

HISTORY IS NOT ENOUGH: USING CONTEMPORARY JUSTIFICATIONS FOR THE RIGHT TO KEEP AND BEAR ARMS IN INTERPRETING THE SECOND AMENDMENT

Abstract: Over two hundred years after James Madison wrote the Second Amendment to the U.S. Constitution, there is still little agreement on the meaning of "the right of the people to keep and bear arms." The debate over this provision has focused on divining the intent of the Framers to determine what was meant by the "militia" in the eighteenth century. Interpreting the past, however, has failed to resolve the issue, evidenced by the fact that both those in favor of and those opposed to a private right to keep and bear arms point to the same authorities for support. This Note argues that rather than continually re-examining historical sources, we should determine whether there are contemporary justifications supporting the individual right of a citizen to keep and bear arms.

INTRODUCTION

Of all of the provisions in the U.S. Constitution, few seem to spark as much debate as the Second Amendment.¹ More than two hundred years after the drafting of the Constitution, the United States is still arguing over why the Framers granted the people the right to keep and bear arms.² There are essentially two main sides in this debate.³ The first is the collective or states' right view, which is that the

¹ See U.S. CONST. amend. II; Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206 (1983); Donna-Marie Korth & Candace Reid Gladston, *The Second Amendment Was Not Intended to Justify Arming Every Tom, Dick and Harriet with an Assault Weapon*, 17 ST. JOHN'S J. LEGAL COMMENT. 515, 515-17 (2003); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 641 (1989); William McCoskey, *The Right of the People to Keep and Bear Arms Shall Not Be Litigated Away: Constitutional Implications of Municipal Lawsuits Against the Gun Industry*, 77 IND. L.J. 873, 873-74 (2002); John Prince, *The Naked Emperor: The Second Amendment and the Failure of Originalism*, 40 BRANDEIS L.J. 659, 660-61 (2002).

² See U.S. CONST. amend. II; Kates, *supra* note 1, at 206; Korth & Gladston, *supra* note 1, at 515-17; Levinson, *supra* note 1, at 641; McCoskey, *supra* note 1, at 873-74; Prince, *supra* note 1, at 660-61.

³ Kates, *supra* note 1, at 206.

Second Amendment only protects the right of the states to maintain a militia and not the right of individual citizens to keep and bear arms.⁴ Proponents of this view claim that the Second Amendment only permits individuals to bear firearms collectively, when they are part of a state organized military unit.⁵ This is the current position of the American Civil Liberties Union and many legal academics.⁶

At the opposite end of the spectrum is the view endorsed by the National Rifle Association and other pro-gun ownership groups, which is that the Second Amendment does protect the right of individual citizens to keep and bear arms.⁷ Although acknowledging that this right exists partly to provide for a militia, this view also allows for citizens to be armed to protect themselves and to serve as a check against tyranny.⁸

To a startling degree, both sides cite the same case law, history, and other authorities to support their views.⁹ The difference is in interpretation, with each group giving varying degrees of importance to different Framers of the Constitution and judicial opinions.¹⁰ The result is that the debate between the two sides has fallen into a never-ending circle of simply re-interpreting those same authorities.¹¹ For example, James Madison's intentions are constantly re-examined in an effort to show that he supported either an individual or a states' right view when he wrote the Second Amendment.¹² Aside from pointing to the current societal costs or benefits of firearms (depending on one's point of view) there has been little new material injected into this debate.¹³

⁴ Levinson, *supra* note 1, at 644.

⁵ *Id.* at 642, 644.

⁶ *Id.*

⁷ Kenneth Lasson, *Blunderbuss Scholarship: Perverting the Original Intent and Plain Meaning of the Second Amendment*, 32 U. BALT. L. REV. 127, 161 (2003).

⁸ See Kates, *supra* note 1, at 267-68.

⁹ Compare Lasson, *supra* note 7, at 133, with Levinson, *supra* note 1, at 647-49 (using exactly the same quote from James Madison in both arguments).

¹⁰ Compare Lasson, *supra* note 7, at 187, with Levinson, *supra* note 1, at 652-55 (reaching different conclusions on *United States v. Miller*, 307 U.S. 174 (1939)).

¹¹ See, e.g., Kates, *supra* note 1, at 248-49; Lasson, *supra* note 7, at 140-41.

¹² See, e.g., Lasson, *supra* note 7, at 133; Levinson, *supra* note 1, at 647-49.

¹³ See Kates, *supra* note 1, at 268-70; Korth & Gladston, *supra* note 1, at 521-22; Lasson, *supra* note 7, at 127. The two sides of the debate hold different opinions on the value of firearms in society, both at the time of the framing of the U.S. Constitution and in the present. Kates, *supra* note 1, at 268-69; Korth & Gladston, *supra* note 1, at 516. They also articulate very different accounts of American history—one claiming that firearms were valued and relied on to protect home and country, and the other maintaining that few knew how to use firearms because such weapons had little practical importance. See Kates, *supra* note 1, at 214-16; Lasson, *supra* note 7, at 131.

The federal courts also are divided on this issue.¹⁴ In 1939, in *United States v. Miller*, the U.S. Supreme Court undertook its most recent examination of which right the Second Amendment protects.¹⁵ Unfortunately, that decision is not entirely clear, and both states' right supporters and individual right advocates read the case as supporting their position.¹⁶ Not surprisingly, perhaps, a split has developed among the federal circuit courts of appeals, with most finding a states' right, but with the Fifth Circuit Court of Appeals finding an individual right to bear arms.¹⁷

It will take a specific ruling from the U.S. Supreme Court to finally resolve the meaning of the Second Amendment.¹⁸ With so much confusion about the intent of the Framers and other historical factors, however, the Court will need to look elsewhere to determine which right the Second Amendment protects.¹⁹ This Note argues that the question should be decided by looking at how state legislatures and courts currently define the right to bear arms.²⁰

Looking to present justifications to interpret an older piece of legislation is a method the Supreme Court has used in the past, such as in the interpretation of state blue laws.²¹ In 1961, in *Gallagher v. Crown Kasher Super Market of Massachusetts, Inc.*, the Court upheld blue laws—restrictions on Sunday activities based in religion—by noting that state legislatures currently justify them as providing a day of rest for workers.²² According to the Court, although the original reasons for enacting blue laws might have violated the Establishment Clause of the First Amendment by promoting religion, a new justification

¹⁴ See *United States v. Emerson*, 270 F.3d 203, 220, 260 (5th Cir. 2001) (noting that although it had found an individual right to bear arms in the Second Amendment, the other federal circuit courts of appeals had not).

¹⁵ 307 U.S. at 175.

¹⁶ Compare *Kates*, *supra* note 1, at 249 (interpreting the Court to have ruled in favor of an individual right), with *Lasson*, *supra* note 7, at 140 (reading the case in favor of a states' right).

¹⁷ See *Emerson*, 270 F.3d at 220, 260.

¹⁸ See *Kates*, *supra* note 1, at 248–50 (stating that *Miller* has caused much confusion).

¹⁹ See *Lasson*, *supra* note 7, at 156. *Lasson* stresses that the U.S. Constitution was intended to be a living, flexible document that can adapt to meet the needs of the present. *Id.* Because history has not provided an answer, it seems that the U.S. Supreme Court should take this approach in deciding the meaning of the Second Amendment to determine if an individual right to bear arms makes sense in today's world. See *id.*

²⁰ See *infra* notes 299–357 and accompanying text.

²¹ See *Gallagher v. Crown Kasher Super Mkt. of Mass., Inc.*, 366 U.S. 617, 626–27 (1961) (describing how the purpose of the blue laws has changed over time).

²² *McGowan v. Maryland*, 366 U.S. 420, 449 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 598 (1961); *Gallagher*, 366 U.S. at 627.

had evolved over time.²³ Providing a day of rest, regardless of the original intent of the blue laws, was an adequate justification for upholding these statutes in modern times.²⁴ Further, any reference to religion that these statutes still contained should be read as a relic of the past and as no longer controlling the purpose of the statute.²⁵

The same reasoning used to find a modern justification for the blue laws can be used to support an individual right to bear arms.²⁶ The analogy to the Second Amendment is that regardless of whether the Framers originally granted the right to bear arms to provide for a militia, other reasons now exist for upholding this as an individual right.²⁷ Evidence of how the right to bear arms is viewed and justified as an individual right is found in state constitutions, an important source for determining how Americans have defined the rights they believe they should have.²⁸ The majority of state constitutions expressly grant an individual right to bear arms.²⁹ Most of these state constitutions provide reasons for doing so, the most common reason being self-defense.³⁰ Numerous state courts have upheld the right of citizens to defend themselves, and the structure of American tort law demonstrates a need for this right.³¹

With this evidence for how most states grant and justify an individual right to bear arms, courts should find that the contemporary reason for the Second Amendment is to protect an individual right of citizens to keep and bear arms.³² Like the blue laws, the U.S. Constitution is a piece of legislation, and the meaning behind its provisions should be able to evolve in a similar manner.³³ The Second Amendment's reference to the militia, like the mention of religion in the blue laws, should be read as outdated and as no longer defining why the right to bear arms exists.³⁴

²³ *McGowan*, 366 U.S. at 445; see U.S. CONST. amend. I.

²⁴ *McGowan*, 366 U.S. at 445; *McGinley*, 366 U.S. at 593, 596-98; *Gallagher*, 366 U.S. at 626-28.

²⁵ *Gallagher*, 366 U.S. at 626-27.

²⁶ See *infra* notes 282-357 and accompanying text.

²⁷ See *infra* notes 282-357 and accompanying text.

²⁸ See *infra* notes 155-180 and accompanying text.

²⁹ *Infra* note 155 and accompanying text.

³⁰ See *infra* notes 166-180 and accompanying text.

³¹ See *infra* notes 185-281 and accompanying text.

³² See *infra* notes 282-357 and accompanying text.

³³ See *Lasson*, *supra* note 7, at 156.

³⁴ See *Gallagher*, 366 U.S. at 626-27.

Part I of this Note reviews how the federal courts have dealt with the Second Amendment.³⁵ Part II reviews the U.S. Supreme Court's treatment of the blue laws and the idea that the justification for a piece of legislation can change over time.³⁶ Part III examines the justifications for an individual right to bear arms today, by looking at state constitutions, state court decisions, and the logic used in American tort law.³⁷ Part IV points out that recognizing an individual right to bear arms is not a surrender to lawlessness because this right, like all others, can be regulated in reasonable ways.³⁸ Part V argues that even if the Second Amendment was originally concerned with the militia, the reasons for a right to bear arms have changed over time, and the Second Amendment should now be read as protecting an individual right to bear arms.³⁹

I. INTERPRETATION OF THE SECOND AMENDMENT BY THE FEDERAL COURTS

The U.S. Supreme Court has not examined the Second Amendment since 1939, and its last holding on which right the Second Amendment protects was unclear.⁴⁰ This lack of a clear ruling has become one of the reasons behind the current split among the federal circuit courts of appeals.⁴¹ The majority of lower federal courts have ruled that the Second Amendment only protects the right of the states to maintain a militia.⁴² The Fifth Circuit Court of Appeals, however, after a lengthy historical analysis, has found that the Second Amendment protects an individual right to keep and bear arms, making it likely that the U.S. Supreme Court will need to revisit the issue.⁴³

A. *The U.S. Supreme Court in United States v. Miller*

The U.S. Supreme Court has not clearly outlined its position on which right the Second Amendment protects.⁴⁴ In 1939, in *United*

³⁵ See *infra* notes 40–81 and accompanying text.

³⁶ See *infra* notes 82–130 and accompanying text.

³⁷ See *infra* notes 131–281 and accompanying text.

³⁸ See *infra* notes 282–298 and accompanying text.

³⁹ See *infra* notes 299–357 and accompanying text.

⁴⁰ See *United States v. Miller*, 307 U.S. 174, 175 (1939).

⁴¹ *United States v. Emerson*, 270 F.3d 203, 220 (5th Cir. 2001); *United States v. Onkes*, 564 F.2d 384, 387 (10th Cir. 1977).

⁴² *Lasson*, *supra* note 7, at 139.

⁴³ See *Emerson*, 270 F.3d at 264.

⁴⁴ See *infra* note 48 and accompanying text.

