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STATE CONSTITUTIONAL RIGHTS TO BEAR ARMS TEN YEARS AFTER *HELLER/MCDONALD*

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STATE CONSTITUTIONAL RIGHTS TO BEAR ARMS TEN YEARS AFTER *HELLER/MCDONALD*

Nino C. Monea*

ABSTRACT

In 2008 and 2010, the United States Supreme Court gave the Second Amendment real teeth and applied it to the states. Before, litigants had to rely on state constitutional provisions protecting the right to bear arms. This Article examines roughly 800 state cases citing a state constitutional right to bear arms to see what effect, if any, the Supreme Court precedent had in the states. After framing issues of state constitutionalism, this Article finds that state courts largely refused to use state constitutions to strike down gun laws, both before and after the Supreme Court got involved. Though state courts did make some cosmetic changes to how they address gun rights, they continued to honor precedent upholding gun safety legislation.

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INTRODUCTION

In *District of Columbia v. Heller* (2008), the United States Supreme Court created an unambiguous personal right to keep and bear arms.¹ Two years later, the Court applied this right to the states in *McDonald v. Chicago*.² The Court came very close to shaking up Second Amendment jurisprudence again in *New York State Rifle & Pistol Ass'n v. City of New York*, though the case was rendered moot at the last second.³ Given that four Justices stated or implied some appetite to review state gun laws, the Second Amendment will likely come before the Court sooner rather than later.⁴

All of these decisions intersected debates over the role of firearms in society. Supporters argue that guns are used hundreds of thousands of times each year for self-defense.⁵ Critics respond that guns are responsible for hundreds of thousands of murders, injuries, suicides, and crimes.⁶ Children sometimes stumble upon weapons in the home and kill others with them.⁷ Cities have claimed that gun manufacturers failed to provide adequate safety mechanisms, deceptively advertised weapons, and facilitated the use of weapons by criminals.⁸ Controversy around gun ownership is nothing new. A Progressive Era court called the prevalence of pistols and other concealable weapons the “greatest nuisance[] of our day.”⁹

The earliest sort of gunpowder-propelled weaponry came from 10th century China, where bamboo or metal tubes were stuffed with gunpowder and shrapnel to fire at targets.¹⁰ Gunpowder was transported to Europe in the 13th century but did

¹ 554 U.S. 570 (2008).

² 561 U.S. 742 (2010).

³ 140 S. Ct. 1525 (2020).

⁴ *See id.* at 1527 (Kavanaugh, J., concurring) (Alito, J., dissenting).

⁵ LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* 157 (2014).

⁶ *Id.*

⁷ *Rhodes v. R.G. Indus., Inc.*, 325 S.E.2d 465 (Ga. Ct. App. 1984).

⁸ Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 ST. LOUIS U. PUB. L. REV. 247, 248–49 (1999).

⁹ *Glenn v. State*, 72 S.E. 927, 929 (Ga. Ct. App. 1911) (quoting *Hill v. State*, 53 Ga. 472, 474 (1874)).

¹⁰ Jeff Harder, *Who Invented the First Gun?*, HOW STUFF WORKS (Jan. 12, 2011), <https://science.howstuffworks.com/innovation/inventions/who-invented-the-first-gun.htm>.

not become reliable until the 15th.¹¹ This weaponry went unregulated in England until 1328 when King Edward III issued a law prohibiting persons “to go or ride armed by night or by day.”¹²

In America, guns and self-defense were once tightly linked to militias. Thomas Paine wrote in the 18th century: “A well-regulated militia will answer all the purposes of self-defense, and of a wise and just government.”¹³ To this end, colonial legislators passed laws mandating firearm ownership,¹⁴ and militia service was compulsory for men.¹⁵ Once regarded as a bulwark of freedom, by 1871, the militia system remained only “as a memory of the past, probably never to be revived.”¹⁶ Even so, for many decades, the Supreme Court essentially said that the Second Amendment protected the right to form a militia, and nothing more.¹⁷ Federal circuits came to the same conclusion, and scholars almost universally agreed with this assessment at one time.¹⁸

States, on the other hand, rarely kept language about militias in their constitutional provisions addressing the right to bear arms.¹⁹ Instead, they made it clear that the right was individual, and that it existed for the defense of self and property.²⁰ In this way, states shed the Second Amendment’s linguistic baggage, which is famously obtuse and circumspect. Therefore, in the two centuries before *Heller*, defining the meaning of the right to bear arms was the province of the states.

