No. 07 – 15763 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE; et al.,
Plaintiffs - Appellants,

vs.

MARY V. KING; et al.,
Defendants - Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUPPLEMENTAL REPLY BRIEF OF APPELLANTS RE: SECOND AMENDMENT ISSUES

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CORPORATE DISCLOSURE STATEMENT

T S TRADE SHOWS is the business name used by RUSSELL and SALLIE NORDYKE to conduct business as gun show promoters throughout Northern and Central California. The business is wholly owned by the Nordykes.

VIRGIL McVICKER is president of the MADISON SOCIETY, a not-for-profit Nevada Corporation with its registered place of business in Carson City, Nevada. The Madison Society has chapters throughout California. The society is a membership organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible law-abiding citizens. It is not a publicly traded corporation.

Dated: October 2, 2008

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

I. INTRODUCTION

Our opening (supplemental) brief, asserted that the factual record from the district court suffices to allow this Court to decide whether the challenged ordinance violates the Second Amendment. Appellees apparently agree for they do not suggest in their opening brief that the case be returned to the district court for some further development of the factual record.

Much of Appellees' opening brief seems directed toward arguing that *District of Columbia v. Heller*, 554 U.S. ___ (2008), was wrongly decided. We take the liberty of quoting Appellees' brief back to them: "'Needless to say, only th[e] [Supreme] Court may overrule one of its precedents.' *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983)."

Next, like a magical incantation, Appellees keep citing a brief phrase from a footnote in a ten year old book by Justice Scalia – almost as if those words had appeared in a recent Supreme Court opinion. The point is that those words do not appear in *Heller* (which reflects the opinion of The Supreme Court, not the private opinion of one judge).

Moreover the *Heller* opinion itself states that the incorporation issue is still an open question. *Heller*, 128 S.Ct. at 2813 n.23 (2008).

Insofar as a single jurist's private opinions are of interest, we offer Justice Brandeis' view of the fundamental importance of self-defense: "We shall have lost something vital and beyond price on the day when the state denies us the right to resort to force …."[1]

We concur with Appellees' assertion that *Heller* holds that gun sales are subject to "regulation." (Appellees' brief, p. 3) That is why we have emphasized the federal regulations, and even more intensive state regulations which our gun shows have always obeyed. Appellants' faithful compliance with these state and federal regulations is an undisputed fact, acknowledged by the California Department of Justice, which the Appellees have conceded. [JSUF ¶¶ 43, 44, 49, 50, 85]

The simple response to Appellees' assertion of the County's power to regulate – is that "regulation" does not mean prohibition. Indeed the word implies that the regulated activity is being allowed to occur. Contra-wise the word "prohibit" literally means "To forbid by law; to prevent; – *not synonymous with 'regulate.*'" Black's Law Dictionary 1091 (5th ed. 1977) (emphasis added)

Appellees ignore the distinction Judge Gould noted in his earlier

[1] Alfred Lief, THE BRANDEIS GUIDE TO THE MODERN WORLD, p. 212 (Little Brown & Co. 1941).

concurrence that:

> [R]ecognizing an individual right to keep and bear arms, government can within due bounds regulate ownership or use of weapons for the public good. We would make progress if the Supreme Court were to establish a doctrine of an individual Second Amendment right subject to reasonable government regulation. The decisional chips would thereafter fall where they may on the basis of particular cases and the delicate balance of their precise facts, aided by the complementary efforts of lawyers, scholars and judges. The law would best put aside extreme positions and adopt an assessment of reasonableness of gun regulation, for this would place us on the right track.

Nordyke v. King ("Nordyke III"), 319 F.3d 1185, 1197 (2003)

The Alameda County Ordinance at issue in this case has as its purpose and effect the banning of gun shows – and the gun sales at gun shows – held at the county fairgrounds. This exceeds mere "regulation" and extends to banning the possession of guns and the free expression and association of attendees at gun shows – which Appellees have denounced for propagating "a gun culture" – as a means of banning gun sales and/or addressing their pretextual public safety issues. *See generally* *Carey v. Population Services Intern'l*, 431 U.S. 678 (1977), holding that states may not "substantially limit... an individual's right to decide to prevent conception" by prohibiting condom sales except in drug stores – though, of course, states may "regulate" both contraceptives and business enterprises.

The Supreme Court has now established the Second Amendment as an individual right, it is now up to this Honorable Court to follow the track suggested by Judge Gould by helping to shape the contours of how the "right to keep and bear arms" is to be enforced against an overreaching county ordinance by application of that Amendment through the Fourteenth Amendment Due Process Clause.

II. THE SECOND AMENDMENT SHOULD BE INCORPORATED AGAINST STATE ACTION THROUGH THE FOURTEENTH AMENDMENT DUE PROCESS CAUSE.

A. There is No Legal Precedent Prohibiting this Court From Finding that the Second Amendment Applies to State Action through the Fourteenth Amendment Due Process Clause.

To reiterate, *Heller* repudiates the authority of the odious case: *United States v. Cruikshank*, 92 U.S. 542 (1876), and its companion, *Presser v. Illinois*, 116 U.S. 252 (1886), on the incorporation issue and acknowledges that this issue is an open question. *Heller*, 554 U.S. at ___ n.23. *See also* *Silveira v. Lockyer*, 312 F.3d 1052, 1067 n.17 (2002).

As predicted in our opening (supplemental) brief, Appellees' make an appeal to the authority of *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992). Having refuted this argument at

pages 26/27 of our opening brief, a simple summary will suffice.

Fresno Rifle & Pistol is irrelevant. That case limited itself to a privileges and immunities analysis and did not address the issue we urge on this Court, i.e., whether the Second Amendment is applicable to the states through the Due Process Clause of the 14th Amendment.

Additionally, *Fresno Rifle & Pistol* did not undertake to decide the incorporation issue but rather deemed itself bound by the antique and now discredited Supreme Court decisions cited in Appellees' brief.

B. Dicta from Various Supreme Court Cases Confirm That the Second Amendment is to be Construed as if it has Already Been Incorporated.

In *Scott v. Sanford ("Dred Scott")*, 60 U.S. 393 (1856), Chief Justice Taney denied that blacks could ever be citizens because that would:

> [...] give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, **and to keep and carry arms wherever they went**. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.[2] [emphasis added]

[2] *Scott v. Sanford*, 60 U.S. at 417.

And further along in that opinion he reiterated:

> **Nor can Congress deny to the people the right to keep and bear arms**, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.[3] [emphasis added]

In grouping these rights in this way, even the wrong-headed *Dred Scott* decision recognized that the category of rights, as defined by the first ten amendments, is fundamental.

Forty-one years after *Dred Scott*, the case of *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897), again grouped the Second Amendment with other rights that have uncontroversially been incorporated against the states, such as: freedom of speech, double jeopardy, compelled self-incrimination, and the confrontation clause.

Dissenting in *Poe v. Ullman*, 367 U.S. 497, 543 (1961), Justice Harlan recognized the right to arms as among the due process rights which the 14th Amendment guarantees against the states:

> The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; ***the right to keep and bear arms***; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes

[3] *Scott v. Sanford*, 60 U.S. at 450.

> a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. [emphasis added]

Though originally only a dissent, this language has been quoted with approval in: *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992) (majority opinion); *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion); *Roe v. Wade*, 410 U.S. 113, 168 (1973) (concurrence); and *Albright v. Oliver*, 510 U.S. 266, 287 (1994) (concurrence).

U.S. v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990), suggests that the term of art phrase "the right of the people" is to be construed in *pari materia* with that same phrase in the First, Second, and Fourth Amendments. This supports the proposition that since the referenced First and Fourth Amendment rights have been held applicable against state and local governments, so should the identically phrased Second Amendment.

Most recently, the *Heller* decision itself describes the "right to keep and bear arms" as similar to, and presumably entitled to the same analysis as other enumerated rights protected under the First, Fifth and Sixth Amendments. *Heller*, 128 S. Ct. at 2818 n.27.

Thus has the Supreme Court rendered opinions recognizing the Second Amendment as comparable to, or having effects identical to, other constitutional rights that are now recognized as applicable to state and local government.[4]

In light of ***Heller's*** holding that the Second Amendment protects an individual right to keep and bear arms for self-defense, unrelated to militia service; that amendment is now ripe to join most of the rest of our Bill of Rights as a protection that extends to all citizens – in all jurisdictions.

C. Federalism is Not a Barrier to Fourteenth Amendment Due Process Incorporation of a Fundamental Right.

Appellees cite vague Hamiltonian pronouncements as proof of the states' power over civil and criminal litigation and to delineate various common law rights.[5] This argument fails because Appellees have failed to produce any late 18th Century authority that states have the power to abolish any human rights, much less the premier "human right" of

[4] For a discussion of the multiple Supreme Court Second Amendment cases *see* David B. Kopel, Stephen P. Halbrook, Ph.D., Alan Korwin SUPREME COURT GUN CASES – Two Centuries of Gun Rights Revealed (Bloomfield Press, Phoenix, AZ, 2004).

[5] Appellees' Opening (Supplementary) Brief at p. 7–21.

self-defense, which necessarily includes the right to be armed to make that defense.

