really belonged exclusively to the government. Thus, this "collective" right was antithetical to the ordinary American understanding of rights as belonging to individuals, not governments. The people of Maine quickly demonstrated that the *Friel* court was grossly out of step with contemporary norms. In 1987 the people overwhelmingly adopted language which reaffirmed that the Maine Constitution guaranteed an individual right to arms: "Every citizen has a right to keep and bear arms and this right shall never be questioned."[101]

Michigan: "Every person has a right to keep and bear arms for the defense of himself and the state."[102]

If "to keep and bear arms" is a "term of art" used to mean militia service

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emphasizing similarity of 1816 and 1851 arms rights); Schubert v. DeBard, 398 N.E.2d 1339 (Ind. Ct. App. 1980) (holding an applicant for license to carry a handgun for self-protection could not be denied for lack of a proper reason unless that person has been convicted of a felony or crime of violence).

[94] *See* Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions, at* http://www.law.ucla.edu/faculty/volokh/beararms/statecon.htm (last visited Feb. 20, 2002).

[95] LA. CONST. art. I, § 11.

[96] Other states which have similar provisions include: Colorado, Idaho, Kentucky, Mississippi, Missouri, Montana, New Mexico, and North Carolina.

[97] *E.g.,* State v. Hamlin, 497 So.2d 1369 (La. 1986) (restricting sawed-off shotguns does not violate the individual right).

[98] *See generally* State v. Jumel, 13 La. Ann. 399 (1858); State v. Chandler, 5 La. Ann. 489 (1850); State v. Smith, 11 La. Ann. 633 (1856).

[99] ME. CONST. of 1819, art. I, § 16.

[100] 508 A.2d 123, 125 (Me. 1986).

[101] ME. CONST. art. I, § 16.

[102] MICH. CONST. art. I, § 6.

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only,[103] that "art" must have been entirely unknown to the people who drafted the state constitutions of the early American republic, for those drafters used "keep and bear arms" again and again to protect the right of individuals to possess and carry firearms for personal defense. Michigan recognizes the state constitution as guaranteeing an individual right.[104]

Mississippi: "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons."[105]

The concealed weapon restriction underscores that "the right to keep and bear arms" includes the right to carry non-concealed firearms for personal protection.

Missouri: "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons."[106]

The 1820 provision stated: "That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances by petition or remonstrance; and that their right to bear arms in defence of themselves and of the State cannot be questioned."[107] This language described "the people" as possessing "the right peaceably to assemble for their common good" and "their right to bear arms."[108] That the right to assemble was specified as being "for their common good" did not, of course, mean that the right did not belong to individuals, or that the right was a "collective" right which belonged only to the government. Likewise, as has been shown, the provision in many state constitutions mentioning only "the common defense" in the arms guarantee has almost always been interpreted to recognize a right of individuals.

The 1876 U.S. Supreme Court case *United States v. Cruikshank*, also treated the right to assemble and the right to bear arms *in pari materia*.[109] Both were rights "found wherever civilization exists," both were recognized but not created by the Constitution, and neither were within the power of Congress under the Fourteenth Amendment to protect against infringement by private persons.[110]

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[103] *See generally* David Yassky, *supra* note 9.

[104] *See, e.g.*, People v. Zerillo, 189 N.W. 927 (Mich. 1922) (prohibition on unnaturalized, foreign-born residents possessing a firearm is unconstitutional); People v. Brown, 235 N.W. 245 (Mich. 1931) ("The protection of the constitution is not limited to militiamen nor military purposes, in terms, but extends to every person to bear arms for the defense of himself as well as of the state."); *see also* State v. Swint, 572 N.W.2d 666 (Mich. Ct. App. 1997).

[105] MISS. CONST. art. III, § 12.

[106] MO. CONST. art. I, § 23.

[107] MO. CONST. of 1820, art. XIII, § 3.

[108] *Id.*

[109] 92 U.S. 542 (1876).

[110] *Id.* at 555.

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Montana: "The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons."[111] This 1889 language closely tracks the Colorado provision from 1876.[112] It supports that point that one may "bear" arms in personal defense. It also underscores that carrying concealed weapons, which militiamen would not do, but individuals might, was something that might be considered part of the arms guarantee, and for which a specific exception was therefore necessary.