¹¹ *Id.*

¹² *Strickland v. State*, 72 S.E. 260, 261 (Ga. 1911).

¹³ PATRICK J. CHARLES, *ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIA TO CONCEALED CARRY* 77 (2018).

¹⁴ MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 9 (2014).

¹⁵ ALLAN R. MILLETT & PETER MASLOWSKI, *FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA* 3 (1994).

¹⁶ *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 184 (1871).

¹⁷ *See United States v. Miller*, 307 U.S. 174 (1939).

¹⁸ James K. Leven, *Attention Gun-Rights Advocates! Don’t Forget the Illinois Constitutional Right to Keep and Bear Arms*, 48 J. MARSHALL L. REV. 53, 81–82 (2014).

¹⁹ *See generally* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006).

²⁰ *Id.*

One would expect, then, that lawyers arguing for expansive gun rights would lean heavily on state constitutions to make their case. But they do not.

Lawyers are far more likely to utilize the Second Amendment to vindicate gun rights than state constitutional provisions. The author has located approximately 860 state court cases that cite a state constitutional provision protecting the right to bear arms.²¹ In contrast, the author located 6,523 state court cases that cited the Second Amendment.²² That means that for every one case mentioning a state constitutional right to bear arms, there are seven-and-a-half cases mentioning the federal right to bear arms *in state court*. This is all the more incredible given that the Second Amendment has only applied to the states since 2010—before that, the Court repeatedly said the Second Amendment did not apply to the states.²³ Lawyers, therefore, would rather cite a textually weaker authority with directly adverse precedent from the United States Supreme Court than their own state constitutions. A similar disparity can be observed for other prominent Constitutional rights.²⁴

This gap cannot be explained by mere ignorance. Gun rights experts exhibit the same allergic reaction to state constitutions. The National Rifle Association—not renowned for passing up pro-gun arguments—has dozens of cases currently in

²¹ Searches were conducted in November 2019 on Lexis. Provisions of state constitutions protecting the right to bear arms were located and then cases were found by using the Shepardize feature or Notes to Decisions. This method is both underinclusive and overinclusive. It is underinclusive because it might not pick up decisions that cited to older state constitutions that used a different numbering scheme for rights. It is overinclusive because it cites some cases that do not actually involve state constitutions, but were picked up by the search algorithm. The author estimates that about 700 of the cases involved the right to bear arms.

²² Searches were conducted in November 2019 on Lexis. A search for “Second Amendment” was performed, and results were filtered based on state. A total of 4,977 cases were located among the states with constitutions that protect a right to bear arms, and an additional 1,546 cases were located in states with constitutions that do not protect a right to bear arms. This method probably turns up some cases that simply mentioned the Second Amendment but were not actually about gun rights. But the state constitution cases suffer from the same overinclusive bias, so the bias runs in the same direction for both types of cases.

²³ See *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

²⁴ Searches were conducted on December 7, 2019 on Lexis. The author found a similar pattern for search and seizure cases and those involving freedom of speech or religion. To give a representative example, in South Carolina, there are 72 state cases citing the state constitutional provision protecting against unreasonable searches and seizures. There are 411 South Carolina state cases mentioning the phrase “Fourth Amendment.” There are 30 South Carolina state cases citing the state constitutional provision protecting freedom of speech and religion, but 207 South Carolina cases mentioning the phrase “First Amendment.”

litigation.²⁵ Virtually none mention a state constitutional argument in their official summaries.²⁶

Federal law has a well-documented “gravitational” pull on the states. That is to say, state legal actors tend to copy—often verbatim—federal legal regimes, including the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and federal court interpretations of statutes.²⁷ Occasionally, state constitutions explicitly glue themselves to the hip of federal law. Florida’s constitutional provision against cruel and unusual punishment directs that it “shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.”²⁸ This phenomenon helps explain why the Second Amendment gets so much more play than state counterparts.