Moreover Appellees' claims are both too late and directed to the wrong forum. Any such considerations should: (a) have been directed to the Supreme Court, and (b) have been made upwards of a century ago when that Court began subjecting state powers to the Bill of Rights, *e.g.*, *Moore v. Dempsey*, 261 U.S. 86 (1923) (right to jury trial free of mob domination); *Gitlow v. N.Y.*, 268 U.S. 652 (1925) (states may not infringe free speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (states may not exercise prior restraint over the press); *Morrison v. California*, 291 U.S. 82 (1934) (state must establish criminal defendants' guilt beyond reasonable doubt); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (state common law crime definition may not proscribe religious advocacy); *Everson v Board of Education*, 330 U.S. 1 (1947) (state may not establish religion); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (state tort law may not infringe free expression guarantees)[6].

Appellees misread *U.S. v. Morrison*, 529 U.S. 598 (2000), as a Tenth Amendment case discussing violence as a matter committed to

[6] Even the Third Amendment has been incorporated in its only modern hearing. *See Engblom v. Carey*, 677 F.2d 957 (1982) (the state may not quarter troops in residences).

absolute state legislative discretion. *Morrison* is actually a case about federal legislative power under the Commerce Clause. Nothing in that case (or any other) implies the conclusion which is the logical extension of the Appellees' argument, *i.e.*, that states are free to – for instance – prohibit women from using guns to defend themselves against rape or murder.

Even assuming Appellees' invocation of Hamilton were serious, nearly a century of Supreme Court decisions foreclose this Court from accepting Appellees' suggestion that the states retain any power or have any authority to suppress any "essential personal liberty of the citizen." *See Near*, 283 U.S. at 707.

D. Appellees' Historical Analysis is Flawed

The rest of Appellees' discussion of the right of self-defense is so marred by error, omission and anachronism as to be misleading.

Appellees project back onto the Founders a dichotomy between defense against apolitical criminals and defense against political thugs, which may accord with modern concepts, but not at all with the thoughts of the Founders. From this false dichotomy, Appellees argue that the Second Amendment concerns only personal defense which they

then claim is a matter the Founders left to the states to regulate regardless of the Bill of Rights.

Logically extended, Appellees' reasoning would lead to the paradoxical conclusion that citizens have the "right to keep and bear arms" for the purpose of resisting tyranny, putting down rebellions and repelling invasions, but these same citizens could somehow be prohibited from possessing arms for personal defense and the prevention of murder, rape and home invasion.

It is utterly wrong to claim that the states were deliberately left free to deprive the people of what the Founders deemed the primary human right, *i.e.*, to self-defense and to have arms for self-defense. To natural law philosophers (whom the Founders revered), self-defense was 'the primary law of nature,' the primary reason for man entering society. Believing self-preservation the very reason for the existence of society, they held that this right – which they understood to encompass the right to arms – "cannot be repealed or superseded, or suspended by any human institution,"[7] including, therefore, the states.

In this context it is useful to contrast the pages that Appellees

[7] From a 1790 lecture by Supreme Court Justice James Wilson (3 James Wilson, *The Works of the Honourable James Wilson, L.L.D.* 84 (Bird Wilson, ed., 1804.)

waste on quoting Blackstone out of context, to how Blackstone actually described the right of self-defense as: "the primary law of nature which [cannot be] taken away by the law of society."[8]

To the Founders, the need for self-defense applied against all attackers whether ordinary rapists and muggers or the Gestapo. Though the Founders could not know the 20th Century word "genocide," they were well aware of the hideous reality that word was coined to describe. They knew that Europe had for two centuries past been wracked by religious strife in which murder, including mass murders, were commonplace.

Steeped in the classics and the Bible, the Founders knew Joshua had massacred the population of Jericho, and of similar incidents throughout the Old Testament. From Thucydides they were equally aware of the Athenians' massacre of the populace of Melos. Conscious of the terrible lesson Thucydides drew from it – "*the strong do what they will, the weak endure what they must*" – the Founders were resolute that the American people would remain armed and strong and never be

[8] 3 Blackstone's Commentaries, Chapter 1. (Compare Hobbes' assertion that the right to self-defense is inalienable because, "a covenant not to defend myself with force from force is void." Thomas Hobbes, Leviathan 88, 95 (1651).)

disarmed and weak.[9]

In sum, Appellees' claim that the Founders wanted the states to have the power to ban guns and/or self-defense is the polar opposite of the truth: the Founders thought the right to self-defense (in which they included the right to arms) inalienable and beyond the legitimate power of any government.

E. Appellees' Discussion of the English Right to Arms, the Writings of St. George Tucker, and State Constitutions are Seriously Misleading.

Appellees' discussion of limitations on the English Bill of Rights only seems relevant because Appellees have omitted the pertinent point. Madison's lost introduction of his Bill of Rights into Congress described the English limitations as defects that his right to arms proposal would correct[10]– a point replicated in the earliest legal analysis of the Second Amendment.[11]

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[9] *See* Don B. Kates, Genocide, Self Defense and the Second Amendment, 29 HAMLINE L. REV. 505-506 (2006) (footnotes omitted; emphasis added).

[10] Madison's actual comments are lost; they may, however, be deduced from his notes. (*See* Don B. Kates, Handgun Prohibition and the Original Meaning of the Second Amendment 82 MICH. L. REV. 203, 237 n.144 (1983).)

[11] Don B. Kates, Handgun Prohibition and the Original Meaning of the Second Amendment 82 MICH. L. REV. 203, 237 n.144 (1983). (citing 1 St. George Tucker, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED

That analysis' was done by St. George Tucker, who extolled the Second Amendment as an individual right whose purposes were three-fold: (1) self-defense; (2) preservation of a militia composed of men using their own guns; and (3) hunting.[12]

Appellees attempt to dispute these facts by citing Professor Cornell's article. That article represents St. George Tucker's private notes on the 10th Amendment and the militia clause as if they were Tucker's discussion of the Second Amendment.[13] This is a misrepresentation of those notes. For the court's convenience here, is how Tucker's private notes analyzed the Second Amendment:

> The right of the people to keep and bear arms shall not be infringed – this may be considered as the palladium of liberty. The right of self defense is the first law of nature. In most governments it has been the study of rulers to abridge this right with the narrowest limits. Where ever standing armies are kept up & the right of the people to bear arms is by any means or under any colour whatsoever prohibited, liberty, if not already annihilated is in danger of being so – In England the people have been disarmed under the specious pretext of

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STATES AND OF THE COMMONWEALTH OF VIRGINIA, 144 (Dennis & Co., 1965) (1803).)

[12] 1 St. George Tucker, Blackstone's Commentaries With Notes of Reference to the Constitution and Law of the Federal Government 143 n.40 (1803).

[13] Stephen P. Halbrook, St. George Tucker's Second Amendment: Deconstructing 'The True Palladium of Liberty' 3 TN J. Law & Policy 120 (2007). (As to Professor Cornell's unscrupulousness use of quotes in other Second Amendment articles *see* Nelson Lund, Outsider Voices on Guns and the Constitution 17 CONSTITUTIONAL COMMENTARY 707-08 (2000).)

> preserving the game. By the alluring idea, the landed aristocracy have been brought to side with the Court in a measure evidently calculated to check the effect of any ferment which the measures of government may produce in the minds of the people.[14]

Appellees' claim that few state constitutions had a "right to keep and bear arms" for personal defense is a deceptive half-truth. They cite Professor Volokh's excellent law review article on the subject, they refer this Court to an appendix they filed, but fail to acknowledge that they have omitted the most pertinent part of the article from their appendix.

For the Court's convenience the entire article is attached to this brief. Appellees' redacted version of the article included in their separate appendix stops on page 204 [of the law review's pagination]. The text ends at the bottom of that page. The next page (205) of that article begins with a section titled: "An Individual Right To Possess Firearms For Self-Defense?" The article then goes on to produce a table showing:

- Those state constitutions in which an individual right is expressly secured. (22 states)
- Those state constitutions in which an individual right is

[14] This quote is taken from a rendition of St. George Tucker's handwritten notes which are archived in the Tucker-Coleman Collection of the Earl Gregg Swem Library at the College of William and Mary by David Hardy . His (as yet unpublished) article is attached to this brief.

expressly secured and that states' case law treats the right as aimed, at least in part, at self defense. (3 states)

- States with court cases that treat the right as individual and aimed in part at self-defense. (14 states)
- States in which an individual right is expressly secured, and the provision was enacted when the supporters treated the right as aimed, at least in part, at self-defense. (1 state)
- States with no express provision defining an individual right and no state court has ruled on the issue. (2 states)
- States with cases that treat the right as collective. (2 states)
- States without a constitutional right to keep and bear arms. (6 states) [including California]

The rest of the article shows the chronological evolution of state constitutional "right to keep and bear arms" provisions. The fault here lies not with Professor Volokh, but with an attempt to exploit his work by presenting only half of it – torn from its context.

It is easy enough to refute the Appellees' claims about state constitutional provisions for self-defense and arms-bearing by referring this court to the ***Heller*** Court's discussion beginning at ***Heller***, 128 S.Ct. at 2802, and ending with the observation that: "[...]19th-century courts

and commentators interpreted these state constitutional provisions to protect an individual right to use arms for self-defense." *Heller*, 128 S.Ct. at 2803.[15]

Appellees' historical analysis and their accounts of Founding Era thought is flawed. We respectfully submit that Appellees' views on this topic be given no weight by this Court.