Nebraska and North Dakota: Nebraska's right, adopted in 1988 referendum, states:

> All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.[113]

North Dakota also added an arms right by a referendum,

> All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.[114]

Like Kentucky, the states of Nebraska and North Dakota interpolate the right to arms in a larger section that guarantees numerous individual rights.[115] Similarly, James Madison=s original proposal for the right to keep and bear arms

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[111] Art. II, § 12 (1889; readopted 1972).
[112] *See* COLO. CONST. art. II, § 13.
[113] NEB. CONST. art. I, § 1.
[114] N.D. CONST. art. I, § 1.
[115] *See, e.g.*, Kasprowicz v. Finck, 574 N.W.2d 564 (N.D. 1998); State v. Richhill, 415 N.W.2d 481 (N.D. 1987) (both holding that North Dakota's right is individual and subject to reasonable regulation); State v. LaChapelle, 449 N.W.2d 762 (Neb. 1990) (holding Nebraska's right as individual, but upholding restriction on short shotguns).

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was to put that clause in Article I, section 9, of the U.S. Constitution, which guarantees various individual rights, such as habeas corpus. If Madison viewed the Second Amendment as a restriction on federal power over the militia, then he would have put the Second Amendment in Article I, section 8, the portion of the Constitution which grants militia powers to the federal government.[116]

Nevada and New Hampshire: In 1982, the people of both of these states voted to add an arms right to the state constitution.[117] Nevada's provision is "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."[118] New Hampshire's states: "All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state."[119]

The vote to include these rights shows the continued importance of the right to arms to Americans. These votes also show modern usage of "the right to keep and bear arms" as encompassing the individual possession and carrying of arms for a variety of purposes, not just militia service.

New Mexico: The 1912 New Mexico Constitution guaranteed: "The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons."[120] In 1971, the people voted to rephrase the guarantee, to make explicit that the protection encompassed recreational as well as defensive purposes.[121] The change reads: "No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons."[122] In 1986, New Mexico did what Alaska would do in 1994, constitutionally forbid local regulation of firearms, adding "[N]o municipality or county shall regulate, in any way, an incident of the right to keep and bear arms."[123] In most states, "preemption" laws against local gun control are accomplished by statute, not by constitutional mandate. Even before the 1986 amendment, however, overly restrictive local gun laws were forbidden by the New Mexico constitution.[124]

The constitutional right to arms provisions New Mexico, New

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[116] U.S. CONST. art. I, § 8, cl. 15 (grants Congress power to provide for calling for the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.) *See also* Don B. Kates, *Second Amendment, in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1639 (Leonard Levy ed., 1986); Joyce Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983).

[117] *See* Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions, at* http://www.law.ucla.edu/faculty/volokh/beararms/statecon.htm (last visited Feb. 20, 2002).

[118] NEV. CONST. art. I, § 11(1).

[119] N.H. CONST. pt. 1, art. 2-a.

[120] N.M. CONST. of 1912, art. II, § 6.

[121] N.M. CONST. art. II, § 6

[122] *Id.*

[123] *Id.*

[124] City of Las Vegas v. Moberg, 485 P.2d 737 (N.M. Ct.App. 1971) (declaring void a gun carrying ordinance making it unlawful for any person to carry a deadly weapon, concealed or otherwise, within the corporation limits of the municipality).

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Hampshire, Nebraska, Nevada, and Montana were adopted as early as 1889 and as late as 1988,[125] but each constitution uses "right to keep and bear arms" to refer unmistakably to an individual right to arms. The usage reflects the shared understanding of the vast majority of the American people that the same phrase in the Second Amendment likewise guarantees a right to every responsible citizen. The popular votes in favor of creating and strengthening these provisions attest to the perceived contemporary importance of the right to keep and bear arms.

Ohio: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power."[126] This 1851 language replaced an 1802 provision: "That the people have a right to bear arms for the defence of themselves and the State; and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power."[127]

The 1851 phrase "for their defense and security" apparently served as a model for New Mexico's 1912 "security and defense" language.[128] The 1851 Ohio language was less explicit in protecting personal defense than was the 1802 Ohio language "for the defence of themselves and the State." Even so, Ohio courts have always construed their constitution to protect an individual right of Ohio citizens to own and carry guns for lawful purposes.[129] The fact that Ohio--like Oregon, Pennsylvania, South Carolina, Texas, Vermont, and Virginia--combines an arms right with anti-standing army language, does not prevent the arms right from being interpreted as applying to all citizens, not just the militia.