Even though the Second Amendment was not binding on the states until recently, there is still a wealth of case law wherein states interpret the right to bear arms without federal mandates. This Article explores why state rights are largely ignored, how state courts understood the right to bear arms before *Heller*, and how, if at all, states have reacted to *Heller* and *McDonald*.

Based on an analysis of roughly 800 state cases citing a state constitutional provision protecting the right to bear arms, the Article has several noteworthy takeaways:

²⁵ *Current Litigation*, NAT’L RIFLE ASS’N CIV. RTS. DEF. FUND, <https://www.nradefensefund.org/current-litigation.aspx> (last visited Jan. 16, 2021).

²⁶ *Id.* An exception is *Nancy Woehlke v. Timothy Craig Milko*, which mentions an argument under Michigan’s constitutional right to bear arms. *Id.* *Hunter Sports Shooting Grounds, Inc. v. Brian X. Foley* mentions the New York state constitution, but for its protection of due process and equal protection, not the right to bear arms. *Id.* In 1990, New York’s high court issued three opinions about freedom of speech under its own constitution, while federal district courts in the state issued 15 rulings on the First Amendment. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 784 (1992). One study found that a majority of civil liberty cases were challenged exclusively on federal grounds. G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1114 (1997).

²⁷ See generally Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703 (2016); see also *Gray v. Hall*, 265 P. 246, 252 (Cal. 1928) (“Due course of law under the state constitution and due process of law under the federal constitution mean the same thing.”).

²⁸ FLA. CONST. art. 1, § 17. See also *Perez v. State*, 620 So. 2d 1256, 1258 (Fla. 1993) (finding that the Florida constitution specifically prohibits a court from interpreting the Florida constitution as providing greater protection than the Fourth Amendment to the U.S. Constitution).

- Although the Second Amendment has only applied to the states since 2010, there have been far more cases citing the Second Amendment than state constitutions *in state court*.
- Over two centuries of state constitutional law, there have only been a handful of successful appeals by gun advocates, and most of these were striking down categorical bans on firearms.
- States have greatly limited the impact of *Heller* and *McDonald* by limiting the application of the cases or changing the mode of analysis for gun challenges without changing their conclusions.
- Litigants used to regularly cite the state constitution alone in gun cases, but now almost always cite the state and federal constitutions.

The Article proceeds in four Parts. Part I looks at state constitutionalism. Lawyers, judges, and the public often seem to forget that state constitutions exist, even when they offer stronger protections than the U.S. Constitution. Six possible explanations are offered and considered. Part I suggests several reasons for advocates to cite state constitutions regardless of their ideological preference.

Part II examines the state of gun rights before *Heller*. Gun advocates waged a long campaign to empower the Second Amendment and eventually won over the Supreme Court. This was in spite of the fact that the Second Amendment is textually weaker than state constitutional rights to bear arms. A possible explanation is that state courts were so unaccommodating to gun advocates that they believed the only way to vindicate their rights was through the federal system.

Part III looks at how *Heller* and *McDonald* have upset the state ecosystem of firearm regulation. The decisions made waves, to be sure, but the effect on the ground has been fairly muted. States now use intermediate scrutiny to assess gun claims. Categorical bans on weapons usually fail, but most gun safety laws have remained in full effect.

Part IV concludes.

I. STATE CONSTITUTIONALISM

It is often said that a state may add to federal protections, but not subtract from them.²⁹ This is not entirely correct. Certainly, the Supremacy Clause prevents states

²⁹ *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) (“[A] state court is entirely free to read its own State’s constitution more broadly than this Court reads the Federal Constitution.”); *People v.*

from negating the federal Constitution.³⁰ But states are free to declare that their constitutions provide less protection than the federal Bill of Rights. State courts are obligated to uphold a federal right if a party argues federal law; they are not compelled to vindicate the same challenge if it was based on state law. For example, the United States Supreme Court has rejected an “interest-balancing” approach to analyzing gun laws.³¹ But the Washington Supreme Court still uses such an approach to analyze challenges to gun laws under its state constitution, while using intermediate scrutiny to assess claims brought under the federal Constitution.³²

That might sound like a meaningless difference since logic tells us that lawyers should cite both state and federal law to maximize their chance of victory. Lawyers, however, do not always behave logically—quite the opposite, as the following section shows.