States v. Miller, the Court gave the latest of only three decisions on this issue.⁴⁵ The case concerned the sale of a sawed-off shotgun in violation of the National Firearms Act.⁴⁶ The Court ruled that the Second Amendment did not protect possession of this weapon because a shotgun with a barrel less than eighteen inches long serves no military purpose and is not related to maintaining a militia.⁴⁷

The Court did not answer clearly the question about a collective versus an individual right.⁴⁸ The opinion states that the purpose of the Second Amendment was to preserve the militia, which could support the states' right theory of the Second Amendment.⁴⁹ The Court went on to observe, however, that history showed that the nation's militia consisted of all able-bodied males, which could support an individual right argument.⁵⁰ For example, if all males are part of the militia, this decision could be read to mean that every male citizen has the right to possess a weapon that serves a military purpose.⁵¹ It is possible that if the defendants had possessed a weapon with military value, they might have had a sound argument with the Court.⁵²

B. *The Federal Circuit Courts of Appeals: An Example of the Futility of Looking to History*

Until recently, the federal circuit courts of appeals had taken the states' right view unanimously.⁵³ For example, in 1977, in *United States v. Oakes*, the Tenth Circuit Court of Appeals held that the Second Amendment does not protect the right of every citizen to possess a weapon.⁵⁴ Further, the court found that even the defendant's membership in a militia did not give him a right to possess an unregistered firearm with no connection to military service.⁵⁵

⁴⁵ 307 U.S. at 175.

⁴⁶ *Id.*

⁴⁷ *Id.* at 178.

⁴⁸ See *id.* at 178-83 (discussing the militia, but never articulating exactly which right there was for individuals to possess arms); *Kates*, *supra* note 1, at 249 (interpreting *Miller* in favor of an individual right view); *Lasson*, *supra* note 7, at 140 (interpreting *Miller* in favor of a states' right view).

⁴⁹ *Miller*, 307 U.S. at 178.

⁵⁰ See *id.* at 179.

⁵¹ *Levinson*, *supra* note 1, at 655.

⁵² See *id.* at 654.

⁵³ *Lasson*, *supra* note 7, at 139 (stating that almost every United States court of appeals' decision since 1939 has rejected the individual rights interpretation of the Second Amendment).

⁵⁴ 564 F.2d at 387.

⁵⁵ *Id.*

The Seventh Circuit Court of Appeals, when it upheld a municipal ban on handguns, agreed with the conclusion of the Tenth Circuit that there was no individual right to bear arms.⁵⁶ Although it did not consider a Second Amendment argument, the Eleventh Circuit Court of Appeals also has upheld a national ban on automatic weapons.⁵⁷ More recently, the Eighth Circuit Court of Appeals has ruled that without membership in a militia, the Second Amendment does not protect an individual's possession of a firearm.⁵⁸

The consistency in upholding a states' right view broke down, however, in 2001, when the Fifth Circuit Court of Appeals ruled, in *United States v. Emerson*, that the Second Amendment does protect an individual's right to possess a firearm.⁵⁹ Observing that no other federal circuit court of appeals has agreed with this holding, the Fifth Circuit nevertheless found that both historical evidence and the plain meaning of the text support an individual right to bear arms.⁶⁰

The *Emerson* court read *Miller* narrowly, finding that the U.S. Supreme Court had decided only that possessing a shotgun with a barrel less than eighteen inches long was not protected by the Second Amendment.⁶¹ The Fifth Circuit determined that the Supreme Court had not decided whether a citizen had the right to bear any weapons when not in a state-organized militia.⁶² The Supreme Court never suggested that the basis for finding the defendants guilty of illegally possessing a weapon was that they had not belonged to a militia.⁶³ Instead, the decision focused only on the type of weapon the defendants had possessed.⁶⁴

The Fifth Circuit next examined the meaning of the words in the Second Amendment itself.⁶⁵ It found that the "people" who are given the right to keep and bear arms cannot be read as meaning the "states."⁶⁶ The word "people" in the Second Amendment must have the same meaning as it does elsewhere in the U.S. Constitution, referring

⁵⁶ See *Quilici v. Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982).

⁵⁷ *Farmer v. Higgins*, 907 F.2d 1041, 1042, 1045 (11th Cir. 1990).

⁵⁸ *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992).

⁵⁹ See 270 F.3d at 264.

⁶⁰ *Id.* at 259-60.

⁶¹ See *id.* at 224.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Emerson*, 270 F.3d at 224.

⁶⁵ *Id.* at 227.

⁶⁶ *Id.* at 227-28.

to citizens and not to state governments.⁶⁷ The court also found that although the U.S. Constitution gives the federal and state governments powers and authority, only the people have rights, and thus, the Second Amendment conveys the right to keep and bear arms to citizens.⁶⁸

The Fifth Circuit also found that the preamble of the Second Amendment—"A well regulated Militia, being necessary to the security of a free state"—cannot be read as interfering with an individual's right to bear arms.⁶⁹ The court held that this phrase cannot control the plain meaning of the Second Amendment to grant a right to individuals.⁷⁰ Further, even if the word "militia" were held to be controlling, it still would not take away any rights from individuals.⁷¹ Looking to *Miller*, James Madison in *The Federalist No. 46*, and the Militia Act of 1792, the Fifth Circuit found that the "militia" in the Second Amendment consists of the body of the people, not the state-organized units of the National Guard.⁷²

The last factor the Fifth Circuit examined was the history of the Second Amendment, which the court also found supported an individual's right to keep and bear arms.⁷³ The amount of material that the court examined was exhaustive, and its analysis was much more thorough than that of the other federal circuit courts of appeals.⁷⁴ In every instance, strong evidence supported the idea that the Second

⁶⁷ *Id.*

⁶⁸ *Id.* at 229.

⁶⁹ *Emerson*, 270 F.3d at 233; see U.S. CONST. amend. II.

⁷⁰ *Id.*

⁷¹ See *id.* at 234-35.

⁷² *Id.* at 234-36. The Fifth Circuit quoted *The Federalist No. 46*, in which James Madison states that any attempt by Congress to use a standing army to threaten liberty would be "opposed [by] a militia amounting to near half a million of citizens with arms in their hands" and describes the "advantage of being armed, which the Americans possess over the people of almost every other nation . . ." *Id.* at 235 (quoting *THE FEDERALIST* No. 46 (James Madison)). The modern militia act states that "the unorganized militia . . . consists of the members of the militia who are not members of the National Guard or the Naval Militia." 10 U.S.C. § 311(b) (2000).

⁷³ *Emerson*, 270 F.3d at 236.

⁷⁴ Compare *id.* at 236-37, 241, 245, 255 (discussing the federalist and anti-federalist debate over ratifying the U.S. Constitution, what the ratifying states wanted or suggested be put in the U.S. Constitution regarding a citizen's right to be armed, the history of the drafting of the Second Amendment, and nineteenth century commentary), with *Hale*, 978 F.2d at 1020 (containing a short historical analysis, which assumes that the Second Amendment only provides for a militia), *Farmer*, 907 F.2d at 1042, 1045 (including no historical analysis at all), and *Quilici*, 695 F.2d at 270 (providing a short examination of case law and no historical background or analysis).

Amendment was intended to protect the right of individual citizens to possess firearms.⁷⁵

Although some of those opposed to an individual right nevertheless admire the enormous amount of historical analysis in *Emerson*, it will not finally resolve the nature of the right that the Second Amendment protects.⁷⁶ As *Emerson* itself noted, no other federal circuit court of appeals has supported this view.⁷⁷ Additionally, many of the opponents of an individual right believe that any justifications for it are now obsolete.⁷⁸ With modern professional police forces, they claim, citizens no longer need to defend themselves.⁷⁹ There is also little or no risk of tyranny in a democracy that has matured as much as the United States and, therefore, there is no need to possess weapons to resist the government.⁸⁰ In response to the historical justifications given in *Emerson*, the opponents of an individual right would say that those factors are no longer relevant or never existed in the first place.⁸¹

II. AN ALTERNATIVE METHOD: THE REVIEW OF BLUE LAWS BY THE U.S. SUPREME COURT AND THE IDEA THAT THE REASON FOR A PIECE OF LEGISLATION CAN CHANGE OVER TIME

In 1961, the U.S. Supreme Court handed down three decisions preserving state blue laws.⁸² In each, the Court found that although restrictions of activities on Sundays had their roots in religion, the laws could be upheld because modern, non-religious reasons to support them had evolved over time.⁸³ Among others, the secular interest of the state in setting aside a day of rest for workers was held to be a legitimate reason for allowing the laws to stand.⁸⁴ In other words, the Court found a contemporary justification to support laws that some considered antiquated and obsolete.⁸⁵

⁷⁵ See *Emerson*, 270 F.3d at 259–60.

⁷⁶ Gil Grantmore, *The Phages of American Law*, 36 U.C. DAVIS L. REV. 455, 459–60 (2003).

⁷⁷ 270 F.3d at 220.

⁷⁸ See, e.g., Korth & Gladston, *supra* note 1, at 522; Lasson, *supra* note 7, at 155–56.

⁷⁹ See, e.g., Lasson, *supra* note 7, at 156.

⁸⁰ *Id.* at 156–57.

⁸¹ See Korth & Gladston, *supra* note 1, at 522; Lasson, *supra* note 7, at 151, 161.

⁸² *McGowan v. Maryland*, 366 U.S. 420, 449 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 597 (1961); *Gallagher v. Crown Kasher Super Mkt. of Mass., Inc.*, 366 U.S. 617, 630–31 (1961).

⁸³ See *McGowan*, 366 U.S. at 431, 444; *McGinley*, 366 U.S. at 593, 596–98; *Gallagher*, 366 U.S. at 624, 630.

⁸⁴ *McGowan*, 366 U.S. at 445.

⁸⁵ See *Gallagher*, 366 U.S. at 627 (explaining that the purpose of the blue laws had changed over time).

A. *A Day of Rest Replacing Religion as the Justification for Blue Laws: McGowan v. Maryland*

In 1961, in *McGowan v. Maryland*, the U.S. Supreme Court reviewed the indictment of seven store employees for selling merchandise on Sunday, in violation of Maryland state law.⁸⁶ The employees argued that this prohibition violated the First Amendment's guarantee of the separation of church and state, as applied to the states through the Fourteenth Amendment.⁸⁷ The Court found that the employees had suffered an economic injury (because of the fines they paid), allegedly due to the imposition of the rules of Christianity upon them.⁸⁸ The employees also claimed that these blue laws violated the Establishment Clause by setting aside Sunday as a day of rest to increase attendance at religious services.⁸⁹

The Court began its discussion by conceding that religion was the original motivation behind the blue laws.⁹⁰ Statutes that mandated the closing of business on Sundays had a long history in both the United States and England.⁹¹ From the time of the founding of the American colonies until the Revolution, the law in place was that of Charles II, which stated the following:

For the better observation and keeping holy the Lord's day, commonly called Sunday: be it enacted . . . that no tradesman, artificer, workman, laborer, or other person whatsoever, *shall do or exercise any worldly labor or business or work of their ordinary callings . . . [or] show forth, or expose for sale any wares, merchandise, fruit . . .*⁹²

With this background, the American colonies were quick to prohibit certain activities on Sundays.⁹³ For instance, in 1650, Plymouth

⁸⁶ 366 U.S. at 422-23. The employees had violated MD. ANN. CODE art. 27, § 521 (repealed 1992). *Id.* Although many items, such as tobacco, milk, bread, and gasoline were exempted from this prohibition, the items sold by the appellants, including floor wax, a three ring binder, and staples, were not. *Id.*

⁸⁷ *Id.* at 430.

⁸⁸ *Id.*

⁸⁹ *Id.* at 431.

⁹⁰ *Id.*

⁹¹ *McGowan*, 366 U.S. at 431. In 1237, Henry III prohibited the opening of markets on Sundays, and further restrictions followed through the 1600s, including the prohibition of, at various times, Sunday fairs in churchyards, all fairs and markets, bodily labor, and various sports. *Id.* at 431-32.

⁹² *Id.* at 432 (citing 29 Car. 2, c. 7 (1677) (Eng.)).

⁹³ *Id.* at 433.