Oklahoma: Oklahoma copied and modified Colorado's provision "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons."[130]

Oregon: "The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power[.]"[131] Although half the sentence is about controlling the military,

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[125] *See* Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions, at* http://www.law.ucla.edu/faculty/volokh/beararms/statecon.htm (last visited Feb. 20, 2002).
[126] OHIO CONST. art. I, § 4.
[127] OHIO CONST. of 1802, art. VIII, § 20.
[128] *See* N.M. CONST. of 1912, art.II, § 6.
[129] *See, e.g.*, Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993) (upholding "assault weapon" ban as reasonable regulation of the right to possess certain firearms for defense of self and property); In re Reilly, 31 Ohio Dec. 364 (C.P. 1919)(striking ordinance forbidding hiring armed guard to protect property); *see also* David B. Kopel, Clayton Cramer & Scott Hattrup, *A Tale of Three Cities: The Right to Bear Arms in State Courts*, 68 TEMPLE L. REV. 1177 (1995) (discussing jurisprudence in Colorado, Ohio, and Oregon).
[130] OKLA. CONST. art. II, § 26.
[131] OR. CONST. art. I, § 27.

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Oregon courts have always construed the state constitution to protect the bearing of arms, including those suitable for militia purposes, as well as those unsuitable for the militia but useful for personal defense, such as black jacks and knives.[132]

Rhode Island: Although Rhode Island became independent in 1776, no state constitution was created until 1842.[133] The constitution was created after an unsuccessful attempted revolution, known as The Dorr War, against Rhode Island's highly aristocratic and undemocratic government.[134] Although the drafters of the Rhode Island Constitution writers had just suppressed what they considered an illegitimate armed insurrection, the popular appeal of the right to bear arms was apparently so strong that the right was included in the constitution: "The right of the people to keep and bear arms shall not be infringed."[135]

South Dakota: South Dakota's 1889 Constitution reflects strong popular support for gun rights, as the constitution omits the exceptions for concealed carrying of arms and for large assemblies of armed men which were common in other state constitutions from the period: "The right of the citizens to bear arms in defense of themselves and the state shall not be denied."[136]

Tennessee: The original 1796 constitution provided: "That the freemen of this State have a right to keep and bear arms for their common defence."[137] During Reconstruction, the clause was re-written: "That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime."[138]

Tennessee's Constitution mentions "common defence" and does not specifically state any other purposes for the arms right. The Tennessee Supreme Court in the 1840 *Aymette* case interpreted the Tennessee guarantee, and suggested that the Second Amendment was intended "[i]n the same view."[139] The Court held that bearing arms was only for militia purposes, and that keeping arms was only for collective resistance to tyranny, not for "private" defense.[140] But even in *Aymette*, the right to own firearms was not restricted solely to people who

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[132] Barnett v. State, 695 P.2d 991 (Or. Ct. App. 1985) (holding a prohibition on black jacks was unconstitutional); State v. Delgado, 692 P.2d 610 (Or. 1984) (holding a prohibition on switchblade knives was unconstitutional); State v. Blocker, 630 P.2d 824 (Or. 1981) (holding that possession of a billy club in public was protected by constitutional right to bear arms); State v. Kessler, 614 P.2d 94 (Or. 1980) (possessing a billy club in own home is protected by right to bear arms provision of Oregon Constitution).

[133] *See* Luther v. Borden, 48 U.S. 1, 4 (1849).

[134] *See generally id.*

[135] R.I. CONST. art. I, § 22.

[136] S.D. CONST. art. VI, § 24.

[137] TENN. CONST. of 1796, art. XI, § 26. In 1836, "freemen" was changed to "free white citizens," thereby preventing the assertion of the right to arms by free blacks. The North Carolina Supreme Court was forced to confront this issue in 1843. *See* State v. Huntley, 25 N.C. 418 (1843).

[138] TENN. CONST. art. I, § 26.

[139] Aymette v. State, 21 Tenn. (2 Hum.) 154, 157 (1840).

[140] *See id.* at 158.