A. State Constitutions Are Under-Studied, Under-Analyzed, and Under-Argued

Traditionally, state constitutions have been ignored by the public,³³ the education system,³⁴ scholars,³⁵ lawyers,³⁶ and courts.³⁷ We possess none of the reverence for state charters that we hold for our national Constitution. Empirical research shows the extent of federal dominance. While studying six state supreme courts during 1975 and 1977, Professor Susan Fino found that only 17 percent of constitutional cases were decided on state grounds, as were only 6.7 percent of equal

Mimes, 953 N.E.2d 55, 77 (Ill. App. Ct. 2011) (stating that while states are free to provide more protection than the U.S. Constitution requires, states may not provide less); *People v. French*, No. 1-11-1570, 2012 Ill. App. LEXIS 2668, at *20 (Ill. App. Ct. Nov. 2, 2012); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 709 (1983).

³⁰ Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 712 (2011).

³¹ *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

³² *State v. Jorgenson*, 312 P.3d 960, 964, 967 (Wash. 2013).

³³ Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 169 (2009) (citing a 1988 poll showing that a majority of Americans did not even know their state had a constitution).

³⁴ *Id.*

³⁵ Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 166 (1984).

³⁶ ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 1–2 (2009).

³⁷ Tarr, *supra* note 26, at 1101.

protection cases between 1975 and 1984.³⁸ Professor Michael Esler calculated that only one-fifth of self-incrimination cases from 1981 to 1986 were decided on state grounds,³⁹ and “systematic studies demonstrate that most state courts . . . have chosen not to depart from federal precedents when interpreting the rights-granting provisions of state constitutions.”⁴⁰ This research comes on the heels of studies going back to the early 1990s documenting the same trend.⁴¹

Lawyers are no more eager than judges to use state constitutions. A 1989 report found that lawyers tended to be ignorant of their state constitutions and that classes in grade school, college, and law school seldom mentioned them.⁴² It shows. Some lawyers simply fail to cite state constitutional rights.⁴³ Some are openly contemptuous of state constitutional arguments.⁴⁴

So great is the reliance on federal law that it can hurt clients. Legal aid attorneys argued that a Supreme Court precedent allowed a woman to operate a daycare under due process analysis, but the state administrative procedure act gave a clearer path to victory.⁴⁵ Another time, a defendant cited a federal case to demand speed radar records be turned over by the prosecution, but said records were freely available under state public record law; all the defendant had to do was pick them up.⁴⁶

Reluctance to use state constitutions is particularly baffling in the context of gun rights. A great many states provide stronger textual arguments than the Second

³⁸ James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1186 (2000).

³⁹ *Id.* at 1186–87.

⁴⁰ Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002).

⁴¹ *Id.*

⁴² WILLIAMS, *supra* note 36, at 1–2.

⁴³ Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1161 (1985).

⁴⁴ *Id.* at 1162 (quoting several lawyers as saying state constitutional law arguments are a “garbage argument,” “a last resort,” or “a one-paragraph throw-in”).

⁴⁵ Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379, 390 (1980).

⁴⁶ *Id.* at 390–91.

Amendment.⁴⁷ Some states even go so far as to mandate that strict scrutiny be used to assess all gun safety laws.⁴⁸

B. *Explanations for Why State Constitutions Are Largely Ignored*

It may seem obvious why society cares less about state constitutions. After all, are they not less important? That depends on how one defines importance. Without question, the federal Constitution was a more revolutionary act—founding a government of checks and balances by mutual agreement of sovereign states had no precedent—and the national government covers a much broader geographic jurisdiction. The federal system also deals with a few issues exclusively, like immigration, bankruptcy, and patents.⁴⁹

But when viewed another way, the states reign supreme. For every case filed in federal court, there are 250 filed in state courts around the country.⁵⁰ This means that most of the laws we break and most of the laws we enforce are nonfederal. State courts are also responsible for most rights that affect individuals in day-to-day life: landlord-tenant, buyers and sellers, claims to alimony, personal injuries, and so forth.⁵¹ Most lawyers practice in state courts.⁵² So why might state constitutions get so little play?