Colony banned labor, unnecessary work, sports, and the sale of alcohol on Sundays.⁹⁴ Around the time of the adoption of the Bill of Rights, every American state had some sort of restriction on Sunday activities.⁹⁵

After reviewing this history of the blue laws, the Court in *McGowan* examined whether these laws had retained their religious character.⁹⁶ The Court observed that as early as the 1700s, non-religious justifications were used to restrict activity on Sundays.⁹⁷ For example, in 1788, an English statute regulating the work of chimney sweeps explained that the restrictions on Sundays both allowed time for religious affairs and limited the number of hours the chimney sweeps could work.⁹⁸ The same year, a New York statute used the words "first day of the week commonly called Sunday," instead of the "Lord's day."⁹⁹ By 1885, Justice Field was able to write the following:

Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor.¹⁰⁰

More recently, the non-religious reasons for banning work or other activities on Sundays have become more prominent, mostly out of concern that workers need a day of rest.¹⁰¹ The justifications for allowing this day off have become stronger, with health studies recommending such a break to maintain employee productivity.¹⁰² Additionally, those supporting these prohibitions no longer represent only religious institutions, but now include labor groups and trade associations.¹⁰³

⁹⁴ *Id.* Massachusetts Bay Colony, Connecticut, and New Haven had similar prohibitions, some enacted even earlier than Plymouth's. *Id.* Leaving no doubt that these restrictions were intended to promote religion, a similar Massachusetts Bay Colony statute proclaimed that the prohibitions were "to the end the Sabbath may be celebrated in a religious manner." *Id.*

⁹⁵ *Id.*

⁹⁶ *McGowan*, 366 U.S. at 433.

⁹⁷ *Id.* at 433-34.

⁹⁸ *Id.* at 434 (citing 28 Geo. 3, c. 48 (1788) (Eng.)).

⁹⁹ *Id.* (citing 2 LAWS OF N.Y. 1785-1788, at 680). Maryland made a similar change to its laws the same year. *Id.*

¹⁰⁰ *Soon Hing v. Crowley*, 113 U.S. 703, 710 (1885).

¹⁰¹ *McGowan*, 366 U.S. at 434.

¹⁰² *Id.* at 434-35 (citing MINISTRY OF MUNITIONS, HEALTH OF MUNITIONS WORKERS COMMITTEE, REPORT ON SUNDAY LABOUR, Memorandum No. 1, at 5 (1915)).

¹⁰³ *Id.* at 435 (stating that modern English restrictions on Sunday activities were supported by the National Federation of Grocers, the National Chamber of Trade, the Draper's Chamber of Trade, and the National Union of Shop Assistants).

Noting that almost every U.S. state had some form of Sunday regulations in place in 1961, the Court in *McGowan* found that blue laws had evolved over the centuries and were no longer solely for the promotion of religion.¹⁰⁴ The modern focus on secular reasons convinced the Court that current blue laws are justified now primarily by secular reasons, rather than religious ones.¹⁰⁵ State governments had directed their efforts to protect the health and well-being of their citizens, and there was no longer any conflict with the Establishment Clause of the U.S. Constitution.¹⁰⁶ The fact that these laws were based on religion hundreds of years ago was no reason why they could not be upheld by interpreting them to promote public welfare today.¹⁰⁷

With these principles in mind, the Court went on to rule that the Maryland blue laws, although originally based in religion, could be upheld for secular reasons.¹⁰⁸ Although the statutes still contained terms like the "Lord's day" or "profan[ing] the Lord's day," they were, in fact, no longer concerned with the promotion of religion.¹⁰⁹ The legislative intent now was to provide a day of rest from work, during which all members of society could spend time together as they wished.¹¹⁰

B. *Further Evidence of a Change in the Justification for the Blue Laws:*
Two Guys from Harrison-Allentown, Inc. v. McGinley

The same year, 1961, in *Two Guys from Harrison-Allentown, Inc. v. McGinley*, the U.S. Supreme Court affirmed this position.¹¹¹ The issue in that case was whether a Pennsylvania statute that banned the sale of many articles on Sundays violated constitutional protections of religious freedom.¹¹² The Court first noted that the Pennsylvania statute also had a religious background.¹¹³ As in *McGowan*, however, the

¹⁰⁴ *Id.* at 435, 444-45.

¹⁰⁵ *Id.* at 444-45.

¹⁰⁶ *McGowan*, 366 U.S. at 442, 444-45.

¹⁰⁷ *Id.* at 445.

¹⁰⁸ *Id.* at 446, 449-50.

¹⁰⁹ *Id.* at 448-49 (quoting MD. ANN. CODE art. 27, § 492 (repealed 1992)).

¹¹⁰ *Id.* at 450. The Court also found persuasive the large number of activities now excepted from the Sunday restrictions, apparently because this allowed so many non-religious activities to take place. *Id.* at 448-49. The fact that Sunday was chosen did not invalidate the statutes, as that day had come to have significance as a day of rest for all people, regardless of whether they observed religious services. *Id.* at 451-52.

¹¹¹ 366 U.S. at 582, 598.

¹¹² *Id.* at 583-84.

¹¹³ *Id.* at 584.

Court found that the statute's current purpose and effect were no longer the promotion of religion.¹¹⁴

The religious background of this statute dated back hundreds of years.¹¹⁵ As early as 1848, however, the Pennsylvania Supreme Court had ruled that these restrictions on Sunday activities no longer had a solely religious purpose.¹¹⁶ Like Maryland, Pennsylvania's purpose in closing businesses on Sundays was to provide a day of rest for workers.¹¹⁷ Because the majority of the state's population was Christian, it was natural that the day of rest was Sunday, and the U.S. Supreme Court upheld the statute as a civil regulation aimed at enforcing a period of rest.¹¹⁸

*C. Upholding a Day of Rest as Adequate Justification for the Blue Laws,
Even When They Still Cause Economic Harm: Gallagher v. Crown
Kosher Super Market of Massachusetts, Inc.*

The last of the three blue laws cases handed down by the U.S. Supreme Court in 1961 was *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*¹¹⁹ This challenge to restrictions on Sunday activities seemed the strongest because the Massachusetts statute prevented a supermarket run by Orthodox Jews from opening for business on Sundays.¹²⁰ As a result, the store had to close two days during the week: on Saturdays to observe the Jewish Sabbath and on Sundays to comply with the blue laws.¹²¹ Thus, the store was placed at a disadvantage compared to others, which only had to close on Sundays.¹²²

The Supreme Court started by acknowledging that Massachusetts's blue laws had their origins in religion and that the religious

¹¹⁴ *Id.* at 598.

¹¹⁵ *Id.* at 592–93. A colonial statute had been enacted in 1682, and then reenacted in 1700, to provide an opportunity for religious services either in the home or at religious meetings. *Id.* In its most recent incarnation, enacted in 1939, Pennsylvania's Sunday statute still contained a hint of these earlier religious purposes, describing Sunday as "the Lord's day." *Id.* at 594.

¹¹⁶ *McGinley*, 366 U.S. at 596 (quoting *Specht v. Commonwealth*, 8 Pa. 312, 323 (1848)).

¹¹⁷ *Id.*

¹¹⁸ *See id.* at 596, 598 (quoting *Specht*, 8 Pa. at 323).

¹¹⁹ 366 U.S. at 617.

¹²⁰ *See id.* at 618–19.

¹²¹ *Id.*

¹²² *Id.* at 619–20, 630. Additionally, the blue laws prevented Orthodox Jewish customers from purchasing kosher food from Friday afternoon until Monday as a result of the statute's restrictions and the customers' own religious observances. *Id.* at 630–31.

overtone were particularly strong in this instance.¹²³ By 1782, however, a statute concerning the "Observance of the Lord's Day" already stated that the reasons for such restrictions included the chance to rest from work.¹²⁴ The blue laws were changing so that their purpose was no longer solely the promotion of religion.¹²⁵

In examining the present state of the law in Massachusetts, the Court found that the current blue laws had been divorced from the religious motivations of their earlier versions.¹²⁶ Although the laws still contained some religious language, such as references to the "Lord's Day," "[i]t would seem that the objectionable language is merely a relic."¹²⁷ The modern purpose of the blue laws was to promote rest and health, not religion.¹²⁸ This finding, along with statements by the Massachusetts legislature and Supreme Judicial Court of Massachusetts, was enough to show that the Massachusetts blue laws had neither a religious purpose nor effect.¹²⁹ Thus, for Sunday blue laws, the reasoning of the U.S. Supreme Court seems clear—the justifications for upholding a law can evolve over time.¹³⁰

¹²³ *Id.* at 624–25. In 1650, Plymouth Colony had enacted a ban on work on Sundays and prescribed fines or whipping to punish violators. *Id.* at 624. In 1671, the religious motivation for this prohibition was reaffirmed, and the death penalty was made available to punish the worst transgressors:

Do therefore Order, That whosoever shall Prophane the Lord's-day, by doing unnecessary servile Work, by unnecessary travailing, or by sports and recreations, he or they that so transgress, shall forfeit for every such default forty shillings, or be publicly whipt: But if it clearly appear that the sin was proudly, Presumptuously and with a high hand committed, against the known Command and Authority of the blessed God, such a person therein Despising and Reproaching the Lord, shall be put to death or grievously punished at the Judgement of the Court.

THE BOOK OF THE GENERAL LAWS OF THE INHABITANTS OF THE JURISDICTION OF NEW PLIMOUTH (Samuel Green ed., Cambridge 1672), reprinted in THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLIMOUTH (William Brigham ed., Boston, Dutton & Wentworth 1836), and in 7 HISTORICAL WRITINGS IN LAW AND JURISPRUDENCE 247 (R.H. Helmholz & Bernard D. Reams, Jr. eds., William S. Hein & Co. 1986) (1672), quoted in *Gallagher*, 366 U.S. at 625. The laws of the Massachusetts Bay Colony were essentially the same, beginning with a 1653 ban on drinking and engaging in sports on Sundays. *Gallagher*, 366 U.S. at 625 (citing THE COLONIAL LAWS OF MASS. 132–33 (reprinted 1887)).

¹²⁴ *Gallagher*, 366 U.S. at 626 (quoting ACTS AND LAWS OF THE COMMONWEALTH OF MASS. ch. 23, at 63 (reprinted 1890)).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 626–27.

¹²⁸ *Id.* at 627–28 (quoting LEGISLATIVE RESEARCH COUNCIL, REPORT RELATIVE TO LEGAL HOLIDAYS AND THEIR OBSERVANCE, S. 525, at 24 (Mass. 1960)).

¹²⁹ *Gallagher*, 366 U.S. at 627–28, 630.

¹³⁰ *McGowan*, 366 U.S. at 434–35.

III. WHAT THE RIGHT TO KEEP AND BEAR ARMS MEANS TO AMERICANS TODAY

A. An Overview of State Constitutions

A review of state constitutions demonstrates that the majority of U.S. states currently grant an individual the right to keep and bear arms.¹³¹ Most of these states have listed their reasons for doing so, and although maintaining a militia may be included, there are other justifications as well.¹³² Many of these provisions are relatively recent, and since 1978, twelve states have amended or added provisions granting the right to bear arms.¹³³ In each case, the state either strengthened the individual right to bear arms or preserved an already existing individual right to bear arms.¹³⁴

The state constitutions divide into four groups.¹³⁵ First, there are those states that do not acknowledge a right to keep and bear arms at all.¹³⁶ Second are the states with provisions concerning arms that are either similar to that in the U.S. Constitution or are tied explicitly to the common defense.¹³⁷ Third, the largest group, are those states

¹³¹ ALA. CONST. art. I, § 26; ALASKA CONST. art. I, § 19; ARIZ. CONST. art. 2, § 26; COLO. CONST. art. II, § 13; CONN. CONST. art. 1, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. 1, § 8; GA. CONST. art. 1, § 1, ¶ VIII; IDAHO CONST. art. I, § 11; ILL. CONST. art. 1, § 22; IND. CONST. art. 1, § 32; KAN. CONST. B. of R., § 4; KY. CONST. § 1; LA. CONST. art. 1, § 11; ME. CONST. art. 1, § 16; MICH. CONST. art. I, § 6; MISS. CONST. art. 3, § 12; MO. CONST. art. 1, § 23; MONT. CONST. art. 2, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. 1, § 11; N.H. CONST. pt. 1, art. 2-a; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 4; OKLA. CONST. art. 2, § 26; OR. CONST. art. I, § 27; PA. CONST. art. 1, § 21; R.I. CONST. art. 1, § 22; S.D. CONST. art. VI, § 24; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; VT. CONST. ch. 1, art. XVI; WASH. CONST. art. 1, § 24; W. VA. CONST. art. III, § 22; WIS. CONST. art. 1, § 25; WYO. CONST. art. 1, § 24.