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might be militiamen; rather the right belonged to all citizens: "The citizens have the unqualified right to *keep* the weapon .Y But the right to *bear arms* is not of that unqualified character."[141] Thus, even with the most restrictive reading possible of the scope of "bear arms" and the purpose of the right to arms, all (law-abiding) citizens retain a right to keep arms. In 1866, a gun confiscation law was declared unconstitutional under the Tennessee guarantee.[142]

In *Andrews v. State*[143] the court expanded upon *Aymette*. The court began by opining that the Tennessee Constitution and the Second Amendment, while not identically worded, had the same meaning.[144] The Tennessee court acknowledged that a militia purpose underlay the Tennessee Constitution and the Second Amendment, but this purpose was consistent with the right of ordinary citizens to use ordinary firearms for non-militia purposes.

> The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.
> But farther than this, it must be held, that the right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace . . .
>
> What, then, is he protected in the right to keep and thus use? Not every thing that may be useful for offense or defense; but what may properly be included or understood under the title of arms, taken in connection with the fact that the citizen is to keep them, as a citizen[145].... [W]e would hold, that the rifle of all descriptions, the shot gun, the musket, and repeater, are such arms . . . .[146]

Like some scholars of today, the Tennessee Attorney General recognized that the Tennessee Constitution and the Second Amendment were originally more concerned with the balance of power in a free society than with individual protection against common criminals. Accordingly, the Attorney General argued that right to arms was a "political right."[147] In the legal discourse of 1870s, a "political right" could be restricted by the political branch, the legislature,

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[141] *Id.* at 160.
[142] *See* Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214 (1866).
[143] 50 Tenn. (3 Heisk.) 165 (1871).
[144] *Id.* at 177.
[145] *I.e.*, as someone who may be called upon to participate in the common defense.
[146] 50 Tenn. (3 Heisk.) at 178-79.
[147] *Id.* at 162.

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whereas a "civil right" was inviolate. The Tennessee court wrote that the Attorney General:

> fails to distinguish between the nature of the right to keep, and its necessary incidents, and the right to bear arms for the common defense. Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; but the right to *keep* them, with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier.[148]

Accordingly, even when "bear arms" is read in its narrowest sense, as the Tennessee courts did, there is no parallel constrictive reading of the right to "keep" arms. The latter right is undeniably an individual civil right.[149]

Texas: "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime."[150] Like many other states, Texas allows strict controls on concealed carrying, but not denial of the right to bear arms itself. An early case decided under the Texas guarantee, *Jennings v. State*, struck down a statute requiring forfeiture of pistol after misdemeanor conviction.[151]

Utah: The 1896 Utah Constitution stated: "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."[152] In 1984, the people of Utah adopted a new provision,

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[148] *Id.* at 182 (emphasis in original).

[149] For post-Andrews jurisprudence, *see, e.g.*, Glasscock v. City of Chattanooga, 11 S.W.2d 678 (Tenn. 1928) (holding an ordinance unconstitutional that made carrying a pistol a misdemeanor on the basis it violated the citizens' right to keep and bear arms); State v. Foutch, 34 S.W.1, 6 (Tenn. 1896) (holding the prosecution of a man who shot a home invader was unconstitutional, the court said, "Under our constitution every citizen of the State has the right to keep and bear arms for his proper defense and the Legislature only has power by law to regulate the wearing of arms to prevent crime").

[150] TEX. CONST. art. I, § 23. Earlier provisions of the right provided: "Every citizen shall have the right to bear arms in defence of himself and the republic. The military shall at all times and in all cases be subordinate to the civil power." TEX. CONST. of 1836, Declaration of Rights, cl. 14. "Every citizen shall have the right to keep and bear arms in lawful defence of himself or the State." TEX. CONST. of 1845, art. I, § 13. For an interpretation, see Cockrum v. State, 24 Tex. 394 (1859) (interpreting this provision as an individual right in a case upholding additional punishment for use of a knife in a homicide). "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 1868, art. I, § 13. For an interpretation, see English v. State, 35 Tex. 473 (1872) (interpreting this provision as an individual right, but not as encompassing dirks and bowie knives).

[151] 5 Tex. App. 298 (1878).

[152] UTAH CONST. of 1896, art. 1, § 6.