F. The Second Amendment Is Properly Subject to "Due Process" Incorporation

We cite *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Washington v. Glucksberg*, 521 U.S. 702 (1997), in our opening (supplemental) brief for the proposition that the Second Amendment has a pedigree that is "*fundamental to the American scheme of justice*" and "*deeply rooted in the Nation's history and tradition, and implicit in the concept of ordered liberty*..." This pedigree should entitled the Second Amendment to Due Process incorporation.

In their attempt to downplay this issue, Appellees cite *Montana v. Egelhoff*, 518 U.S. 37 (1996), to try and limit the holding of *Duncan*. There is just one problem, *Montana* is not an incorporation case.

[15] The omitted part of this quote acknowledges one 19th Century state supreme court case exception, which the Opinion disposes of in Part II-D-2. *Heller*, 128 S.Ct. at 2809.

The opinion in the *Montana* case concedes that "trial by jury" and certain baseline procedural due process rights contained in the Fifth and Sixth Amendments are incorporated by the Fourteenth Amendment due process clause against the states. The case turned on the issue of how these federal rights might modify Montana substantive criminal law and/or that state's evidence code. In looking at historical practices in England through the lens of Blackstone (among other authorities), the Supreme Court found – on the issues of the relevance of voluntary intoxication and *mens rea* – that Montana's law did not offend the Due Process Clause.

The Second Amendment should be treated the same way as the rest of the enumerated rights in the first ten amendments that have been selectively incorporated through the Fourteenth Amendment Due Process Clause.

G. This Court Can Examine Legislative Purpose to Determine if a State/Local Law Infringes on a Fundamental Right.

Near v. Minnesota, 283 U.S. 697 (1931), was the first First Amendment incorporation case to actually strike down a state/local law. In setting the context for its ruling, the Court noted:

> [I]n passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect. That operation and effect we think is clearly shown by the record in this case. We are not concerned with mere errors of the trial court, if there be such, in going beyond the direction of the statute as construed by the Supreme Court of the State. It is thus important to note precisely the purpose and effect of the statute as the state court has construed it. [internal citations omitted]
>
> *Near v. Minnesota*, 283 U.S. at 708-709

The Alameda Ordinance is camouflaged as a public safety measure intended to deter violence. However the legislative purpose and its effect was banning gun shows. [JSUF ¶¶ 9, 10, 11] Appellees have admitted that gun shows are not a source of the evil they attempt to redress with their ordinance. [JSUF ¶¶ 43, 44, 49, 50, 85] By their own admission the Ordinance is not aimed at redressing any wrongs.

Appellees' Ordinance is aimed at excluding an entire class of people and activities (i.e., gun shows) from the fairgrounds. To the extent that it duplicates state law forbidding violent conduct with firearms it is redundant. To the extent that it bans gun shows it is unconstitutional.

To use modern strict scrutiny language, the local ordinance does not serve a compelling government interest because any misconduct it

could affect is already addressed by the more severe laws against crimes committed with guns, and the federal and state laws regulating guns shows. *See* *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Nor is the Ordinance in question aimed at prohibiting gun sales or gun possession in the entire county. It is aimed at an admittedly law-abiding gun show. If the existence of a "gun culture" with its gun worship, gun sales and gun possession, are really public safety issues, why is the County only banning such conduct on county property and not the entire county?

The Alameda Ordinance also has the potential for punishing innocent (and constitutionally protected) conduct in a futile attempt to avert misconduct that is already criminalized by state law. This is best summed up by the bumper sticker slogan: "*When guns are outlawed, only outlaws will have guns.*"

As set out on page 17 of Appellants' opening brief, Jamai Johnson was not deterred by the potential for felony punishment under state law for his vile acts at the fairgrounds on July 4, 1998. Furthermore,

Jamai Johnson was sent to prison under state laws that existed before the ordinance was even proposed. [JSUF: ¶ 2]

The Alameda Ordinance (violation of which a misdemeanor) is not aimed at punishing Jamai Johnson (or any future thug) for his crimes, it is aimed at suppressing the gun shows that the Alameda Board of Supervisors object to because they have determined, ostensibly through the political process, that gun shows are a disfavored activity that they want to evict from county property. See also: *Romer v. Evans*, 517 U.S. 620 (1996).

The government's opposition to an idea is never enough to justify abridgment of a fundamental right. *See generally* *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

III. THE ORDINANCE VIOLATES THE FUNDAMENTAL RIGHT PROTECTED BY THE SECOND AMENDMENT

The Appellees final argument (p. 61) is unpersuasive for two reasons: (1) The Ordinance violates the Second Amendment directly; and/or (2) The Ordinance violates Equal Protection by treating similarly situated groups differently as to the exercise of fundamental rights.

A. The Ordinance Violates the Second Amendment Directly.

To address this point, this Court may have to develop a new doctrine of law for Second Amendment scrutiny of state and local laws. This was a task that *Heller* left for future courts. *Heller*, 128 S.Ct. at 2818 n.27. If this Court is inclined to pursue this course, Appellants believe the Second Amendment should be accorded the same dignity as other provisions of the Bill of Rights which apply a strict scrutiny test when analyzing First Amendment rights. *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

In applying such a test, the first point is that Appellees have not even tried to identify any evils or public safety concerns raised by gun shows. This makes it particularly disingenuous for Appellees to cite *Heller's* comment that the right to possess guns may be restricted in "sensitive places" like schools or prisons. *Heller*, 128 S.Ct at 2817. From this one might assume that Appellees are claiming that gun shows are "sensitive places." But Appellees cannot offer any such claim.

Gun shows simply do not meet any criteria for being "sensitive" as contemplated by *Heller*. Moreover, any such claim by the County is flatly inconsistent with the challenged ordinance. Not only does the Ordinance fail to define "sensitive places," it heedlessly applies to

county properties regardless of their "sensitivity."

Appellees' own description is that the ordinance covers "*open space venues, such as County-owned parks, recreational areas, historic sites, parking lots of public buildings (the State prohibits gun possession within the same buildings), and the County fairgrounds*." (Appellee Brief, p. 1.) What is "sensitive" about parking lots and open spaces? And if they were sensitive, why doesn't the state law banning guns in certain buildings include their parking lots? *See* Cal. Pen. Code § 171b.

The challenged ordinance expressly allows participants in other events at the fairground to have guns. How can the fairgrounds be a "sensitive place" as to gun shows but not a "sensitive place" when guns are involved in other fairgrounds events?

A final reason that gun shows at the fairgrounds cannot be deemed "sensitive" is that any such claim contradicts state law. California law does treat certain places as sensitive, but expressly exempts gun shows from any such treatment. Cal. Pen. Code § 171b(b)(7).

We recognize that ***Heller*** allows states to designate places that actually are sensitive as sensitive. That does not mean that public entities may make such designations arbitrarily, without basis in any

supporting criteria. The "sensitive places" issue is a complete red herring with no basis in the facts of this case.

Continuing the theme of red herrings is Appellees' argument that no Plaintiff has asserted a right to self defense. The "right to keep and bear arms" necessarily implies the right to acquire those arms. That includes the implied right to engage in (regulated) activities like buying and selling firearms to exercise that right. *See generally* Richmond v. Virginia, 448 U.S. 555 (1980). *Compare* Carey v. Population Services International, 431 U.S. at 688, (constitutional right to prevent pregnancy invalidates state laws which limit access to contraceptive devices), and *Planned Parenthood v. Aakhus* 14 Cal. App. 4th 162, 172 (App. 2d Dist. 1993) (right to abortion includes access to clinics), and *Feminist Women's Health Center v. Blythe* 17 Cal. App. 4th 1543, 1563 n.7 (App. 3d Dist.1993) (same).

If this Court chooses to take up the task left open by the Supreme Court and propound a new doctrine of law for scrutinizing Second Amendment violations, it should rely on history and analogous Bill of Rights cases to formulate a strict scrutiny test. Under a strict scrutiny analysis, the Alameda Ordinance violates the Second Amendment.

B. The Ordinance Violates the Equal Protection Clause of the Fourteenth Amendment as Applied to a Fundamental Right.

Our other point is based on settled law and does not require development of any novel legal doctrine. Whatever the scope of the Second Amendment, once it is deemed a fundamental right, applicable to state action through the Due Process Clause, ***any*** infringement of that right which discriminates between similarly situated persons is subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *See* *San Antonio Independent Sch. District v. Rodriguez*, 411 U.S. 1 (1973).

Closely analogous to our case (except that it involved only rational basis scrutiny) is a recent Ninth Circuit case invalidating a California law because of the irrationality of an exception it provided. *Merrifield v. Lockyer*, No. 05-16613 (9th Cir. Sept 16, 2008), was a challenge to a California pest control regulatory scheme. In that case the court first held the scheme at least minimally rational for due process purposes. But it held that equal protection was violated by its exemption provision, which exempted some enterprises on a rationale that applied more imperatively to others whom it did not exempt.