¹³² See, e.g., MO. CONST. art. 1, § 23 (citing the defense of home, person, and property); WIS. CONST. art. 1, § 25 (listing security, defense, hunting, and recreation).

¹³³ ALASKA CONST. art. I, § 19; DEL. CONST. art. I, § 20; FLA. CONST. art. 1, § 8; IDAHO CONST. art. I, § 11; ME. CONST. art. 1, § 16; NEB. CONST. art. I, § 1; NEV. CONST. art. 1, § 11; N.H. CONST. pt. 1, art. 2-a; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; W. VA. CONST. art. III, § 22; WIS. CONST. art. 1, § 25.

¹³⁴ ALASKA CONST. art. I, § 19; DEL. CONST. art. I, § 20; FLA. CONST. art. 1, § 8; IDAHO CONST. art. I, § 11; ME. CONST. art. 1, § 16; NEB. CONST. art. I, § 1; NEV. CONST. art. 1, § 11; N.H. CONST. pt. 1, art. 2-a; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; W. VA. CONST. art. III, § 22; WIS. CONST. art. 1, § 25. Even states which chose to regulate the right to bear arms further, like Florida, left the individual right to bear arms itself intact. See, e.g., FLA. CONST. art. 1, § 8.

¹³⁵ See *infra* notes 140-184 and accompanying text.

¹³⁶ See *infra* notes 140-143 and accompanying text.

¹³⁷ See *infra* notes 144-154 and accompanying text.

granting what is clearly an individual right to keep and bear arms.¹³⁸ Fourth, the last group consists solely of Minnesota, which does not have a constitutional provision concerning the right to bear arms, but does have a provision that may confer such a right indirectly for limited purposes.¹³⁹

1. States Not Recognizing Any Right to Keep and Bear Arms

Only four states, Iowa, Maryland, New Jersey, and California, have no reference in their constitutions to any sort of a right to bear arms.¹⁴⁰ California's constitution is representative of the others in this regard.¹⁴¹ It does not list any right to possess arms in its constitutional list of inalienable rights.¹⁴² Although states may allow their citizens to keep and bear arms, there is apparently no right to do so under these states' constitutions.¹⁴³

2. States with Amendments Similar to the Second Amendment of the U.S. Constitution

States with amendments that are the same or similar to the Second Amendment of the U.S. Constitution make up a larger group, consisting of Arkansas, Hawaii, Massachusetts, New York, North Carolina, South Carolina, Tennessee, and Virginia.¹⁴⁴ Of these eight, Hawaii, New York, North Carolina, and South Carolina essentially repeat the Second Amendment of the U.S. Constitution.¹⁴⁵ All four begin their provisions on bearing arms with "A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms

¹³⁸ See *infra* notes 155-180 and accompanying text.

¹³⁹ See MINN. CONST. art. XIII, § 12; *infra* notes 181-184 and accompanying text.

¹⁴⁰ See CAL. CONST.; IOWA CONST.; MD. CONST.; N.J. CONST.

¹⁴¹ See CAL. CONST. art. I, § 1.

¹⁴² See *id.*

¹⁴³ See CAL. CONST.; IOWA CONST.; MD. CONST.; N.J. CONST. For example, New Jersey does not address bearing arms in its constitution, but it does have a statute listing those citizens explicitly forbidden from owning firearms, implying that it may be legal for others to own them. N.J. STAT. ANN. § 2C:39-7 (West 1995). Iowa's constitution, in article 1, section 1, lists defending life and liberty among the inalienable rights it protects, but does not specifically mention bearing arms to do so. See IOWA CONST. art. 1, § 1.

¹⁴⁴ ARK. CONST. art. 2, § 5; HAW. CONST. art. 1, § 17; MASS. CONST. pt. 1, art. XVII; N.C. CONST. art. I, § 30; S.C. CONST. art. I, § 20; TENN. CONST. art. I, § 24; VA. CONST. art. I, § 13; N.Y. CIV. RIGHTS LAW § 4 (McKinney 1992) (providing a statutory, rather than constitutional, provision for the right to bear arms in New York).

¹⁴⁵ HAW. CONST. art. 1, § 17; N.C. CONST. art. I, § 30; S.C. CONST. art. I, § 20; N.Y. CIV. RIGHTS LAW § 4.

shall not be infringed."¹⁴⁶ Although some of these provisions could be read to support an individual right to bear arms, they are just as ambiguous as the Second Amendment of the U.S. Constitution.¹⁴⁷

Arkansas and Massachusetts state explicitly that the people have the right to bear arms for the "common defense," but they do not list any other purpose.¹⁴⁸ Virginia's provision is much less clear because although it grants the right to be armed to the militia, it states that the militia is made up of the body of the people.¹⁴⁹ It is possible to read this as meaning that all citizens, as potential members of the militia, have the right to be armed.¹⁵⁰ Nevertheless, because Virginia's constitution also could be read to allow the right to be armed solely for the common defense, Virginia remains in this category.¹⁵¹

Kansas's constitutional provision grants the people "the right to bear arms for their defense and security."¹⁵² The Kansas Supreme Court has determined, however, that this provision only grants a collective right for the people to be armed.¹⁵³ This interpretation is similar to that used by Massachusetts courts, so Kansas fits best in this category as well.¹⁵⁴

3. States with Amendments that Provide an Individual Right to Keep and Bear Arms

Thirty-six states allow an individual the right to bear arms, by far the largest of the four groups.¹⁵⁵ Within this category, state constitu-

¹⁴⁶ HAW. CONST. art. 1, § 17; N.C. CONST. art. 1, § 30; S.C. CONST. art. I, § 20; N.Y. CIV. RIGHTS LAW § 4. Hawaii and New York's provisions contain nothing more, but North Carolina and South Carolina's provisions go on to describe limits on the military power of the state. HAW. CONST. art. 1, § 17; N.C. CONST. art. I, § 30; S.C. CONST. art. I, § 20; N.Y. CIV. RIGHTS LAW § 4.

¹⁴⁷ Levinson, *supra* note 1, at 643-44 (stating that "[n]o one has ever described the Constitution as a marvel of clarity, and the Second Amendment is perhaps one of the worst drafted of all its provisions").

¹⁴⁸ ARK. CONST. art. 2, § 5; MASS. CONST. pt. 1, art. XVII. The Supreme Judicial Court of Massachusetts has ruled that the Massachusetts Constitution does not convey any individual right to possess arms. *Commonwealth v. Davis*, 343 N.E.2d 847, 849 (Mass. 1976).

¹⁴⁹ See VA. CONST. art. I, § 13.

¹⁵⁰ See Levinson, *supra* note 1, at 646-47.

¹⁵¹ See Lasso, *supra* note 7, at 167-68 (viewing any reference to the militia to mean that a provision is solely to provide for an organized military force and conveys no right for individuals to possess arms).

¹⁵² KAN. CONST. B. of R., § 4.

¹⁵³ See *Junction City v. Lee*, 532 P.2d 1292, 1295 (Kan. 1975).

¹⁵⁴ See *id.*; *Davis*, 343 N.E.2d at 849.

¹⁵⁵ ALA. CONST. art. 1, § 26; ALASKA CONST. art. I, § 19; ARIZ. CONST. art. 2, § 26; COLO. CONST. art. II, § 13; CONN. CONST. art. 1, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. 1,

tions grant an individual right to bear arms for varying reasons and with varying degrees of specificity.¹⁵⁶ Regardless of the differences in their wording, however, it is clear that the right to bear arms is being granted to the individual and is not created merely for the sake of a militia.¹⁵⁷ These states divide into five main subgroups.¹⁵⁸

The first subgroup, Georgia, Idaho, Louisiana, and Rhode Island, all have state constitutional provisions giving the right to bear arms to "the people."¹⁵⁹ Each of these provisions is similar to Rhode Island's provision, which states simply that "[t]he right of the people to keep and bear arms shall not be infringed" without giving the reasons behind this right.¹⁶⁰ Unlike the U.S. Constitution, however, these states make no mention of a militia in granting this right.¹⁶¹ Although undoubtedly conveying an individual right to bear arms, these states do not specify any reasons that may have evolved over time to justify this conveyance.¹⁶²

The next subgroup, Alaska, Illinois, and Maine, are more explicit in granting the right to bear arms to individuals.¹⁶³ Alaska's constitutional provision is similar to the others in stating that "[t]he individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State."¹⁶⁴ Although providing ex-

§ 8; GA. CONST. art. 1, § 1, ¶ VIII; IDAHO CONST. art. I, § 11; ILL. CONST. art. 1, § 22; IND. CONST. art. 1, § 32; KY. CONST. § 1; LA. CONST. art. 1, § 11; ME. CONST. art. 1, § 16; MICH. CONST. art. I, § 6; MISS. CONST. art. 3, § 12; MO. CONST. art. 1, § 23; MONT. CONST. art. 2, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. 1, § 11; N.H. CONST. pt. 1, art. 2-a; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 4; OKLA. CONST. art. 2, § 26; OR. CONST. art. I, § 27; PA. CONST. art. 1, § 21; R.I. CONST. art. 1, § 22; S.D. CONST. art. VI, § 24; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; VT. CONST. ch. 1, art. XVI; WASH. CONST. art. I, § 24; W. VA. CONST. art. III, § 22; WIS. CONST. art. 1, § 25; WYO. CONST. art. 1, § 24.

¹⁵⁶ Compare R.I. CONST. art. 1, § 22 (stating that "the right of the people to keep and bear arms shall not be infringed"), with DEL. CONST. art. I, § 20 (granting citizens the right to be armed to defend themselves, their homes, and their property and to hunt).

¹⁵⁷ See PA. CONST. art. 1, § 21. Pennsylvania's constitution grants citizens the right to bear arms in defense of themselves and the state, which the Pennsylvania Superior Court has interpreted as conveying an individual right to bear arms. *Id.*; *Commonwealth v. Ray*, 272 A.2d 275, 278-79 (Pa. Super. Ct. 1970), *vacated*, 292 A.2d 410 (Pa. 1972) (vacating on grounds that Commonwealth's appeal should have been quashed in the first place).

¹⁵⁸ See *infra* notes 159-180 and accompanying text.

¹⁵⁹ GA. CONST. art. 1, § 1, ¶ VIII; IDAHO CONST. art. I, § 11; LA. CONST. art. 1, § 11; R.I. CONST. art. 1, § 22.

¹⁶⁰ See R.I. CONST. art. 1, § 22.

¹⁶¹ See, e.g., *id.*

¹⁶² See, e.g., *State v. Williams*, 735 So. 2d 62, 70 (La. Ct. App. 1999). In 1999, in *State v. Williams*, the Louisiana Court of Appeal provided no explanation specifying the reason for a right to bear arms following its statement that "both the United States and the Louisiana constitutions provide for the right of a citizen to possess arms." See *id.*

¹⁶³ See ALASKA CONST. art. I, § 19; ILL. CONST. art. 1, § 22; ME. CONST. art. 1, § 16.

¹⁶⁴ See ALASKA CONST. art. I, § 19.

PLICIT examples of how many states recognize an individual right to bear arms, these states also do not rationalize why they grant this right.¹⁶⁵

The third subgroup consists of states granting an individual the right to bear arms to defend both self and state: Alabama, Arizona, Connecticut, Florida, Indiana, Kentucky, Michigan, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Washington, and Wyoming.¹⁶⁶ Some states, such as Alabama and Connecticut, have provisions giving "every citizen" the right to bear arms.¹⁶⁷ Others phrase their provisions similarly to that in Florida's constitution, which begins with "[t]he right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state."¹⁶⁸ Because each of these provisions differentiate between the people and the state, it would be difficult to argue that they grant only a collective right to participate in the common defense.¹⁶⁹ More importantly, these states give a reason for this right, self-protection, distinctly separate from maintaining a militia.¹⁷⁰

¹⁶⁵ See ALASKA CONST. art. I, § 19; ILL. CONST. art. I, § 22; ME. CONST. art. I, § 16.

¹⁶⁶ ALA. CONST. art. I, § 26; ARIZ. CONST. art. 2, § 26; CONN. CONST. art. I, § 15; FLA. CONST. art. I, § 8; IND. CONST. art. I, § 32; KY. CONST. § 1; MICH. CONST. art. I, § 6; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; S.D. CONST. art. VI, § 24; TEX. CONST. art. I, § 23; VT. CONST. ch. I, art. XVI; WASH. CONST. art. I, § 24; WYO. CONST. art. I, § 24.