1. Judges Prefer to Use Federal Law to Resolve Issues

Lawyers often fail to even brief state constitutional issues on appeal, and some courts call out this omission or specifically request briefing on missed state issues.⁵³

⁴⁷ See, e.g., ME. CONST. art. 1, § 16 (“Every citizen has a right to keep and bear arms and this right shall never be questioned.”); N.H. CONST. pt. 1, art. 2-a (“All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.”); PA. CONST. art 1, § 21 (“The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.”).

⁴⁸ LA. CONST. art. 1, § 11; MO. CONST. art. 1, § 23.

⁴⁹ U.S. CONST. art. 1, § 8, cl. 4, 8.

⁵⁰ *FAQs: Judges in the United States*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 3 (June 12, 2014), https://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf.

⁵¹ Linde, *supra* note 45, at 380.

⁵² Linde, *supra* note 35, at 172.

⁵³ *People v. Montyce H.*, 959 N.E.2d 221, 229 (Ill. App. Ct. 2011) (the party’s brief contained so little analysis of state constitution that court refused to address the point); *Wells v. Tex. Dep’t of Pub. Safety*, No. 14-17-00547-CV, 2019 Tex. App. LEXIS 1502, at *4–5 (Tex. App. Feb. 28, 2019) (same); *Ex parte Perez*, No. 05-03-00363-CR, 2003 Tex. App. LEXIS 4670, at *2–3 (Tex. App. June 3, 2003) (attorneys failed to brief state constitutional issue); *Burkhalter v. State*, No. 05-99-01145-CR, 2000 Tex. App. LEXIS

Some of the state arguments may have been left out due to ignorance or space limitations, but lawyers may have been responding to judges' subtle clues to deprioritize state law.

State courts have shown little desire to declare independence from the federal government. There are countless examples of state courts mimicking federal interpretation of rights.⁵⁴ Courts also feel the need to explain that the United States Supreme Court permits them to interpret their state's law independently—as if state courts needed permission.⁵⁵

Professor James A. Gardner has theorized that we lack an accepted framework to analyze state constitutions.⁵⁶ Opinions sounding in state constitutional rights seldom talk about the state constitution's history, drafters, the purpose in creating the document, or the specific events that shaped it.⁵⁷ When courts do invoke the state constitution, they are often so tightlipped about their reasoning that lawyers have nothing to work with in future cases.⁵⁸

Professor Sanford Levinson has speculated that state judges would rather hide behind federal precedent when writing a right-expansive opinion than go out on a limb and couch the opinion on state law grounds.⁵⁹ If anyone accused the judge of judicial activism, they could respond they were simply following the mandates of the Constitution.

The United States Supreme Court has not helped matters. It once said, "It is fundamental that state courts be left free and unfettered by us in interpreting their

2855, at *4 (Tex. App. May 2, 2000) (state constitutional issue so sparsely briefed that court refused to address it); *Univ. of Utah v. Shurtleff*, 144 P.3d 1109, 1114 (Utah 2006) (court had to ask for briefing on state issues); *State v. Sieyes*, 225 P.3d 995, 1004 (Wash. 2010) (attorneys failed to brief state constitutional issue). *Cf.* *People v. Miller*, 998 N.E.2d 715, 2011 Ill. App. LEXIS 1030, at *13 ("Defendant does not explain how incorrect statements of federal constitutional law would affect a holding based on Illinois constitutional law or why the Illinois constitution would provide him more protection than the federal constitution.").

⁵⁴ Abrahamson, *supra* note 43, at 1158–60 (citing cases).