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strengthening the right.[153] "The people" was replaced by "The individual right of the people," apparently to forestall the kind of "collective rights" misreading which, in 1984, was often applied to the Second Amendment. The purposes of the right were broadened to all "other lawful purposes." And the legislature was no longer allowed to regulate "the exercise" of the right, but only to define "the lawful use of arms."[154]

Virginia: Virginia's 1776 constitution extolled the militia and denounced standing armies.[155] "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; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power."[156] The militia part of this provision contributed language which, in more concise form, became the first part of the Second Amendment.

In 1971, the people of Virginia sought explicit protection of their individual right to arms, and so a clause was added after "safe defense of a free state."[157] The clause read: "therefore, the right to keep and bear arms shall not be infringed."[158]

Some scholars read the Second Amendment as if it contains only the first clause, concerning the militia. Yet this misreading ignores the fact that when Virginians wanted to add an explicit individual right to their state constitution, they added the main clause of the Second Amendment.

West Virginia and Wisconsin: The West Virginia provision, adopted in 1986, states: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use."[159] Wisconsin's provision, adopted in 1998, states: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."[160]

The voters of Wisconsin adopted a guarantee by a vote of 1,161,942 to 412,508.[161] The voters of West Virginia adopted their guarantee by an overwhelming margin as well.[162] West Virginia is a mostly rural state where "traditional values" are especially popular; Wisconsin is the home of the

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[153] *See* Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions,* at http://www.law.ucla.edu/faculty/volokh/beararms/statecon.htm (last visited Feb. 20, 2002).
[154] UTAH CONST. art. I, § 6.
[155] VA. CONST. of 1776.
[156] *Id.* at art. I, § 13.
[157] VA. CONST. art. I, § 13.
[158] *Id.*
[159] W. VA. CONST. art. III, § 22. For an application, *see* State ex rel. City of Princeton v. Buckner, 377 S.E.2d 139 (W.Va. 1988) (holding unconstitutional a law banning carrying a concealed weapon and making no provision for obtaining a permit).
[160] WIS. CONST. art. I, § 25.
[161] *See 1998 Election Results, at* http://www.legis.state.wi.us/leginfo/ref_cbc.pdf (last visited Feb. 21, 2002).
[162] *See* David Lamb, *Anti-Drug Mood in Oregon; Most Abortion Curbs Fail; Five States Pass Lotteries,* L.A. TIMES, Nov. 6, 1986 at pt.1, p. 20.

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American progressive movement. In both states, the right to arms was adopted by a huge majority.

The voters of West Virginia and Wisconsin, like the voters of Nebraska, Maine, and Utah, have adopted or strengthened their state right to arms in modern times, with an awareness of modern conditions, such as urbanization, powerful modern firearms, and crime. These votes suggest that the American people do not regard the right to arms as an obsolete relic of frontier days, or as a quaint expression of early republic worries about standing armies. Thus, these votes contradict the notion of some academics that the Second Amendment should be regarded as obsolete or irrelevant.[163]

Wyoming: "The right of citizens to bear arms in defense of themselves and of the state shall not be denied."[164]

Once more, "bear arms" is something that citizens can do "in defence of themselves," and not only in defense of "the state."

V. TWO EXCEPTIONS

We have examined forty-two states where the right to keep and bear arms as expressed in the state constitutions have been consistently interpreted as protecting an individual right. In two states, however, the interpretation has shifted.

Kansas: The Kansas Bill of Rights was adopted in 1859, and guaranteed: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power."[165]

The Kansas approach to interpreting the Second Amendment was created in dicta from a 1905 Kansas Supreme Court decision, *City of Salina v. Blaksley*, interpreting the state constitution. [166] The case arose out of enforcement of an ordinance against carrying concealed weapons.[167] The government, on appeal, simply urged that the ordinance was a reasonable regulation of the right to arms, but the Kansas Supreme Court went much further, and declared that the right to arms protected the state government, not the individual citizen,[168] thereby

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[163] *See generally* Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 338 (2000); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) (arguing that modern society does not share the founders' distrust of standing armies, thus what the Second Amendment accomplished in 1789 has now become irrelevant).

[164] WYO. CONST. art. I, § 24.

[165] KAN. CONST. of 1859, Bill of Rights, § 4.

[166] City of Salina v. Blaksley, 83 P. 619 (Kan. 1905).

[167] *Id.*

[168] *See generally id.*

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adopting a "collective rights" theory, meaning the state was not bound to respect it.