¹⁶⁷ See, e.g., ALA. CONST. art. I, § 26; CONN. CONST. art. I, § 15.

¹⁶⁸ See, e.g., FLA. CONST. art. I, § 8.

¹⁶⁹ See, e.g., PA. CONST. art. I, § 21; VT. CONST. ch. I, art. XVI. For example, Vermont's provision grants the right to be armed to "the people" to defend themselves and the state, which the Vermont Supreme Court has interpreted to convey an individual right to possess arms. VT. CONST. ch. I, art. XVI; see *State v. Rosenthal*, 55 A. 610, 610-11 (Vt. 1903). In 1970, in *Commonwealth v. Ray*, the Pennsylvania Superior Court held that "[t]he right of citizens of Pennsylvania to bear arms in defense of themselves; their property and the State predates any Constitution of the Commonwealth, and has been embodied in every Constitution we have had and is in Article I, § 1, and Article I, § 21 of the present Constitution of Pennsylvania." 272 A.2d at 278-79. The Oregon Supreme Court has found that the phrase "[d]efense of themselves" includes "an individual's right to bear arms to protect both his person and home" and that the word "arms" referred to in Oregon's constitution means "hand-carried weapons commonly used by individuals for personal defense." *State v. Kessler*, 614 P.2d 94, 98, 100 (Or. 1980).

¹⁷⁰ See, e.g., *Rabbitt v. Leonard*, 413 A.2d 489, 491 (Conn. Super. Ct. 1979). In 1979, in *Rabbitt v. Leonard*, the Connecticut Superior Court ruled as follows:

The use of the conjunction "and" gives every citizen a dual right; he has the right to bear arms to defend the state, a clear reference to the militia; and he may also bear arms to defend himself. It appears that a Connecticut citizen, under the language of the Connecticut constitution, has a fundamental right to bear arms in self-defense, a liberty interest which must be protected by procedural due process.

Ohio also falls within this category.¹⁷¹ The Ohio constitutional provision is different from those described above, granting "people the right to bear arms for their defense and security."¹⁷² The Ohio Supreme Court, however, has interpreted this provision as granting individual citizens a right of self-defense, allowing a citizen to keep and bear arms.¹⁷³

The fourth subgroup, Colorado, Mississippi, Missouri, Montana, New Hampshire, Oklahoma, and Utah, all have constitutions granting individuals the right to be armed to defend home, person, and property.¹⁷⁴ Montana's constitutional provision is representative of this group, stating that "[t]he right of any person to keep or bear arms in defense of his own home, person, and property, or in the aid of the civil power when thereto legally summoned, shall not be called into question."¹⁷⁵ The Montana Supreme Court has interpreted this provision literally to grant a person "the right to keep and bear arms and to use same in defense of his own home, his person and property."¹⁷⁶ Such language adds two more reasons for an individual right to bear arms besides self-defense: the defense of home and property.¹⁷⁷

Finally, seven states grant an individual right to bear arms for the defense of home, person, and property as well as for hunting—Delaware, Nebraska, Nevada, New Mexico, North Dakota, West Virginia, and Wisconsin.¹⁷⁸ Delaware's provision that "[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" is similar to the others.¹⁷⁹ These provisions list all four of the reasons that have been advanced by the states for granting an individual right to bear arms—defense of self, home, and property and hunting.¹⁸⁰

¹⁷¹ See *supra* note 166 and accompanying text.

¹⁷² See OHIO CONST. art. I, § 4.

¹⁷³ See, e.g., *Arnold v. City of Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993). According to the Ohio Supreme Court, in 1993, in *Arnold v. City of Cleveland*, "The right of defense of self, property and family is a fundamental part of our concept of ordered liberty." *Id.*

¹⁷⁴ COLO. CONST. art. II, § 13; MISS. CONST. art. 3, § 12; MO. CONST. art. 1, § 23; MONT. CONST. art. 2, § 12; N.H. CONST. pt. 1, art. 2-a; OKLA. CONST. art. 2, § 26; UTAH CONST. art. I, § 6.

¹⁷⁵ See, e.g., MONT. CONST. art. 2, § 12.

¹⁷⁶ *State v. Nickerson*, 247 P.2d 188, 192 (Mont. 1952).

¹⁷⁷ MONT. CONST. art. 2, § 12.

¹⁷⁸ DEL. CONST. art. I, § 20; NEB. CONST. art. I, § 1; NEV. CONST. art. 1, § 11; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; W. VA. CONST. art. III, § 22; WIS. CONST. art. 1, § 25.

¹⁷⁹ See DEL. CONST. art. I, § 20.

¹⁸⁰ See, e.g., *id.*

4. Minnesota: An Indirect Individual Right to Bear Arms?

Minnesota's constitution does not contain any explicit language granting its citizens the right to keep and bear arms.¹⁸¹ Nevertheless, article XIII, section 12 provides that "[h]unting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people."¹⁸² Prior to the enactment of this provision, the Minnesota Supreme Court had mentioned the possibility of a common law right to bear arms, but did not rule explicitly that one existed.¹⁸³ There are no rulings on what effect article XIII, section 12 would have on such a common law right if it were recognized explicitly.¹⁸⁴

B. Reasons Articulated by State Courts for an Individual Right to Bear Arms

1. Self-Defense

In interpreting their state constitutions, many state courts have found self-defense to be one of the most vital reasons for upholding an individual right to possess arms.¹⁸⁵ The right to defend one's self also has been held to protect the means to do so, allowing citizens to keep and bear arms.¹⁸⁶ This right has even been found, in some circumstances, to overcome a charge of violating a ban on concealed weapons.¹⁸⁷

a. State v. Hamdan: *The Right to Bear Arms and Bans on Concealed Weapons*

In 2003, in *State v. Hamdan*, the Wisconsin Supreme Court discussed the right of self-defense and its relation to the state's 1998 constitutional amendment granting the right to bear arms for "security, defense, hunting, recreation or any other lawful purpose."¹⁸⁸ The issue in that case was the constitutionality of a store owner's conviction

¹⁸¹ See MINN. CONST.

¹⁸² *Id.* art. XIII, § 12.

¹⁸³ *In re Atkinson*, 291 N.W.2d 396, 399 (Minn. 1980).

¹⁸⁴ Although there are cases on other situations this provision may affect, such as boat inspections, there are no reported cases concerning its impact on a right to bear arms. See *State v. Colosimo*, 669 N.W.2d 1, 6 (Minn. 2003).

¹⁸⁵ See, e.g., *Arnold*, 616 N.E.2d at 169; *State v. Hamdan*, 665 N.W.2d 785, 790 (Wis. 2003).

¹⁸⁶ *State v. Kessler*, 614 P.2d 94, 99 (Or. 1980).

¹⁸⁷ *Hamdan*, 665 N.W.2d at 804-05.

¹⁸⁸ WIS. CONST. art. I, § 25; *Hamdan*, 665 N.W.2d at 790.

for carrying a concealed weapon in his place of business.¹⁸⁹ The court found it reasonable for the store owner to keep a concealed handgun in the store to protect himself, his family, his customers, and his property.¹⁹⁰ The right to bear arms for the purpose of security in one's place of business provided a constitutional defense for violating the state's concealed weapons ban.¹⁹¹

To arrive at this conclusion, the court weighed the public benefits of the concealed weapons law against the benefits of allowing individuals to keep and bear arms.¹⁹² The concealed weapons ban was held to be a legitimate use of the police power with a reasonable justification.¹⁹³ The ban prevented people from accessing weapons that they might use in a flash of anger or in response to fear.¹⁹⁴ Additionally, requiring weapons to be worn openly put the public on notice that it was dealing with someone who had a dangerous weapon.¹⁹⁵ This permitted people, including the police, to act accordingly.¹⁹⁶

These justifications, however, did not override the rights of store owners to keep and bear arms.¹⁹⁷ Such people are less likely to act on impulse in their own businesses where the highest priority is the safety of their customers.¹⁹⁸ Store owners certainly are not likely to use concealed weapons to commit crimes in their own establishments.¹⁹⁹

The court identified two locations where the crime of possessing a firearm is mitigated—a person's home and place of business.²⁰⁰ In either place, which a person may own and spend most of his or her time, the purposes justifying a ban on concealed weapons are less compelling than otherwise.²⁰¹ In these situations, a person has a substantial interest in exercising a right to be armed by carrying a concealed weapon.²⁰²

Furthermore, the court noted that many states have recognized a special connection between the right to bear arms and the protection

¹⁸⁹ *Hamdan*, 665 N.W.2d at 789–90.

¹⁹⁰ *Id.* at 790.

¹⁹¹ *Id.*

¹⁹² *Id.* at 800.

¹⁹³ *Id.* at 803.

¹⁹⁴ *Hamdan*, 665 N.W.2d at 803–04.

¹⁹⁵ *Id.* at 804.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Hamdan*, 665 N.W.2d at 804.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 804, 811–12.

of property.²⁰³ In Wisconsin, for example, the right to bear arms in protecting property is implied by the state constitution's reference to "security."²⁰⁴ This does not refer to any imminent threat, but instead, means the preservation of a state of peace, most strongly associated with a person's home and other places where a person has a possessory interest.²⁰⁵

In these places, a person is not likely to depend on police protection, but rather is likely to provide his or her own security.²⁰⁶ The court warned that "[i]n fact, a person who takes no initiative to provide security in these private places is essentially leaving security to chance."²⁰⁷ The right of a person to bear arms in the interest of providing security is at its apex when exercised in the person's home or business.²⁰⁸ Consequently, the court in *Hamdan* found the store owner's conviction for carrying a concealed weapon unconstitutional because he was in his place of business, had a weapon for the lawful purpose of providing security, and needed to keep the weapon concealed for practical reasons.²⁰⁹

b. *State v. Kessler: Protecting the Weapons Needed for Self-Defense*

In 1980, in *State v. Kessler*, the Oregon Supreme Court came to essentially the same conclusion as the Wisconsin Supreme Court in *Hamdan*, ruling that Oregon's constitution allowed for the possession of a dangerous weapon in the home for the defense of persons and property.²¹⁰ Although the case involved the possession of a billy club (which state law prohibited) and not a firearm, the decision was based on the recognition of the right of self-defense.²¹¹ Oregon law could prohibit carrying dangerous weapons in public, but the state constitution protected the keeping of arms within a person's home to repel intruders.²¹²

²⁰³ *Id.* at 805. One of the court's examples was Oklahoma, where it was held that a citizen has the common law right to possess a concealed weapon in the citizen's own home. *Id.* (citing *Gilio v. State*, 33 P.3d 937, 941 (Okla. Civ. App. 2001)).

²⁰⁴ *Hamdan*, 665 N.W.2d at 806 (citing Wis. CONST. art. I, § 25).

²⁰⁵ *Id.* at 807.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Hamdan*, 665 N.W.2d at 811-12. The court also found that it was unreasonable to require a store owner to carry a weapon openly when in the place of business. *Id.* at 809. Such a requirement would both alert criminals to the presence of the weapon and possibly scare customers. *Id.*

²¹⁰ *Kessler*, 614 P.2d at 100; see *Hamdan*, 665 N.W.2d at 804, 811-12.

²¹¹ See *Kessler*, 614 P.2d at 100.

²¹² *Id.* (citing OR. CONST. art. I, § 27; OR. REV. STAT. § 166.510 (repealed 1985)).

In examining the issue, the court noted a long tradition in the United States of allowing citizens to bear arms for the protection of self and property.²¹³ Additionally, the privilege of self-defense had been recognized since the fifteenth century in England and from the beginning of the United States.²¹⁴ In granting this right of self-defense to individuals, the court interpreted the state constitution to also protect the possession of weapons that could be used for personal protection.²¹⁵ The defendant's billy club fell within this protected category.²¹⁶

c. *Arnold v. City of Cleveland: The Right to Bear Arms Cannot Be Destroyed by Regulation*

More recently, in 1993, in *Arnold v. City of Cleveland*, the Ohio Supreme Court explained how self-defense was a significant right in that state as well.²¹⁷ Although it upheld a municipal ban on assault weapons, the court pointed out that Ohio's constitution "secures to every person a fundamental *individual* right to bear arms for 'their defense and security.'"²¹⁸ The state constitution unquestionably had been written to allow citizens to possess firearms for defense of self and property.²¹⁹ The court assumed that there had been no debate about the provision to bear arms when the constitution was revised in 1802 and 1851 because the right was so widely recognized and uncontroversial.²²⁰ Like the Oregon Supreme Court in *Kessler*, the *Arnold* court held that the right of self-defense has always existed in the United States.²²¹

²¹³ *Id.* at 98.