Likewise Appellees' ordinance exempts gun possession by various

comparable groups but not gun shows. The only rationales for not exempting gun shows are either: (a) that Appellees dislike the "gun culture" message which the shows convey [JSUF: ¶ 9, 10, 11]; or (b) that Appellees are seeking to curtail gun ownership by curtailing gun sales (a purpose that the Appellees flatly deny they are seeking to enforce). [JSUF: ¶ 14, 46, 47]

Since each of these rationales is repugnant to the First and Second Amendments (respectively), Appellees' ordinance is even more clearly a violation of equal protection than the *Merrifield* statute was. Moreover, because fundamental rights are at stake, this Court should apply a heightened scrutiny analysis, whereas *Merrifield* involved only minimal scrutiny against a regulatory scheme.

The Alameda ordinance as applied to Appellants' gun shows violates Equal Protection based on the fundamental rights protected by the Second Amendment.

CONCLUSION

> [W]e noted the connections (but not identity) between Section I of the 14th Amendment and the Civil Rights Act of 1866. Alongside that act, Congress passed the Freedman's Bureau Act, a sister statute introduced the same day by the same

> sponsor and featuring key clauses in *pari materia*. As finally adopted, the Freedman's Bureau Act affirmed that "laws... concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of the estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens."
>
> Akhil Reed Amar, The Bill Of Rights p. 260 (Yale University Press 1998).
> [footnotes and citations omitted]

The Second Amendment is so obviously a fundamental right, protected by infringement from both federal **and** state action that the matter should not be as controversial as it became in the very late 20th Century.

Heller v. District of Columbia, has now settled part of that controversy and a careful reading and analysis of the historic record and relevant case law regarding fundamental rights – including the "right to keep and bear arms" – will fill in the rest of the details and help to develop the doctrine necessary to adjudicate this case.

Appellees have utterly failed to identify a single evil or public safety concern raised by gun shows. It is their burden, and they have not met it. Instead the record indicates that the challenged ordinance reflects only illicit purposes and/or effects of the County's Ordinance. Each of these purposes/effects are invalid under the First Amendment

and/or Second Amendments and/or the Equal Protection Clause.

The Second Amendment was once a well understood constitutional right by elected officials on the right and left:

> Certainly one of the chief guarantees of freedom under any government, no matter how popular and respected, is the right of the citizen to keep and bear arms. This is not to say that firearms should not be very carefully used and that definite rules of precaution should not be taught and enforced. But the right of the citizen to bear arms is just one more safeguard against a tyranny which now appears remote in America, but which historically has proved to be always possible.
>
> Hubert Humphrey
> *Know Your Lawmakers*, Guns 4 (Feb. 1960)

For the foregoing reasons we urge the court to hold the Ordinance invalid on its face and as applied against the Appellants and their gun shows.

Respectfully Submitted, October 2, 2008.

_____
Donald Kilmer
Counsel for Plaintiff - Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 5872 words, excluding the part of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using WordPerfect Version 12 in Century Schoolbook 14 point font.

Date: October 2, 2008

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Donald Kilmer, Attorney for Appellants

St. George Tucker Article by David Hardy
[currently unpublished]

The Lecture Notes of St. George Tucker;
A Framing Period View of the Bill of Rights

by

David T. Hardy

Few if any legal figures in the early Republic held the status of St. George Tucker. Educated in the law by William and Mary's George Wythe, Tucker succeeded him as the College's professor of law, a post he held from 1790 to 1804, when he was appointed to the appellate bench by James Madison.[1] While at William and Mary, he produced an edition of Blackstone's Commentaries,[2] annotated in light of American law. The text became "the standard work on American law for a generation" and remained for two decades the legal treatise most frequently cited by American courts.[3] Tucker had exceptional opportunity to observe the legal events at the Founding. A friend and correspondent of Jefferson and Madison, his closest friend, John Page, served in the First House, and his brother Thomas in the First Senate.[4]

Largely forgotten today, Tucker returned to some legal prominence last Term, when the majority in *District of Columbia v. Heller*[5] cited his Blackstone as proof that the Second Amendment had originally been understood as an individual right to arms,[6] and the dissent invoked his lecture notes to argue that during the Framing period he had seen it as a militia-related right of States.[7]

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[1] *See generally* Craig Evan Klafter, *St. George Tucker: The First Modern American Law Professor*, 6 J. OF THE HISTORICAL SOC. 133 (2006).
[2] WILLIAM BLACKSTONE, COMMENTARIES (St . George Tucker ed., Lawbook Exchange, Ltd . 1996) (1803).
[3] David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BRIGHAM YOUNG U. L. REV. 1362, 1372.
[4] MARY COLEMAN, ST. GEORGE TUCKER: CITIZEN OF NO MEAN CITY 35, 61, 113-14 (1938).
[5] 128 S.Ct. 2783 (2007)
[6] *Id.* at 2805.
[7] *Id.* at 2839 n. 32. The majority's response, *id.* at 2805 n. 19, assumes that the passage quoted by the dissent is in fact Tucker's discussion of the Second Amendment. In this both majority and dissent were misled. See n. 15 and related text, *infra.*

Tucker's handwritten lecture notes are archived in the Tucker-Coleman Collection of the Earl Gregg Swem Library at the College of William and Mary.[8] The following is a transcription of the portion dealing with the Bill of Rights, which follows Tucker's discussion of the limits placed upon Congress by Article I §10. The main text appears to date from 1791-92, with some marginal notes added later.[9] Given his position and their dating, Tucker's notes are exceptional evidence of original public understanding.

In the following transcript, indecipherable words are denoted by blanks, and probable but uncertain ones by brackets. Tucker refers to the Amendments by their original numbering, identifying the First Amendment as the Third Article. Tucker's original "footnotes" (actually written on the blank facing pages) are so identified. His pagination is in brackets.

Tucker begins by itemizing the restrictions upon Congressional power found in Article I, 10, and then turns to those imposed by the Bill of Rights:

[Page 140]

The Third Article to the Amendments to the Constitution imposes several important restrictions on the legislative authority of the Federal government – *viz*.

8. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

Our State bill of rights, art, 16, contains the following axiom – that religion, or the duty we owe to our Creator, and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence. In vain may the civil magistrate interpose the authority of human laws to produce that conviction

[P. 141]

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[8] Tucker's legal papers are presently being edited into a two-volume edition, due for publication in 2011. http://oieahc.wm.edu/tucker/index.html.

[9] Tucker refers to the Bill of Rights as ratified, placing the notes at 1791 or later, and earlier in his notes devotes a lengthy discussion to whether the States may arm the militia if Congress failed to do so, a point mooted by enactment of the Militia Act of 1792, 1 Stat. 271. *126-28. But the marginal note at *145 refers to the Alien Act of 1798, 1 Stat. 570. *See* note 18, *infra.*

which human reason rejects: in vain may the secular arm be extended to realize the fortunes denounced against unbelievers by all the various sectarists of the various denominations of religion throughout the world. It is not in the power of human laws to convince though it[10] to torture and to punish. Hence the numberless persecutions, martyrdoms and massacres, which have stained the annals of mankind, from the first moment that civil and religious institutions were blended together – To separate them by mounds which can never be overleap'd[11], is the only means by which the peace of mankind, and the genuine fruits of charity & fraternal love can be preserved. This prohibition may therefore be considered as the [cement?] of government as well as the guarantee of happiness to the individual. See Acts of 1785 c, [3?].

9. Congress shall make no law abridging the freedom of speech, or of the press.

As human laws are incapable of producing conviction on the human mind, neither can they without violating the most important of human rights control the expression of whatsoever our reason dictates. The liberty of speech in inseparable from liberty of thought. Both are the immediate gift of the Creator, and are equally entitled to exemption from coercion by any earthly power. –

[P. 142]

Restraints on the freedom of speech are the unequivocal marks of a tyrannical principle in government where they are imposed. – They have been resorted to in almost every nation, especially during the times of national struggles; but they are rather traps than fetters.[12]

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[10] "Is" appears to be omitted here.

[11] A possible ancestor of Jefferson's more elegant "wall of separation between church and state." *See Everson v. Bd. of Education*, 330 U.S. 1, 16 (1947). A more likely source is, however, the writing of James Burgh, with which Jefferson was familiar. ISAAC KRAMNICK & G. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 82 (1996).

[12] Tucker note: See the Acts of this Cwealth for punishing certain offenses Acts 1776. Ch :5. "If any person residing within this Cw shall by any word, open deed, or act, [advisedly?] & [illegally?] defend the authority, jurisdiction or power of the king or parliament as heretofore claimed and experienced within this colony, or shall attribute any such authority to the king &c., the person offending, being legally convicted, shall be punished by fine & impr. To be [assessed by?] a jury, so

The freedom of the press, says our own State bill of rights, is one of the greatest bulwarks of liberty & can never be restrained but by despotic govern'ts.