Except for the concurring opinion in the 1840 Arkansas case,[169] which was ignored by future Arkansas courts, there was no legal precedent for the Kansas court's theory. All precedent had treated the Second Amendment and its state analogues as individual rights.[170] Thus, the Kansas Supreme Court, prefiguring the scholarship of Michael Bellesiles,[171] simply offered citations to precedents which, when actually examined, were contrary to the court's theory. All of the precedents cited by the Kansas Supreme Court upheld particular gun controls, while treating the right to arms as an individual right.[172]

In 1979, Kansas's courts abandoned the 1905 interpretation. Kansas citizens -- regardless of whether they are in the Kansas National Guard -- may raise claims under the Kansas Bill of Rights guarantee.[173]

Massachusetts: According to the Massachusetts Constitution adopted in 1780, "The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it."[174]

In the nineteenth century, Massachusetts's courts interpreted this clause as guaranteeing an individual right to arms.[175] But in 1976, the Massachusetts high court ruled that the Massachusetts arms rights provision is merely an affirmation of the state government's militia powers.[176]

Today, Massachusetts is the only state where the state constitutional right to arms has been held not to extend to individuals who are not in a militia.

Textually, the Massachusetts Constitution offers strong language for the anti-individual interpretation; the right is only "for the common defence"[177] and the right is in the same sentence as restrictions on standing armies, whereas the Second Amendment contains no such language. Also, the 1976 Massachusetts court could rely on the 1905 Kansas case, since the Kansas Supreme Court did not abandon that case until 1979.

Current interpretation of the right to arms in Massachusetts is the exception that proves the rule. Out of forty-four states with a right to arms, Massachusetts is the only one that does not protect individual rights, and that

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[169] State v. Buzzard, 4 Ark. 18 (1840).
[170] Kopel, *supra* note 86, at 1510-12.
[171] *See generally* Michael Bellesiles, *The Origins of Gun Culture in the United States,* 83 J. AM. HIST. 425 (1996).
[172] Kopel, *supra* note 85, at 1510-12.
[173] Junction City v. Mevis, 601 P.2d 1145 (Kan. 1979).
[174] MASS. CONST. pt. 1, art. 17.
[175] Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313 (1825) (right to keep arms is an individual right); Commonwealth v. Murphy, 44 N.E. 138 (Mass. 1896) (ordinary individual may invoke arms right, but right does not include mass armed parades in public).
[176] Commonwealth v. Davis, 343 N.E.2d 847 (Mass. 1976).
[177] This restriction was rejected in U.S. Senate debate on the proposed federal Second Amendment. *See* 1 ANNALS OF CONG. 460 (Joseph Gales ed., 1789).

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policy was not created until nearly 200 years after the state constitution was adopted, and was contrary to Massachusetts precedent.

VI. CONCLUSION

We have examined the text of the forty-four state constitutions which guarantee a right to arms. In forty-two of those states, we have found an unbroken interpretive mode: language identical to or similar to the federal Second Amendment that has been consistently interpreted as guaranteeing an individual right. This individual rights interpretation has prevailed even when the state constitution text denounces standing armies or mentions only "the common defense." Even then, the state arms guarantees have been held to protect individual rights. *A fortiori*, the federal Second Amendment -- which has no "standing army" language, and whose drafters specifically rejected the inclusion of a "for the common defence" clause -- also guarantees an individual right.

In contrast to the standard of the forty-two states, we did find two states with an exception. In 1976, Massachusetts rejected state precedent, and ruled that the state's arms right was not an individual one.[178] From 1905 to 1979, Kansas had a similar interpretation.[179]

Clever attorneys can sometimes torture constitutional language to mean almost anything. But from 1776 until the present, we have seen that the American people, through the language they have created and revised for their state constitutions, have continued to use arms rights language in a remarkably consistent way. For well over two centuries, language similar or identical to the Second Amendment has been used to guarantee the right of law-abiding individuals, not just militiamen, to personally own and carry firearms. It is simply perverse to suggest that words which from century to century and from state to state have had such a widely-shared meaning in state constitutions, should have an entirely contrary meaning when the same words appear in the federal constitution.

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[178] *See* Davis, 343 N.E.2d 847 (Mass. 1976).
[179] *See* Salina v. Blaksley, 83 P. 619 (Kan. 1905).

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