²¹⁴ *Id.* The court noted the following:

"The privilege of self-defense rests upon the necessity of permitting a man who is attacked to take reasonable steps to prevent harm to himself, where there is no time to resort to the law. The early English law, with its views of strict liability, did not recognize such a privilege. . . . But since about 1400 the privilege has been recognized, and it is now undisputed, in the law of torts as well as in the criminal law."

Id. at 98 n.13. (quoting WILLIAM L. PROSSER, LAW OF TORTS 108 (4th ed. 1971) (citations omitted)).

²¹⁵ *Id.* at 99.

²¹⁶ *Kessler*, 614 P.2d at 100.

²¹⁷ 616 N.E.2d at 169.

²¹⁸ *Id.* (alteration in original) (quoting OHIO CONST. art. I, § 4 and citing *State v. Hogan*, 58 N.E. 572, 575 (Ohio 1900)).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See *Arnold* 616 N.E.2d at 169; see also *Kessler*, 614 P.2d at 98.

To describe the importance of citizens being able to keep and bear firearms today, the *Arnold* court wrote the following:

To deprive our citizens of the right to possess any firearm would thwart the right that was so thoughtfully granted by our forefathers and the drafters of our Constitution. For many, the mere possession of a firearm in the home offers a source of security. Furthermore, given the history of our nation and this state, the right of a person to possess certain firearms has indeed been a symbol of freedom.²²²

The court upheld the ban on assault weapons, but ruled that an attempt to ban all firearms would have violated the state constitution.²²³

d. *Feliciano v. 7-Eleven, Inc.: The Importance of Self-Defense in State Policy*

Although not specifically dealing with firearms, in 2001, in *Feliciano v. 7-Eleven, Inc.*, the West Virginia Supreme Court ruled that West Virginia also attaches great importance to the right of self-defense.²²⁴ The plaintiff, a 7-Eleven employee, had been fired for violating store policy when he disarmed and subdued a robber, instead of complying with her demands as store policy dictated.²²⁵ The plaintiff then filed a civil claim that he had been wrongfully discharged for exercising his right to defend himself.²²⁶ The court held that self-defense was a "substantial public policy exception" to the state's doctrine of at-will employment and could serve as the basis for a claim of wrongful discharge.²²⁷

In determining the value of the right of self-defense, the court looked, in part, to the state constitution and determined that state judicial history "clearly demonstrates the existence of a public policy favoring an individual's right to defend" himself or herself.²²⁸ From the time of West Virginia's earliest reported cases, the right of self-defense against an unprovoked attack had been continually recognized and preserved.²²⁹ The court then reviewed more than a dozen cases sup-

²²² 616 N.E.2d at 169-70.

²²³ *Id.* at 173.

²²⁴ See 559 S.E.2d 713, 722-23 (W. Va. 2001).

²²⁵ *Id.* at 716.

²²⁶ *Id.*

²²⁷ *Id.* at 724.

²²⁸ *Id.* at 719. The West Virginia Constitution provides that "[a] person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use." W. VA. CONST. art. III, § 22.

²²⁹ *Feliciano*, 559 S.E.2d at 719.

porting that position, including several cases holding that when a person's life is in danger, that person may use a deadly weapon in self-defense.²³⁰ The court also found that the right to defend one's self, family, or property was not limited solely to the home.²³¹ A person might also stand his or her ground and defend his or her place of business, rather than be forced to retreat by an assailant.²³² In the plaintiff's case, there was a substantial public policy allowing him to exercise his right of self-defense, and to be fired for doing so supported a claim of wrongful discharge.²³³

e. *People v. Buckmire: Recognizing a Need to Bear Arms for Self-Defense, Absent a Constitutional Provision*

A state that does not have a constitutional provision granting any right to bear arms still may recognize the importance of self-defense.²³⁴ In 1995, in *People v. Buckmire*, for example, the Supreme Court for New York County, New York, took into account the state legislature's recognition of a right of self-defense in deciding whether a defendant who had carried a loaded gun to work had violated a state statute.²³⁵ The relevant statute provided that a person was guilty of criminal possession of a weapon if the person carried any loaded firearms.²³⁶ There was, however, an exception to the statute—if a loaded firearm was possessed in either a person's home or place of business, there was no violation.²³⁷ These exceptions showed that the legislature had decided that the crime of firearm possession was mitigated in the two places where a law-abiding citizen spent the most time and expected the most personal security.²³⁸ As a result, the defendant had not violated the statute by bringing a loaded gun to the office building where he was employed.²³⁹

²³⁰ *Id.* at 719–22 (quoting *State v. Hamrick*, 81 S.E. 703, 705 (W. Va. 1914)).

²³¹ *Id.* at 722.

²³² *Id.*

²³³ *Id.* at 723–24.

²³⁴ See *People v. Buckmire*, 638 N.Y.S.2d 883, 885 (Sup. Ct. 1995). New York has a statute concerning the right to bear arms, but it does not have a constitutional provision. See N.Y. CIV. RIGHTS LAW § 4 (McKinney 1992); see also *supra* note 144.

²³⁵ *Id.*

²³⁶ *Id.* (citing N.Y. PENAL LAW § 265.02(4) (McKinney 2000)).

²³⁷ *Id.*

²³⁸ See *id.* at 885.

²³⁹ *Buckmire*, 638 N.Y.S.2d at 886.

2. Protection of Property

Many states have stressed self-defense to justify the bearing of arms by individual citizens, but in 1952, in *State v. Nickerson*, the Montana Supreme Court explicitly ruled that arms may be used lawfully to defend property as well.²⁴⁰ In *Nickerson*, the court had to decide whether the defendant had committed assault when he pointed a pistol at a man who had come onto his property uninvited.²⁴¹ The intruder had entered the defendant's property in defense of a squatter who had taken over the defendant's dwelling in his absence.²⁴² To decide whether the defendant had committed assault in confronting the intruder, the court examined the state constitution, which provided that a person could bear arms in "defense of his own home, person and property."²⁴³ In explaining the importance of defending home and property, the court stated the following:

If a man may not lawfully defend his property, his home, by the use of whatever force it is necessary to use under the circumstances of the case, then he is at the mercy of every tramp, trespasser, or even burglar, who comes along, and enters and takes possession, during his temporary absence therefrom.²⁴⁴

The use of force was allowed to prevent a trespass or an interference with personal property.²⁴⁵ The court held that use of a weapon was unlawful only if it was unnecessary.²⁴⁶ Here, the defendant's use of force was reasonable because he did not injure the intruder and because had he used less force, he might have put himself at risk of injury or loss of property.²⁴⁷ Because neither the intruder, nor his squatter friend, had any right or authority to enter the defendant's property, the defendant had not committed assault by pointing a pistol at the intruder.²⁴⁸

²⁴⁰ 247 P.2d 188, 193 (Mont. 1952).

²⁴¹ *Id.* at 188.

²⁴² *Id.* at 189-92.

²⁴³ *Id.* at 192 (citing MONT. CONST. of 1889, art. 3, § 13).

²⁴⁴ *Id.* at 193 (quoting *State v. Howell*, 53 P. 314, 315 (Mont. 1898)).

²⁴⁵ *Nickerson*, 247 P.2d at 192.

²⁴⁶ *Id.* at 193 (quoting *Dinan v. Gibbon*, 63 Cal. 387 (1883)).

²⁴⁷ *Id.* (quoting *State v. Yancey*, 74 N.C. 244 (1876)).

²⁴⁸ *Id.*

C. *The Structure of American Tort Law and Allowing Citizens to Possess the Means to Defend Themselves*

Self-defense becomes an even stronger reason for upholding an individual's right to bear arms in light of the doctrine that, in general, the police have no duty to protect individuals.²⁴⁹ Absent a specific offer of police protection, individual citizens are expected to provide their own security.²⁵⁰ The assumption is that citizens actually have the means with which to protect themselves.²⁵¹

In 1855, in *South v. Maryland*, the U.S. Supreme Court set out one of the earliest decisions expounding this rule.²⁵² A man had been attacked by a mob and imprisoned by them for four days, after which he paid his assailants \$2500 to be set free.²⁵³ The victim then tried to bring a claim against the sheriff for failure to protect, because the sheriff had been present when the victim was attacked, but did nothing to stop the mob.²⁵⁴

Even after noting that the victim had suffered great injury as a result, the Court refused to find the sheriff liable for any negligence.²⁵⁵ Any duty the sheriff had in his role as keeper of the peace was to the public.²⁵⁶ As a result, any neglect of that duty was punishable only by an indictment, not by private action.²⁵⁷

Federal courts still adhere to the precedent set out in *South*.²⁵⁸ In 2003, in *Hernandez v. City of Goshen*, the Seventh Circuit Court of Appeals affirmed the position that failure by the police to protect some-

²⁴⁹ See *Kirk v. City of Shawnee*, 10 P.3d 27, 30 (Kan. Ct. App. 2000). The court explained the "public duty doctrine" as follows:

Under this doctrine, the fact the governmental entity owes a legal duty to the public at large does not establish a basis for an individual to claim the agency owed a legal duty to him or her personally. No duty exists unless the plaintiff establishes that the agency owed a special duty to the injured party.

Id. (citation omitted).

²⁵⁰ See *Dore v. City of Fairbanks*, 31 P.3d 788, 794 (Alaska 2001).

²⁵¹ *Clark v. Town of Ticonderoga*, 737 N.Y.S.2d 412, 414-15 (App. Div. 2002) (stating that an offer of police protection must reasonably induce the private party to forgo other means of protection).

²⁵² 59 U.S. (18 How.) 396, 403 (1855).

²⁵³ *Id.* at 401.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 403.

²⁵⁶ *Id.*

²⁵⁷ *South*, 59 U.S. at 403.

²⁵⁸ See *Hernandez v. City of Goshen*, 324 F.3d 535, 539 (3d Cir. 2003); see also *South*, 59 U.S. at 403.

one did not create a constitutional claim.²⁵⁹ In that case, a mill employee, who got into a fight with another worker, left the mill threatening to come back and to injure others.²⁶⁰ The mill manager called the police to report this threat and told them that he was worried about the safety of his employees.²⁶¹ The police replied that they would not do anything unless someone was actually harmed.²⁶² Later that day the disgruntled worker returned to the mill where he shot and killed the manager and wounded several employees.²⁶³ The court held that "police departments have no duty to protect private persons from injuring each other, at least where the police department has not itself created the danger."²⁶⁴ Even when the police are aware of a danger to someone and fail to act, there is no liability on their part.²⁶⁵

State courts have followed suit, consistently denying claims brought by injured citizens against the police for failing to protect them.²⁶⁶ Many courts follow the view in the *Restatement (Second) of Torts*, that one person does not owe any duty to protect another from any foreseeable harm caused by a third party.²⁶⁷ There are two exceptions to this rule.²⁶⁸ The first exception is if a special relationship exists between the actor (the police) and the third party who is anticipated to injure someone, then the police do have a duty to prevent that injury.²⁶⁹ This special relationship would exist if the police had taken the third party into custody and knew or should have known that he or she was likely to injure someone if not kept under control.²⁷⁰ The other exception is if a special relationship exists between the party who is concerned about his or her safety and the police.²⁷¹ If the po-

²⁵⁹ *Hernandez*, 324 F.3d at 539.

²⁶⁰ *Id.* at 536.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* The worker who shot the manager and other employees also died during the incident, but the opinion does not specify if it was by his own hand or as a result of police action. *Id.*

²⁶⁴ *Hernandez*, 324 F.3d at 538.

²⁶⁵ *Id.* at 539.

²⁶⁶ See, e.g., *Dore*, 31 P.3d at 796; *Robertson v. City of Topeka* 644 P.2d 458, 463 (Kan. 1982).

²⁶⁷ *Dore*, 31 P.3d at 793 n.33 (quoting RESTATEMENT (SECOND) OF TORTS § 314 (1965) (providing that "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action")).