Since the introduction of art of printing the rights of mankind, & the reasonable limits of the powers of government, have been, if not better, at least more generally, understood than at any former period, since the commencement of human annals.[13]

– In England, where the freedom of the press flourished more than in any part of Europe, the nation has consequently enjoyed a greater portion of freedom. In America, where the freedom of the press was still less restrained, we may venture to pronounce that the people, from that source alone, have so far as related to the internal administration of the government always enjoyed a greater portion of liberty, even before the revolution, than the ____ State itself. Since that period, our [enemies?] have endeavored to disseminate opinions that our liberty has become licentiousness. – This is a calumny which the peaceable demeanor of the people & the regular administration of justice, daily contradict and refute. The liberty of the press, will I trust, secure to --- generations that portion of liberty which is now enjoyed among us, unsullied, undiminished, and unimpaired.

[P. 143]

10. The same article provides that Congress shall make no law abridging the right of the people peaceably to assemble, and <u>to petition the government</u> for the redress of grievances. The bill of rights proposed by the Convention of Virga article 15 expresses that right in terms better adapted to the nature of a representative government, administered by the servants of the people & not by rulers who are their lords, by declaring, that the people have a right peaceably to assembled together to consult for their common good, <u>or to instruct their representatives</u>, and that every freeman has a right to petition or, or apply to the legislature for redress of grievances. This is the language of a free people asserting

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as the fine shall not exceed L 20,000, nor the imprisonment the term of five years. See the [Little?] Rev. Code 40.

[13] Tucker note: De Lolme [JEAN DE LOLME, THE RISE AND PROGRESS OF THE ENGLISH CONSTITUTION (1781)] considers the freedom of the press as a [censorial?] power actually residing in the people. [Pa?] 212. The liberty of the press consists in this, that neither the courts of justice, nor any other [judges?] whatsoever, are authorized to [take notice?] of writings <u>intended for the press,</u> [but] are confined to those which are [actually?] <u>printed</u> & must in their [case proceed?] by the trial by jury. Ibid. 215.

their rights: the other [savors?] too much of that state of condescension observable in the acts of those rulers who affect to grant, what they cannot with-hold.[14]

The right of the people to keep and bear arms shall not be infringed – this may be considered as the palladium of liberty. The right of self defense is the first law of nature. In most governments it has been the study of rulers to abridge this right with the narrowest limits. Where ever standing armies are kept up & the right of the people to bear arms is by any means or under any colour whatsoever prohibited, liberty, if not already annihilated is in danger of being so[15]. – In England the people have been disarmed under the specious

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[14] Tucker note: In England it is provided by Statute 13 Car: 2 c. 5 that no petition to the king or either house of parliament, for any alterations in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury in the county – hence I presume arose the custom of grand juries presenting public grievances in this country. – The same statute declares that no petition shall be presented by more than [ten?] persons. 1 B.C. [Blackstone's Commentaries] 143.

[15] One is left wondering how the dissent in *District of Columbia v. Heller* could have argued, from these lecture notes, that "St. George Tucker, on whom the Court relies heavily, did not consistently adhere to his position that the Amendment was designed to protect the 'Blackstonian" self defense right…" or that his lecture notes suggest the Second "Amendment should be understood in the context of the compromise over military power represented by the original Constitution and the Second and Tenth Amendment." ____ at ____ n. 32.

The brief answer is that the dissent relied uncritically on the portions of the lecture notes quoted in Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123 (2006). Professor Cornell there asserts that the quotations given reflect Tucker's "earliest formulation of the meaning of the Second Amendment," and "cast[] the the right to bear arms as a right of the states." *Id.* at 1130.

In fact, the notes quoted there come from Tucker's discussion of the *militia clauses* of the original Constitution, which predictably deal with military power and the States. Tucker argues that the States have the power to arm their militias since such power is not forbidden to them by the Constitution, hence is protected by the Tenth Amendment, just as any arms given would be protected by the Second Amendment. Lecture notes at *127-29. When, less than twenty pages later, Tucker does discuss the Bill of Rights, the language he uses parallels closely his 1803 Blackstone, usually down to the word.

[p. 144]

pretext of preserving the game. By the alluring idea, the landed aristocracy have been brought to side with the Court in a measure evidently calculated to check the effect of any ferment which the measures of government may produce in the minds of the people. -- The Game laws are a [consolation?] for the government, a rattle for the gentry, and a rack for the nation.[16]

12. No soldier shall in time of peace be quartered in any house without the consent of the owner; nor in time of war but in the manner prescribed by law.

This clause by a kind of side wind seems to countenance the keeping up a standing army in time of peace; on which subject we have already offered some remarks. It is calculated in some measure to lessen the burden of the ___ to the individual, but by no means to add to the security of the nation.

13. The right of the people to be secure in their persons, houses, papers & effects, against unreasonable searches and seizures, shall not be violated –--- What shall be deemed unreasonable searches and seizures. The same article informs us, by declaring, "<u>that no warrant</u> shall issue, but first, upon <u>probable cause</u> –

[P. 145]

which cause secondly, must be supplied by <u>oath</u> or <u>affirmation</u>; thirdly the warrant must <u>particularly described</u> the <u>place</u> to be <u>searched</u>; and fourthly – <u>the persons</u>, or <u>things</u> to be seized. All other <u>searches</u> or <u>seizures</u>, except such as are thus

[16] Tucker note: In England the right of the people to bear arms is confined to protestants – and by the terms <u>suitable to their condition & degree</u>, the effect of the Declaration is entirely done away. Vi: Stat. 1 W & M l:2 c. 2.

authorized, are therefore unreasonable and unconstitutional,[17] And herewith agrees our State bill of rights – Art. 10.[18]

The case of general warrants, under which term all warrants except such as are above described are included, was warmly agitated in England about thirty years ago – and after much altercation they were finally pronounced to be illegal by the common law – see [Release?] of Money v. Leach 3 Burrow 1743. 1 Bl. Rep: 555; vi ___ 4 B.C. 291.

But this clause does not extend to repeal, or annul the common law principle that offenders may in certain cases be arrested, even without warrant. As in the case of riots, or breaches of the peace committed within view of a Justice of the Peace, or other peace officer of a county, who may in such cases cause the offender to be apprehended, or arrest him, without warrant.

Nor can it be construed to restrain the authority, which not only peace officers, but every private person possesses, by the common law, to arrest any felon if they shall be present when the felony is committed,

14. The invaluable privilege of trial by jury is secured by the 7 & 8 articles of the Amendmts, concerning the antiquity and excellence of this mode of trial,

[P. 146]

as well in civil as in criminal cases. I shall for the present refer to 3 B.C. 349 to 3_5 – 4 B.C. 349 to 364. –

An objection however may be made that the 8th Article provides only for a trial by a jury of the State & district wherein the crime is alleged to have been committed, instead of a jury of the vicinage, which term vicinage seems to imply in our State the county at large & not the immediate neighborhood – and I must confess that I am among the number of those who doubt the propriety of this departure from the strict common law principles.

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[17] Prof. Amar has argued that the Fourth Amendment's warrant/probable cause requirement stems from the legal immunity given the person executing the search, protecting against the original strict liability for an unreasonable search. Hence, probable cause was originally intended only to apply to warrants; warrantless searches need only be "reasonable." AKHIL REED AMAR, THE BILL OF RIGHTS 68-71 (1998). Tucker's discussion appears to be to the contrary, treating probable cause and warrant as components of reasonableness.

[18] Tucker here has a marginal note: "vi: Act concerning aliens – contra 5: Cong: c:" In his 1803 VIEW OF THE CONSTITUTION he inserts at this point an argument that the Alien Act, 1 Stat. 570, violates the Fourth Amendment.

The common law maxim, that no man is to be brought into jeopardy of his life, more than once for the same offence, is rendered a fundamental law of the gov't by the same article, as is also that other inestimable maxim of the common law, that no man should be compelled in any criminal case to give evidence against himself. That he shall moreover be informed of the nature & cause of the accusation, be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor, & have the assistance of counsel for his defence, -- And that he shall in no case be deprived of life, liberty, or property without due process of law -- & herewith again agrees our own State bill of rights.

The importance of all of these articles will more evidently appear, in the course of our examinations of the subjects to which they relate, in the fourth book of the Commentaries – I have enumerated them above only for the sake of method.

15. The right of trial by jury in civil suits at common law is also [secured?] by the 9th article of the ratified amendments in all cases where the matter in controversy should exceed the value of twenty dollars. Here again I must refer the student to 3 B.C. 349 to 385.

[P. 147]

16. Art:10 provides that excessive bail shall not be required; nor excessive fines imposed; nor cruel & unusual punishments inflicted.

These restraints against oppression are well adapted to the nature of our government, and correspond exactly with the declaration contained n our own State bill of rights. Art. 9.

17. Private property shall not be taken for public use without just compensation. Art: 7.

This article is intended to restrain the arbitrary & oppressive measure of obtaining supplies by impress't as were practiced during the last war, not infrequently without any compensation whatsoever. A law of our own State, describes in what cases impress may be made, & by whom: and authorizes the commitment of the offender, in case of illegal impresses.

18. The 11th Article declares that the enumeration in the Const. of certain rights, shall not be construed to deny or disparage other rights retained by the people.