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 793.

²⁷⁰ *Id.* at 793-94.

²⁷¹ *Id.* at 794.

lice took this person into protective custody or made some assurance that the person could rely on them for protection, then this would establish such a special relationship.²⁷²

An example of a state court using these principles can be found in *Dore v. City of Fairbanks*, where, in 2001, the Alaska Supreme Court found the police not guilty of failure to protect a wife from her husband.²⁷³ Because the police did not act on a warrant to arrest the husband, he was able to kill his wife and then commit suicide.²⁷⁴ With no special relationship between the police and either the victim or the killer, there was no negligence on the part of the police for failing to act.²⁷⁵ Also in 2001, in *Robertson v. City of Topeka*, the Kansas Supreme Court held that the absence of a special relationship between the plaintiff and the police meant he could not recover for damage to his property caused by a trespasser that the police refused to remove.²⁷⁶ In 2002, in *Clark v. Town of Ticonderoga*, the Supreme Court, Appellate Division, Third Department of New York, used the same lack of a special relationship to find the police not guilty of negligence for failing to protect the plaintiff.²⁷⁷ The plaintiff's estranged husband had stabbed her after a series of incidents involving the police and after officers had assured her that they would look out for her.²⁷⁸

In the three cases above, there is a common theme that a special relationship between the victim and the police is one in which the victim would have relied completely on the police instead of taking steps to protect himself or herself.²⁷⁹ The *Clark* court, for example, wrote that a special relationship would exist when the police made a voluntary offer to protect the plaintiff in such a way that it induced her to relax her guard and to forgo other methods of protecting herself.²⁸⁰ Unless the plaintiff actually had the right and the means to defend herself, this would have left her completely unprotected.²⁸¹

²⁷² *Dore*, 31 P.3d at 794; *Clark*, 737 N.Y.S.2d at 414-15.

²⁷³ 31 P.3d at 789.

²⁷⁴ *Id.* at 789-90.

²⁷⁵ *See id.* at 794-96.

²⁷⁶ 644 P.2d at 463. The plaintiff had called the police to his home to remove a trespasser, saying that the intruder would likely burn his house down. *Id.* at 460. The police refused to remove the trespasser and instead told the plaintiff to leave the premises. *Id.* The house began burning fifteen minutes later. *Id.*

²⁷⁷ 737 N.Y.S.2d at 414-16.

²⁷⁸ *Id.* at 414.

²⁷⁹ *See Dore*, 31 P.3d at 794; *Robertson*, 644 P.2d at 463; *Clark*, 737 N.Y.S.2d at 415.

²⁸⁰ 737 N.Y.S.2d at 415.

²⁸¹ *Id.* The court seems to assume that other means of protection were available. *See id.*

IV. RECOGNIZING AN INDIVIDUAL RIGHT TO BEAR ARMS DOES NOT MEAN SURRENDERING TO LAWLESSNESS

Even courts that recognize that an individual has the right to bear arms have maintained that this right is not absolute and therefore can be regulated.²⁸² In 1993, in *Arnold v. City of Cleveland*, the Ohio Supreme Court gave a detailed description of the importance of the individual right to bear arms.²⁸³ The court then went on to state that this right was not unlimited and was subject to reasonable regulation under the police power.²⁸⁴ In fact, the state legislature was required to use the police power to further public safety, under which the control of firearms certainly comes.²⁸⁵ The question was not whether the legislature could regulate firearms, but whether such regulations were reasonable.²⁸⁶ The court held that a ban on assault weapons, which limited the type of weapons citizens could possess, was reasonable, but a ban on all arms would have been unconstitutional.²⁸⁷

In 1990, in *State v. Brown*, the Maine Supreme Judicial Court arrived at a similar conclusion.²⁸⁸ Because the 1987 amendment to the state constitution clearly granted individuals the right to bear arms, the court had to determine whether this meant a convicted felon could claim this right.²⁸⁹ The decision that felons could not bear arms rested, in part, on the commonsense assumption that the citizens had never intended the amendment to allow inmates in state prisons or patients in mental hospitals to possess weapons.²⁹⁰ Further, following case law from other states, the court ruled that no right is absolute.²⁹¹ The question then became whether depriving felons of this right was reasonable and had a rational relationship to the problem that was of concern to the state.²⁹² Keeping weapons out of the hands of those

²⁸² See, e.g., *State v. Brown*, 571 A.2d 816, 818 (Me. 1990); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 172-73 (Ohio 1993).

²⁸³ 616 N.E.2d at 169-70.

²⁸⁴ *Id.* at 172.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 172-73 (holding that using the police power to ban all arms in the city would have violated the state constitution's provision granting the right to bear arms).

²⁸⁸ 571 A.2d at 820.

²⁸⁹ *Id.* at 816 (citing ME. CONST. art. 1, § 16).

²⁹⁰ *Id.* at 818.

²⁹¹ *Id.*

²⁹² *Id.* at 820.

who already had shown a flagrant disregard for the law, in order to protect the public, clearly passed the test.²⁹³

In 1986, in *State v. McAdams*, the Wyoming Supreme Court described this balance between the reasonable use of the police power and the right to bear arms.²⁹⁴ Although almost all states use the police power to regulate the possession of arms, that power cannot be invoked in such a way that it destroys, rather than restricts, the right to bear arms.²⁹⁵ A balance must be struck between the individual rights of the citizen and the state's right to pass statutes that maintain order in society.²⁹⁶ For the *McAdams* court, a state ban on concealed weapons did impose some limitations on an individual's right to defend himself.²⁹⁷ It was reasonable, however, when balanced against the goal of protecting the public from a dangerous weapon that it was unaware of and that could be used in the heat of passion.²⁹⁸

V. ANALYSIS: SELF-DEFENSE, HUNTING, AND THE PROTECTION OF HOME AND PROPERTY CAN BE USED TO JUSTIFY AN INDIVIDUAL RIGHT TO BEAR ARMS INDEPENDENT OF MAINTAINING A MILITIA

In upholding state blue laws, as in *McGowan v. Maryland* in 1961, the U.S. Supreme Court ruled that the justifications for a statute may change over time.²⁹⁹ Originally, laws restricting citizen activities on Sundays were created to promote religious observances.³⁰⁰ If this purpose had continued to be the main reason justifying the blue laws, then these statutes probably would have violated the Establishment Clause of the First Amendment.³⁰¹ Gradually, however, state legislatures continued these restrictions for secular purposes, namely providing a day of rest for workers.³⁰² The same year, in *Gallagher v. Crown Kasher Super Market of Massachusetts, Inc.*, the Court held that even when some of the earlier religious language persisted, it was only a relic of history and no longer controlled the purpose of the statute.³⁰³

²⁹³ See *Brown*, 571 A.2d at 819-21.

²⁹⁴ 714 P.2d 1236, 1237-38 (Wyo. 1986).

²⁹⁵ *Id.* at 1237.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 1238.

²⁹⁸ *Id.*

²⁹⁹ 366 U.S. 420, 444 (1961).

³⁰⁰ *Id.* at 431.

³⁰¹ *Id.*; see U.S. CONST. amend. I.

³⁰² *Id.* at 444-45.

³⁰³ 366 U.S. 617, 626-27 (1961).

The same approach can be used to resolve the question of whether the Second Amendment should be read to protect an individual or a collective right for the people to keep and bear arms.³⁰⁴ The Framers of the U.S. Constitution clearly wrote the Second Amendment to allow the people to keep and bear arms.³⁰⁵ Over two hundred years later, there is still disagreement on the purpose for granting this right.³⁰⁶ States' right supporters claim that the only purpose was to allow the people to form a militia and to enable the United States to avoid the need for a standing army.³⁰⁷ Some now claim that this need is long gone and that the Second Amendment should be repealed, as it has outlived its purpose.³⁰⁸ Individual rights supporters argue instead that the Second Amendment was written to protect the right of individual citizens to keep and bear arms.³⁰⁹ The current split among the federal circuit courts of appeals shows that reasonable people can read history to support either view.³¹⁰

Even if maintaining a militia was the original reason for guaranteeing the right of the people to bear arms, other reasons for allowing citizens to keep and bear arms have evolved over time.³¹¹ These contemporary justifications are not for a collective right of the people to defend themselves as a militia, but instead, they are for an individual right to bear arms.³¹² Evidence of these justifications, most importantly self-defense, can be seen in reviewing state constitutional provisions and state court decisions concerning the right to bear arms.³¹³ Because federal legislators have never redrafted the Bill of Rights, state constitutions are the best source for determining how Americans and their legislatures define and justify a right to bear arms today.³¹⁴

³⁰⁴ See Lasson, *supra* note 7, at 156 (stating that the U.S. Constitution must be able to evolve over time).

³⁰⁵ Kates, *supra* note 1, at 218 (arguing that the word "people" cannot be read to refer somehow to the states and not to individual citizens).

³⁰⁶ See, e.g., Kates, *supra* note 1, at 206; Korth & Gladston, *supra* note 1, at 515-17; Levinson, *supra* note 1, at 641; McCoskey, *supra* note 1, at 873-74; Prince, *supra* note 1, at 660-61.

³⁰⁷ See Korth & Gladston, *supra* note 1, at 517-18.

³⁰⁸ *Id.* at 522.

³⁰⁹ Lasson, *supra* note 7, at 161.

³¹⁰ See *supra* notes 40-81 and accompanying text.

³¹¹ See *supra* notes 166-180 and accompanying text.

³¹² See, e.g., COLO. CONST. art. II, § 13; MISS. CONST. art. 3, § 12.

³¹³ See, e.g., Arnold v. City of Cleveland, 616 N.E.2d 163, 169 (Ohio 1993).

³¹⁴ See *supra* notes 131-248 and accompanying text. The U.S. Supreme Court found that how a state court interprets and justifies a piece of legislation was persuasive in its review of the blue laws. *McGowan*, 366 U.S. at 449-50.

Thirty-six states currently grant an individual the right to bear arms, leaving no doubt that this right is valued by many Americans.³¹⁵ This is especially true in the case of the twelve states that have recently added or amended their constitutional provisions concerning the right to bear arms.³¹⁶ Each of these states either added a new individual right to bear arms or left untouched an existing individual right.³¹⁷ With this recent activity, it is hard to argue that any reason for an individual right to bear arms is an archaic holdover from another era.³¹⁸

Reviewing state constitutions shows that for many states the right to bear arms has become important as a guarantee of self-defense.³¹⁹ Of the thirty-six states that have a constitutional provision granting an individual right to bear arms, twenty-nine of them include some definition of personal security as a justification.³²⁰ Without an individual right to bear arms, the ability of citizens to defend themselves

³¹⁵ See ALA. CONST. art. I, § 26; ALASKA CONST. art. I, § 19; ARIZ. CONST. art. 2, § 26; COLO. CONST. art. II, § 13; CONN. CONST. art. 1, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. 1, § 8; GA. CONST. art. 1, § 1, ¶ VIII; IDAHO CONST. art. I, § 11; ILL. CONST. art. 1, § 22; IND. CONST. art. 1, § 32; KY. CONST. § 1; LA. CONST. art. 1, § 11; ME. CONST. art. 1, § 16; MICH. CONST. art. I, § 6; MISS. CONST. art. 3, § 12; MO. CONST. art. 1, § 23; MONT. CONST. art. 2, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. 1, § 11; N.H. CONST. pt. 1, art. 2-a; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 4; OKLA. CONST. art. 2, § 26; OR. CONST. art. I, § 27; PA. CONST. art. 1, § 21; R.I. CONST. art. 1, § 22; S.D. CONST. art. VI, § 24; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; VT. CONST. ch. 1, art. XVI; WASH. CONST. art. 1, § 24; W. VA. CONST. art. III, § 22; WIS. CONST. art. 1, § 25; WYO. CONST. art. 1, § 24.

³¹⁶ ALASKA CONST. art. I, § 19; DEL. CONST. art. I, § 20; FLA. CONST. art. 1, § 8; IDAHO CONST. art. I, § 11; ME. CONST. art. 1, § 16; NEB. CONST. art. I, § 1; NEV. CONST. art. 1, § 11; N.H. CONST. pt. 1, art. 2-a; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; W. VA. CONST. art. III, § 22; WIS. CONST. art. 1, § 25.

³¹⁷ See, e.g., ME. CONST. art. 1, § 16 (amended 1988); WIS. CONST. art. 1, § 25 (added 1998).

³¹⁸ See Korth & Gladston, *supra* note 1, at 521 (noting that "[t]he passage of two centuries has brought wholesale changes in the composition of the well-regulated militia, and in the role of firearms in American society"). Wisconsin is perhaps the best example of this recent activity, adding a constitutional provision in 1998 to grant the people the right to bear arms "for security, defense, hunting, recreation or any other lawful purpose." See WIS. CONST. art. 1, § 25.

³¹⁹ See, e.g., MONT. CONST. art. 2, § 12; N.H. CONST. pt. 1, art. 2-a.

³²⁰ ALA. CONST. art. I, § 26; ARIZ. CONST. art. 2, § 26; COLO. CONST. art. II, § 13; CONN. CONST. art. 1, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. 1, § 8; IND. CONST. art. 1, § 32; KY. CONST. § 1; MICH. CONST. art. I, § 6; MISS. CONST. art. 3, § 12; MO. CONST. art. 1, § 23; MONT. CONST. art. 2, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. 1, § 11; N.H. CONST. pt. 1, art. 2-a; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 4; OKLA. CONST. art. 2, § 26; OR. CONST. art. I, § 27; PA. CONST. art. 1, § 21; S.D. CONST. art. VI, § 24; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; VT. CONST. ch. 1, art. XVI; WASH. CONST. art. 1, § 24; W. VA. CONST. art. III, § 22; WIS. CONST. art. 1, § 25; WYO. CONST. art. 1, § 24.

against criminals and other threats would be seriously hampered, if not effectively destroyed.³²¹ Even New York, with no constitutional provision concerning a right to bear arms, has recognized the importance of allowing citizens to possess weapons to defend themselves at home and at their places of employment.³²²

Many state courts have affirmed the importance of the right of self-defense.³²³ The Wisconsin Supreme Court has made the practical observation that citizens who do not take steps to defend themselves are leaving their security to chance.³²⁴ The logical extension of this right, as held by the Oregon Supreme Court in *State v. Kessler*, is that citizens also must have the means available to defend themselves.³²⁵ It seems clear that the right to defend oneself, which has existed in the common law for centuries, is not worth much if individual citizens are not permitted to keep and bear arms.³²⁶

The structure of tort law makes the need for individual citizens to be able to keep and bear arms even more important.³²⁷ State courts have followed the position of the Restatement (Second) of Torts that the police do not owe any duty to protect a person unless they have given assurances that they will protect him or her.³²⁸ These assurances must be such that it would induce the person to forgo other methods of protecting himself or herself.³²⁹

As shown by *Clark v. Town of Ticonderoga*, this is a high burden that is not met by the police simply offering to check up on a citizen.³³⁰ There must be more to the offer of protection to make the citizen relax his or her guard.³³¹ The assumption that a person has other available means of protecting himself or herself meshes with the importance that state courts have given to the right to bear arms

³²¹ See *Arnold*, 616 N.E.2d at 169–70; *State v. Kessler*, 614 P.2d 94, 98, 100 (Or. 1980).

³²² *People v. Buckmire*, 638 N.Y.S.2d 883, 885–86 (Sup. Ct. 1995).

³²³ See, e.g., *Arnold*, 616 N.E.2d at 169–70; *State v. Hamdan*, 665 N.W.2d 785, 790 (Wis. 2003).

³²⁴ *Hamdan*, 665 N.W.2d at 807.

³²⁵ See 614 P.2d at 99.

³²⁶ See *Arnold*, 616 N.E.2d at 169–70.

³²⁷ See *Kirk v. City of Shawnee*, 10 P.3d 27, 30 (Kan. Ct. App. 2000) (explaining that the government does not owe any duty to protect individual citizens).

³²⁸ See, e.g., *Dore v. City of Fairbanks*, 31 P.3d 788, 793 (Alaska 2001); *Robertson v. City of Topeka*, 644 P.2d 458, 463 (Kan. 1982).

³²⁹ *Robertson*, 644 P.2d at 462; *Clark v. Town of Ticonderoga*, 737 N.Y.S.2d 412, 415 (App. Div. 2002).

³³⁰ See 737 N.Y.S.2d at 415.

³³¹ See *id.*

for self-defense.³³² If we are not going to hold the police responsible for failing to protect individual citizens, we should not then take away the means by which a citizen may protect himself or herself.³³³

Fourteen states also list defense of property as a specific reason for granting an individual right to bear arms.³³⁴ Although the morality of using firearms to defend property rather than life may be debatable, defense of property can be critical to prevent citizens from being at the mercy of criminals who seek to prey on them.³³⁵ As shown in the Montana Supreme Court's decision in *State v. Nickerson*, however, the use of arms in defending property must be limited to where it is appropriate.³³⁶ This concern about the appropriateness of such use of firearms is not a reason for denying an individual right to bear arms; it is instead an example of how the right can be reasonably regulated, which is within the government's power.³³⁷

The same fourteen states that list defense of property as a justification for an individual right to bear arms also list defense of the home as a separate justification.³³⁸ Many state courts also seem to consider defense of the home a special situation, separate from the defense of property.³³⁹ The Wisconsin Supreme Court held that defense of the home is of such importance that a person possessing a concealed weapon in his or her residence is not violating the state ban on concealed weapons.³⁴⁰ The Oregon Supreme Court explicitly ruled that Oregon's constitution protects the possession of dangerous weapons within the home.³⁴¹ The Ohio Supreme Court noted that for many citizens, the mere possession of a firearm in the home gives them a sense of security.³⁴² The ability of individual citizens to possess weapons for

³³² See *Arnold*, 616 N.E.2d at 169-70; *Kessler*, 614 P.2d at 98, 100.

³³³ See *Arnold*, 616 N.E.2d at 169 (citing *State v. Hogan*, 58 N.E. 572, 575 (Ohio 1900)).

³³⁴ COLO. CONST. art. II, § 13; DEL. CONST. art. I, § 20; MISS. CONST. art. 3, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. 2, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. 1, § 11; N.H. CONST. pt. 1, art. 2-a; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; OKLA. CONST. art. 2, § 26; UTAH CONST. art. I, § 6; W. VA. CONST. art. III, § 22; WIS. CONST. art. I, § 25.

³³⁵ *State v. Nickerson*, 247 P.2d 188, 193 (Mont. 1952).

³³⁶ *Id.* at 192.

³³⁷ See, e.g., *State v. Brown*, 571 A.2d 816, 818 (Me. 1990); *Arnold*, 616 N.E.2d at 172-73.

³³⁸ COLO. CONST. art. II, § 13; DEL. CONST. art. I, § 20; MISS. CONST. art. 3, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. 2, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. 1, § 11; N.H. CONST. pt. 1, art. 2-a; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; OKLA. CONST. art. 2, § 26; UTAH CONST. art. I, § 6; W. VA. CONST. art. III, § 22; WIS. CONST. art. I, § 25.

³³⁹ See *Buckmire*, 638 N.Y.S.2d at 885; *Kessler*, 614 P.2d at 100; *Hamdan*, 665 N.W.2d at 804.

³⁴⁰ *Hamdan*, 665 N.W.2d at 804.

³⁴¹ *Kessler*, 614 P.2d at 100.

³⁴² *Arnold*, 616 N.E.2d at 170.

the defense of their homes and for repelling intruders is certainly a widely recognized right.³⁴³

In addition to the defense of self, property, and home, seven state constitutions also list hunting as a reason for an individual right to bear arms.³⁴⁴ In both Wisconsin and Maine, protecting citizens' ability to hunt was a major factor in why these states recently added a specific individual right to bear arms to their state constitutions.³⁴⁵ In Minnesota, where any right to bear arms is ambiguous, hunting was important enough for the population to give it specific constitutional protection.³⁴⁶ Because even a small, eastern state like Delaware recognizes the value of hunting to its citizens, it should be seen as a nationally important, contemporary justification for an individual right to bear arms.³⁴⁷

States' right proponents may be correct: perhaps there is no longer a need to allow the people to be armed to form a militia.³⁴⁸ Self-defense, defense of the home and property, and the ability to hunt, however, are compelling reasons for still allowing individual citizens to keep and bear arms.³⁴⁹ They are at least as valid as providing a day of rest was in upholding the blue laws.³⁵⁰ With these contemporary reasons justifying an individual right to be armed, it is clear that the right of the people to keep and bear arms in the Second Amendment now should be read as an individual right.³⁵¹ The Second Amendment's mention of the militia should be read as merely a relic of the past and no longer controlling.³⁵²

³⁴³ See, e.g., *Arnold*, 616 N.E.2d at 170; *Hamdan*, 665 N.W.2d at 805.

³⁴⁴ DEL. CONST. art. I, § 20; NEB. CONST. art. I, § 1; NEV. CONST. art. 1, § 11; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; W. VA. CONST. art. III, § 22; WIS. CONST. art. I, § 25.

³⁴⁵ See *Arms Measure Approved in Maine*, ASSOCIATED PRESS POL. SERVICE, Nov. 4, 1987, 1987 WL 2438673 [hereinafter *Arms Measure*]; Adam S. Marlin, *Feingold Backs State Amendment on Guns*, WIS. ST. J., Sept. 24, 1998, 1998 WL 14532313. U.S. Congressman Mark Neumann, who supported the amendment, stated, "My position on gun control is that any law-abiding citizen should be able to own guns. . . . I know I go deer hunting in the fall, and I want to be able to own my gun." Marlin, *supra*. Steve Duren, director of the Sportsman's Alliance of Maine, which led the push for the amendment, declared that "[i]t was a sportsman-backed issue from the start, and sportsmen carried it." *Arms Measure*, *supra*.

³⁴⁶ See MINN. CONST. art. XIII, § 12.

³⁴⁷ See DEL. CONST. art. I, § 20.

³⁴⁸ Korth & Gladston, *supra* note 1, at 521.

³⁴⁹ DEL. CONST. art. I, § 20; NEB. CONST. art. I, § 1; NEV. CONST. art. 1, § 11; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; W. VA. CONST. art. III, § 22; WIS. CONST. art. I, § 25 (listing the primary reasons for an individual right to bear arms).

³⁵⁰ See *McGowan*, 366 U.S. at 444-45.

³⁵¹ See *Lasson*, *supra* note 7, at 156 (positing the idea that the U.S. Constitution must be a flexible, living document).

³⁵² See *Gallagher*, 366 U.S. at 626-27 (treating the contemporary mention of the "Lord's Day" in the blue laws as a relic of the past).

Interpreting the Second Amendment to protect this individual right to bear arms should not create a fear of totally unrestricted firearm possession and use.³⁵³ State courts in many of the states that recognize an individual's right to bear arms have pointed out that this right, like all others, can be reasonably regulated to protect public safety.³⁵⁴ As the Ohio Supreme Court has ruled, the government can restrict the types of weapons citizens may possess.³⁵⁵ Additionally, as the Maine Supreme Judicial Court has held, the state can act to keep firearms out of the hands of those who pose a threat to the public, namely convicted felons.³⁵⁶ What the states may not do, however, is regulate the right to bear arms to the point that it becomes meaningless.³⁵⁷

CONCLUSION

In the case of the Second Amendment, the normal methods of statutory interpretation have not yielded a satisfactory result. Neither the intent of the Framers, nor other historical sources have provided an answer as to which right the Second Amendment was written to protect. If the U.S. Supreme Court revisits the issue, which the current split among the federal circuit courts of appeals makes likely, the Court will have to look elsewhere for the answer. Instead of looking to the past, however, the Court should look to how the right to bear arms is interpreted in the nation today. It should use again the method that it employed with the blue laws, deciding if a contemporary reason exists for upholding an older piece of legislation. Applying this approach to the right to bear arms shows that there are ample reasons today for upholding that right as an individual one.

ROBERT A. CREAMER

³⁵³ See, e.g., *Brown*, 571 A.2d at 818; *Arnold*, 616 N.E.2d at 172-73 (noting that the right to bear arms can be reasonably regulated).

³⁵⁴ See, e.g., *Brown*, 571 A.2d at 818; *Arnold*, 616 N.E.2d at 172-73.

³⁵⁵ *Arnold*, 616 N.E.2d at 172-73.

³⁵⁶ *Brown*, 571 A.2d at 819-21.

³⁵⁷ *State v. McAdams*, 714 P.2d 1236, 1237 (Wyo. 1986).