The want of a bill of rights was strongly, & with great energy & force of [reasoning?] [insisted on?] by the [opponents?] of the C.U.S. in its original form. The author of the letters signed by Publius [roundly?] asserts that a bill of rights

was not only unnecessary but would be dangerous. His [reasoning?], as on most other points, is extremely ___ & acute, but by no means so convincing as many other parts of his letters. A bill of rights may be considered in two points of view, first as giving law to the government to be established, & secondly, as giving information to the people. The objection to a bill of rights in the former view would apply to every written constitution. As to the second point, a bill of rights reduces to obvious fundamental maxims, [perceptible?] to every man of the commonest

[P. 148]

understanding, what can only be discovered in the consequence of learned & deep research & inquiries into the principles of [the laws?], without such aid. – I cannot therefore subscribe to the doctrine, ingenious as the [argument?] in favor of it must be acknowledged to be.

The amendments proposed & ratified by the States are most of them such as would have formed the basis of a bill of rights – that they are not altogether [extensive enough?] will appear to them who will candidly examine those which were offered by this State, New York, North Carolina & Rhode Island, which I believe includes the whole that were offered by other States.

19. Lastly, it is declared that the powers not delegated to the U.S. by the C. nor prohibited to the States, are reserved to the States, respectively, or to the people. Art: 12.

This article has been thought liable to some objection from a degree of equivocation in the use of the disjunctives, nor & or. I have not [words crossed out] ___ ___ the objection. But I should conclude the sense to be, that every necessary power of government, not prohibited to the States, may be exercised by the State governments, concurrently with the United States, or independent thereof according to the subject. Now by the word prohibited in this article, I understand first, such powers as by the very terms of the Constitution are taken away from the States expressly: such for example as that of coining money, as also the other powers enumerated in Art. I S. 10 –

[P. 149]

Secondly, such as are in express terms granted to the United States, and are not in their nature susceptible of a concurrent authority in the individual States, such as the power to define or punish piracies & felonies committed on the high seas, and offenses against the law of nations. The right of creating & appointing to offices under the U.S. --- All other powers necessarily springing from the very act of

establishing a government, such as the powers of directing the course of inheritance, and of defining and punishing offenses agst. the society, other than such as are [entrusted?] to the declarations to Congress & all others of a similar description, I apprehend are [secured?] to the States – such of them as are enumerated in the Constitution and are susceptible of a concurrent authority the States may possess in that manner. Such of them as are not enumerated, they will [possess?] exclusively of the U.S – Such powers as are neither enumerated in the Constitution of the U.S. nor in the State Constitutions, nor necessarily spring from the act of establishing a government, I presume remain with the people, the original grantors of all the powers of government in those States.

Conclusion

Tucker's lecture notes give remarkable insight into how an American jurist and academic understood the Bill of Rights immediately after its ratification. Tucker agrees with Jefferson that the Establishment Clause erects a strong barrier between church and state. He sees freedom of expression as broadly, indeed absolutely protected against Federal interference, and linked to freedom of thought. He viewed the Second Amendment as an individual right derived from the natural right of self defense, and Fourth Amendment reasonableness as incorporating its warrant and probable cause requirements. Tucker's lecture notes, in brief, indicate that this Framing period scholar was astonishingly modern.

STATE CONSTITUTIONAL RIGHTS TO KEEP AND BEAR ARMS

by EUGENE VOLOKH

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STATE CONSTITUTIONAL RIGHTS TO KEEP AND BEAR ARMS

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I. INTRODUCTION

Debates rage about the meaning of the Second Amendment; but observers often miss that there are forty-five right-to-bear-arms provisions in American constitutional law, not just one. Forty-four states have state constitutional rights to bear arms. Most are written quite differently from the Second Amendment. Nearly all secure (at least in part) an individual right to keep some kinds of guns for self-defense. Some date back to the Framing; some have been enacted in the last four decades.

Serious analyses of the original meaning of the Second Amendment should consider the Framing-era state provisions. Serious analyses of modern gun control proposals should consider the currently effective provisions. Serious analyses of American tradition as to the right to bear arms should consider all the provisions as they now are and as they have evolved over time.

Unfortunately, there are to my knowledge no print sources summarizing not just all the currently enacted rights but also all the past versions of these provisions. This article aims to fill that gap. Part II lists all the current and past provisions by state. Part III provides a table that indicates whether the provisions, as written or as interpreted by the state court, secure an individual right to keep some kinds of guns for self-defense, as opposed to merely a collective right or possibly an individual right aimed solely at some other purpose. Part IV lists all the current and past provisions by enactment date, and notes how each enactment differed from the preceding version.

II. PROVISIONS BY STATE, CURRENT AND PAST

Each provision is listed with the year it was first enacted; moves to different sections are not noted. If a provision first enacted in one year was changed very slightly some years later, the latter version is listed together with the original year, and the changes and change dates are noted in the footnotes.

Alabama 1819: "That every citizen has a right to bear arms in defense of himself and the state."[1]

Alaska 1994: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State."[2]

1959: "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."[3]

Arizona 1912: "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."[4]

Arkansas 1868: "The citizens of this State shall have the right to keep and bear arms, for their common defense."[5]

1864: "That the free white men of this State shall have a right to keep and to bear arms for their common defence."[6]

1861: "That the free white men and Indians of this State have the right to keep and bear arms for their individual or common defense."[7]

1. ALA. CONST. art. I, § 27 ("[t]hat" added, and "defence" changed to "defense," in 1875).

2. ALASKA CONST. art. I, § 19.

3. *Id.*

4. ARIZ. CONST. art. II, § 26.

5. ARK. CONST. art. II, § 5 (comma after "arms" added, and "defence" changed to "defense," in 1874).

6. ARK. CONST. of 1864, art. II, § 21.

1836: "That the free white men of this State shall have a right to keep and to bear arms for their common defence."[8]

California: No provision.

Colorado 1876: "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."[9]

Connecticut 1818: "Every citizen has a right to bear arms in defense of himself and the state."[10]

Delaware 1987: "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."[11]

Florida 1990: "(a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, 'purchase' means the transfer of money or other valuable consideration to the retailer, and 'handgun' means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.

(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.

7. ARK. CONST. of 1861, art. I, § 21.
8. ARK. CONST. of 1836, art. II, § 21.
9. COLO. CONST. art. I, § 13.
10. CONN. CONST. art. I, § 15 ("defence" changed to "defense" in 1956).
11. DEL. CONST. art. I, § 20.

(d) This restriction shall not apply to a trade in of another handgun."[12]

1968: "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."[13]

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."[14]

1868: "The people shall have the right to bear arms in defence of themselves and of the lawful authority of the State."[15]

1865: Provision deleted.

1838: "That the free white men of this State shall have a right to keep and to bear arms for their common defence."[16]

Georgia 1877: "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."[17]

1868: "A well-regulated militia being necessary to the 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."[18]

1865: "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."[19]

Hawaii 1959: "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."[20]

12. FLA. CONST. art. I § 8.
13. *Id.*
14. FLA. CONST. of 1885, art. I, § 20.
15. FLA. CONST. of 1868, art. I, § 22.
16. FLA. CONST. of 1838, art. I, § 21.
17. GA. CONST. art. I, § 1, para. VIII.
18. GA. CONST. of 1868, art. I, § 14.
19. GA. CONST. of 1865, art. I, § 4.
20. HAW. CONST. art. I, § 17.

Idaho 1978: "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."[21]

1889: "The people have the right to bear arms for their security and defence; but the Legislature shall regulate the exercise of this right by law."[22]

Illinois 1970: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."[23]

Indiana 1851: "The people shall have a right to bear arms, for the defense of themselves and the State."[24]

1816: "That the people have a right to bear arms for the defence of themselves, and the State; and that the military shall be kept in strict subordination to the civil power."[25]

Iowa: No provision.

Kansas 1859: "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."[26]

21. IDAHO CONST. art. I, § 11.
22. IDAHO CONST. of 1889, art. I, § 11.
23. ILL. CONST. art. I, § 22.
24. IND. CONST. art. I, § 32.
25. IND. CONST. of 1816, art. I, § 20.
26. KAN. CONST. bill of rights, § 4.

Kentucky 1891: "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."[27]

1850: "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."[28]

1799: "That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned."[29]

Louisiana 1974: "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."[30]

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."[31]

Maine 1987: "Every citizen has a right to keep and bear arms and this right shall never be questioned."[32]

1819: "Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned."[33]

Maryland: No provision.

Massachusetts 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

27. KY. CONST. bill of rights § 1.

28. KY. CONST. of 1850, art. XIII, § 25.

29. KY. CONST. of 1792, art. XII, cl. 23 ("That" and the "s" in "rights" added in 1799).

30. LA. CONST. art. I, § 11.

31. LA. CONST. of 1879, art. 3.

32. ME. CONST. art. I, § 16 (enacted after Maine Supreme Court interpreted original provision as securing only collective right, State v. Friel, 508 A.2d 123, 125 (Me. 1986)).

33. ME. CONST. of 1819, art. I, § 16.

shall always be held in an exact subordination to the civil authority, and be governed by it."[34]

Michigan 1963: "Every person has a right to keep and bear arms for the defense of himself and the state."[35]

1850: "Every person has a right to bear arms for the defence of himself and the state."[36]

1835: "Every person has a right to bear arms for the defence of himself and the State."[37]

Minnesota: No provision.

Mississippi 1890: "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."[38]

1868: "All persons shall have a right to keep and bear arms for their defence."[39]

1817: "Every citizen has a right to bear arms in defence of himself and of the State."[40]

Missouri 1945: "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."[41]

1875: "That the right of no citizen to keep and bear arms in defence of his home, person and 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."[42]

34. MASS. CONST. pt. 1, art. 17.

35. MICH. CONST. art. I § 6.

36. MICH. CONST. of 1850, art. XVIII, § 7.

37. MICH. CONST. of 1835, art. I, § 13.

38. MISS. CONST. art. III, § 12.

39. MISS. CONST. of 1868, art. I, § 15.

40. MISS. CONST. of 1817, art. I, § 23 ("of" before "the State" added, and comma after "arms" deleted, in 1832).

41. MO. CONST. art. I, § 23.

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

1865: "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 lawful authority of the State cannot be questioned."[43]

1820: "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."[44]

Montana 1889: "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."[45]

Nebraska 1988: "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."[46]

Nevada 1982: "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."[47]

New Hampshire 1982: "All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state."[48]

43. MO. CONST. of 1865, art. I, § 8.
44. MO. CONST. of 1820, art. XIII, § 3.
45. MONT. CONST. art. II, § 12.
46. NEB. CONST. art. I, § 1 (right added to preexisting provision).
47. NEV. CONST. art. I, § 11(1).
48. N.H. CONST. pt. 1, art. 2-a.

New Jersey: No provision.

New Mexico 1986: "No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms."[49]

1971: "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."[50]

1912: "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."[51]

New York: No provision.

North Carolina 1971: "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."[52]

1876: "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. Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent

49. N.M. CONST. art. II, § 6
50. *Id.*
51. N.M. CONST. of 1912, art. II, § 6.
52. N.C. CONST. art. I, § 30.

the legislature from enacting penal statutes against said practice."[53]

1868: "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."[54]

1776: "That 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."[55]

North Dakota 1984: "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."[56]

Ohio 1851: "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."[57]

1802: "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."[58]

Oklahoma 1907: "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil

53. N.C. CONST. of 1876, art. I, § 24.
54. N.C. CONST. of 1868, art. I, § 24.
55. N.C. DECLARATION OF RIGHTS § XVII.
56. N.D. CONST. art. I, § 1 (right to bear arms added to preexisting provision).
57. OHIO CONST. art. I, § 4.
58. OHIO CONST. of 1802, art. VIII, § 20.

power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons."[59]

Oregon 1857: "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."[60]

Pennsylvania 1790: "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned."[61]

1776: "That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power."[62]

Rhode Island 1842: "The right of the people to keep and bear arms shall not be infringed."[63]

South Carolina 1895: "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."[64]

1868: "The people have a right to keep and bear arms for the common defence. As, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the general assembly. The military power ought always to be held in an exact subordination to the civil authority, and be governed by it."[65]

59. OKLA. CONST. art. II, § 26.

60. OR. CONST. art. I, § 27.

61. PA. CONST. art. 1, § 21 ("the" before "citizens" added in 1838; commas after "arms" and "State" deleted in 1873).

62. PA. DECLARATION OF RIGHTS, cl. XIII.

63. R.I. CONST. art. I, § 22.

64. S.C. CONST. art. I, § 20.

65. S.C. CONST. of 1868, art. I, § 28.

South Dakota 1889: "The right of the citizens to bear arms in defense of themselves and the state shall not be denied."[66]

Tennessee 1870: "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."[67]

1834: "That the free white men of this State have a right to keep and to bear arms for their common defence."[68]

1796: "That the freemen of this State have a right to keep and to bear arms for their common defence."[69]

Texas 1876: "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."[70]

1868: "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."[71]

1845: "Every citizen shall have the right to keep and bear arms, in the lawful defence of himself or the State."[72]

1836: "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."[73]

Utah 1984: "The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms."[74]

66. S.D. CONST. art. VI, § 24.
67. TENN. CONST. art. I, § 26.
68. TENN. CONST. of 1834, art. I, § 26.
69. TENN. CONST. of 1796, art. XI, § 26.
70. TEX. CONST. art. I, § 23.
71. TEX. CONST. of 1868, art. I, § 13.
72. TEX. CONST. of 1845, art. I, § 13 (comma added after "arms" in 1866).
73. REPUB. TEX. CONST. of 1836, DECLARATION OF RIGHTS, cl. 14.
74. UTAH CONST. art. I, § 6.

1895: "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."[75]

Vermont 1777: "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."[76]

Virginia 1971: "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power."[77]

Washington 1889: "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."[78]

West Virginia 1986: "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."[79]

Wisconsin 1998: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."[80]

Wyoming 1889: "The right of citizens to bear arms in defense of themselves and of the state shall not be denied."[81]

75. UTAH CONST. of 1895, art. I, § 6.
76. VT. CONST. ch. I, art. 16.
77. VA. CONST. art. I, § 13 (right added to preexisting 1776 provision).
78. WASH. CONST. art. I, § 24.
79. W. VA. CONST. art. III, § 22.
80. WIS. CONST. art. I, § 25.
81. WYO. CONST. art. I, § 24.

III. AN INDIVIDUAL RIGHT TO POSSESS FIREARMS FOR SELF-DEFENSE?

The table below characterizes each state's right-to-bear-arms provision, notes when the version that deserves this characterization was first enacted, and cites cases that support the characterization. Here are the codes used in the second column:

9: An individual self-defense right is expressly secured, though keeping and bearing arms for other purposes may also be protected (22 states). No case is cited because the language is clear. Example: Alabama, "That every citizen has a right to bear arms in defense of himself and the state."

8: An individual right is expressly secured, and court decisions treat the right as aimed at least in part at self-defense (3 states). Example: Maine, "Every citizen has a right to keep and bear arms and this right shall never be questioned."

7: Court decisions treat the right as individual and aimed at least in part at self-defense (14 states). Example: Florida, "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"; Florida cases make clear that "the right of the people to keep and bear arms in defense of themselves" means that each person has the right to keep and bear arms in defense of himself.

6: An individual right is expressly secured, and the provision was enacted at a time (1994) when the supporters of an individual right treated the right as aimed at least in part at self-defense (1 state, Alaska, "The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State").

5: The right is not expressly characterized as individual, and courts have not passed on the question (2 states, Hawaii, Virginia).

1: Courts have treated the right as collective (2 states, Kansas, Massachusetts).

0: No state constitutional right-to-bear-arms provision (6 states, California, Iowa, Maryland, Minnesota, New Jersey, New York).

TABLE 1

Ala.	9	1819	
Alaska	6	1994	
Ariz.	9	1912	
Ark.	7	1836	Wilson v. State, 33 Ark. 557 (1878)
Cal.	0		
Colo.	9	1876	
Conn.	9	1818	
Del.	9	1987	
Fla.	7	1868	Alexander v. State, 450 So.2d 1212 (Fla. Dist. Ct. App. 1984)
Ga.	7	1877	McCoy v. State, 157 Ga. 767 (1924)
Haw.	5	1959	
Idaho	7	1902	*In re* Brickey, 70 P. 609 (Idaho 1902)
Ill.	8	1970	Kalodimos v. Village of Morton Grove, 470 N.E.2d 266, 273 (Ill. 1984)
Ind.	7	1816	Kellogg v. City of Gary, 562 N.E.2d 685, 694 (Ind. 1990)
Iowa	0		
Kan.	1	1859	City of Salina v. Blaksley, 83 P. 619 (Kan. 1905), *adhered to by* City of Junction City v. Lee, 532 P.2d 1292 (Kan. 1975). *But see* City of Junction City v. Mevis, 601 P.2d 1145, 1151 (Kan. 1979) (striking down a gun control law, challenged by an individual citizen, on the grounds that the law was "unconstitutionally overbroad," and thus implicitly concluding that the right to bear arms did indeed belong to individual citizens)
Ky.	9	1792	
La.	8	1984	State v. Chaisson, 457 So.2d 1257, 1259 (La. App. 1984)
Me.	8	1987	State v. Brown, 571 A.2d 816 (Me. 1990)
Md.	0		
Mass.	1	1780	Commonwealth v. Davis, 343 N.E.2d 847 (Mass. 1976)
Mich.	9	1835	
Minn.	0		
Miss.	9	1817	
Mo.	9	1875	
Mont.	9	1889	
Neb.	9	1988	

Nev.	9	1982	
N.H.	9	1982	
N.J.	0		
N.M.	9	1971	
N.Y.	0		
N.C.	7	1868	State v. Kerner. 107 S.E. 222, 225 (N.C. 1921)
N.D.	9	1984	
Ohio	7	1802	Arnold v. City of Cleveland, 616 N.E.2d 163, 169 (Ohio 1993)
Okla.	9	1907	
Or.	7	1857	State v. Hirsch, 114 P.3d 1104, 1110 (Ore. 2005)
Pa.	7	1776	Sayres v. Commonwealth, 88 Pa. 291 (1879)
R.I.	7	1842	Mosby v. Devine, 851 A.2d 1031, 1043 (R.I. 2004)
S.C.	7	1881	State v. Johnson, 16 S.C. 187 (1881)
S.D.	7	1889	Conaty v. Solem, 422 N.W.2d 102, 104 (S.D. 1988)
Tenn.	7	1796	State v. Foutch, 34 S.W. 1, 1 (Tenn. 1896)
Tex.	9	1836	
Utah	9	1984	
Vt.	7	1777	State v. Rosenthal, 55 A. 610 (Vt. 1903)
Va.	5	1971	*Compare* 1993 Va. Op. Atty. Gen. 13 (construing the right as collective) *with* 2006 WL 304006 (Va. Op. Atty. Gen.) (construing the right as individual)
Wash.	9	1889	
W. Va.	9	1986	
Wis.	9	1998	
Wyo.	9	1889	State v. McAdams, 714 P.2d 1236, 1238 (Wyo. 1986)

IV. PROVISIONS BY DATE

New right-to-bear-arms provisions, and new portions of those provisions, are set in italics. Deletions are set in strikeout. Material that is the same as in a preceding version, or that isn't directly focused on the right to bear arms, is set in plain text. Changes of "defence" to "defense" marked as "defen*s*e," with no separate strikeout of the "c." Some otherwise hard-to-see changes are also underlined.

1776 North Carolina: *That 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.

1776 Pennsylvania: *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.

1777 Vermont: *That the people have a right to bear arms for the defence of themselves and the State*—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power.

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

1790 Pennsylvania: ~~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.~~ *The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.*

1792 Kentucky: *The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.*

1796 Tennessee: *That the freemen of this State have a right to keep and to bear arms for their common defence.*

1799 Kentucky: *That* the right*s* of the citizens to bear arms in defence of themselves and the State shall not be questioned.

1802 Ohio: *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.

1816 Indiana: *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.

1817 Mississippi: *Every citizen has a right to bear arms, in defence of himself and the State.*

1818 Connecticut: *Every citizen has a right to bear arms in defence of himself and the state.*

1819 Alabama: *That every citizen has a right to bear arms in defence of himself and the state.*

1819 Maine: *Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned.*

1820 Missouri: 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.*

1832 Mississippi: Every citizen has a right to bear arms~~,~~ in defence of himself and *of* the State.

1834 Tennessee: That the *free white men* ~~freemen~~ of this State have a right to keep and to bear arms for their common defence.

1835 Michigan: *Every person has a right to bear arms for the defence of himself and the State.*

1836 Arkansas: *That the free white men of this State shall have a right to keep and to bear arms for their common defence.*

1836 Texas: *Every citizen shall have the right to bear arms in defence of himself and the republic.* The military shall at all times and in all cases be subordinate to the civil power.

1838 Florida: *That the free white men of this State shall have a right to keep and to bear arms for their common defence.*

1842 Rhode Island: *The right of the people to keep and bear arms shall not be infringed.*

1845 Texas: ~~The military shall at all times and in all cases be subordinate to the civil power.~~ Every citizen shall have the right to keep and bear arms in *lawful* defence of himself *or the State* ~~and the republic~~.

1850 Kentucky: 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.*

1850 Michigan: Every person has a right to bear arms for the defence of himself and the ~~S~~state.

1851 Indiana: The people shall 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~~.

1851 Ohio: ~~That~~ t*T*he people have the right to bear arms for *their defense and security* ~~the defence of themselves and the State~~; *but* ~~and as~~ standing armies, in time of peace, are dangerous to liberty, *and* ~~they~~ shall not be kept up*,*~~;~~ and ~~that~~ the military shall be *in* ~~kept under~~ strict subordination to the civil power.

1857 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.

1859 Kansas: *The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.*

1861 Arkansas: That the free white men *and Indians* of this State ~~shall~~ have the right to keep and ~~to~~ bear arms for their *individual or* common defens*e*.

1864 Arkansas: That the free white men ~~and Indians~~ of this State *shall* have the right to keep and *to* bear arms for their ~~individual or~~ common defen*c*e.

1865 Florida: ~~That the free white men of this State shall have a right to keep and to bear arms for their common defence~~. [Provision deleted.]

1865 Georgia: *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.*

1865 Missouri: 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 lawful authority of* the State cannot be questioned.

1868 Arkansas: ~~That the free white men of this State shall have a~~ *The citizens of this State shall have the* right to keep and ~~to~~ bear arms for their common defense.

1868 Florida: *The people shall have the right to bear arms in defence of themselves and of the lawful authority of the State.*

1868 Georgia: A well-regulated militia~~,~~ being necessary to the security of a free ~~State~~ *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.*

1868 Mississippi: ~~Every citizen has a right to bear arms in defence of himself and of the State~~ *All persons shall have a right to keep and bear arms for their defence.*

1868 North Carolina: ~~That the people have a right to bear arms, for the defence of the State~~ *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.

1868 South Carolina: *The people have a right to keep and bear arms for the common defence.* 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.

1868 Texas: Every *person* ~~citizen~~ 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.*

1870 Tennessee: That the *citizens* ~~free white men~~ of this State have a right to keep and to bear arms for their common defens*e; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.*

1874 Arkansas: The citizens of this State shall have the right to keep and to bear arms*,* for their common defens*e*.

***1875* Alabama:** That every citizen has a right to bear arms in defen*s*e of himself and the state.

1875 Missouri: ~~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 lawful authority of the State cannot be questioned~~ *That the right of no citizen to keep and bear arms in defence of his home, person and 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.*

1876 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.*

1876 North Carolina: A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to and governed by the civil power. *Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the legislature from enacting penal statutes against said practice.*

1876 Texas: Every *citizen* ~~person~~ 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*~~, under such regulations as the legislature may prescribe~~.

1877 Georgia: ~~A well-regulated militia being necessary to the security of a free people, t~~*T*he right of the people to keep and bear arms shall not be infringed~~;~~*,* but the ~~g~~*G*eneral ~~a~~*A*ssembly shall have power to prescribe the manner in which arms may be borne.

1879 Louisiana: *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.*

1885 Florida: ~~The people shall have the~~ *The* right *of the people* to bear arms in defence of themselves and of the lawful

authority of the State, *shall not be infringed, but the Legislature may prescribe the manner in which they may be borne.*

1889 Idaho: *The people have the right to bear arms for their security and defense; but the Legislature shall regulate the exercise of this right by law.*

1889 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.*

1889 South Dakota: *The right of the citizens to bear arms in defense of themselves and the state shall not be denied.*

1889 Washington: *The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.*

1889 Wyoming: *The right of citizens to bear arms in defense of themselves and of the state shall not be denied.*

1890 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* ~~All persons shall have a right to keep and bear arms for their defence~~.

1891 Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Seventh: ~~That the rights of the citizens~~ *The right* to bear arms in defens*e* of themselves and *of* the State ~~shall not be questioned; but~~, *subject to the power of* the General Assembly ~~may pass~~ *to enact* laws to prevent persons from carrying concealed weapons.

1895 South Carolina: *A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.* ~~The people have a right to keep and bear arms for the common defence.~~ 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.

1895 Utah: *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.*

1907 Oklahoma: *The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.*

1912 Arizona: *The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.*

1912 New Mexico: *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.*

1945 Missouri: That the right of ~~no~~ *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, ~~when thereto legally summoned,~~ shall *not be questioned* ~~be called into question~~; but *this shall not justify the* ~~nothing herein contained is intended to justify the practice of~~ wearing *of* concealed weapons.

1959 Alaska: *A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.*

1959 Hawaii: *A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.*

1963 Michigan: Every person has a right to *keep and* bear arms for the defen*s*e of himself and the state.

1968 Florida: The right of the people to *keep and* bear arms in defen*s*e of themselves and of the lawful authority of the ~~S~~*s*tate shall not be infringed, ~~but the Legislature may prescribe the manner in which they may be borne~~ *except that the manner of bearing arms may be regulated by law.*

1970 Illinois: *Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.*

1971 New Mexico: ~~The people have the right to bear arms for their security and defense~~ *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.

1971 North Carolina: A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they *shall not be maintained* ~~ought not to be kept up~~, and the military *shall* ~~should~~ 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 ~~legislature~~ General Assembly from enacting penal statutes against that practice.

1971 Virginia: That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, *therefore, the right of the people to keep and bear arms shall not be infringed*; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

1974 Louisiana: ~~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.~~ *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.*

1978 Idaho: The people have the right to ~~bear arms for their security and defense; but the Legislature shall regulate the exercise of this right by law~~ *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.*

1982 Nevada: *Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes.*

1982 New Hampshire: *All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.*

1984 North Dakota: All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; *and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes*, which shall not be infringed.

1984 Utah: *The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.* ~~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.~~

1986 New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. *No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.*

1986 West Virginia: *A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.*

1987 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.*

1987 Maine: Every citizen has a right to keep and bear arms ~~for the common defence;~~ and this right shall never be questioned.

1988 Nebraska: All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and *the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes*, and such rights shall not be denied or infringed by the state or any subdivision thereof.

1990 Florida: *(a)* The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the

state shall not be infringed, except that the manner of bearing arms may be regulated by law.

(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, "purchase" means the transfer of money or other valuable consideration to the retailer, and "handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.

(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.

(d) This restriction shall not apply to a trade in of another handgun.

1994 Alaska: A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. *The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State.*

1998 Wisconsin: *The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.*