⁵⁵ Linde, *supra* note 35, at 176. An appellate court sheepishly said it "would be presumptuous on our part" to extend the *Batson* rule in state law. *Eiland v. State*, 607 A.2d 42, 59 (Md. Ct. Spec. App. 1992).

⁵⁶ *See* Gardner, *supra* note 26, at 763–64.

⁵⁷ *Id.* at 765.

⁵⁸ *Id.* at 804.

⁵⁹ Sanford Levinson, *America's Other Constitutions: The Importance of State Constitutions for Our Law and Politics*, 45 TULSA L. REV. 813, 820 n.47 (2010).

state constitutions.”⁶⁰ But more recently, the Court has decided it would presume that state courts were interpreting federal law unless they made it clear they were relying on state law.⁶¹ So state judges must go out of their way to utilize state constitutions. They may find it easier and safer to just stick with federal law.

2. Lawyers Get Much Less Exposure to State Constitutional Law

It may also be that the allure of federal law is subconscious. Law students are inculcated to the supremacy of federal law. Ten years ago, Judge Jeffrey Sutton concluded no law school offers state constitutional law as part of its core curriculum, and only 24 out of nearly 200 law schools offer a course on it.⁶² In the author’s more recent search of first-year curricula at every state’s flagship public law school, not a single one required state constitutional law,⁶³ but virtually all of them required or recommended federal constitutional law.⁶⁴ The University of Nebraska requires a class on international law,⁶⁵ so it could be argued that international law is more prominent in some law schools than the fundamental law of the states. The first textbook on state constitutional law did not hit the shelves until 1988.⁶⁶ Most bar exams do not cover state constitutions.⁶⁷

⁶⁰ *Minnesota v. Nat’l Tea Co.*, 309 U.S. 551, 557 (1940).

⁶¹ *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983).

⁶² Sutton, *supra* note 33, at 166.

⁶³ The possible exception would be Louisiana State University, which requires “Legal Traditions and Systems of the Western World: Louisiana’s Experience.” *Required & Elective Courses*, LA. ST. U. L., <https://www.law.lsu.edu/academics/curriculum/jdcl/requiredandelectivecourses/> (last visited Jan. 16, 2021). The course description states that it goes over Louisiana’s Civil Code but does not mention the Louisiana constitution. *LAW 5015—Legal Traditions and Systems, Catalog Search*, LA. ST. U., https://catalog.lsu.edu/search_advanced.php?cur_cat_oid=20&search_database=Search&search_db=Search&page=1&ecpage=1&epage=1&tpage=1&location=33&filter%5Bkeyword%5D=5015 (last visited Jan. 16, 2021).

⁶⁴ In September of 2019, the author surveyed the registrar websites for the flagship public university of each state.

⁶⁵ *First Year*, NEB. C.L., <https://law.unl.edu/first-year-curriculum/> (last visited Jan. 16, 2021).

⁶⁶ Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 955 (1994). Before 1969, only a half-dozen articles had been published on state constitutional law. Linde, *supra* note 35, at 175 n.24.

⁶⁷ Sutton, *supra* note 33, at 168.

Once law students begin practice, they will likely find that federal law is more prestigious than state law. It receives more coverage from journalists and scholars.⁶⁸ Federal government employees earn more than their state and local counterparts.⁶⁹ If one is trying to effect national policy change through the law, it is easier to do so through one victory at the federal level than waging fifty battles in the states. Law clerks tend to come from “federally” oriented law schools and bring their federal reasoning with them to the courts.⁷⁰ And so, state constitutions drift to the back of the mind, if they were ever present at all.⁷¹

3. State Constitutions Are Far Wordier, Clunkier, and Shorter-Lived

The federal Constitution has only been amended 27 times and never revised wholesale, giving it a sense of permanence. Massachusetts and New Hampshire are the only two states that still use state charters older than the federal Constitution,⁷² all the rest having been adopted later or entirely revised.⁷³

Because most state charters have seen more edits or were drafted in modernity, they are not simply miniature versions of the federal Constitution. On the contrary, they are larger.⁷⁴ Much larger. Every single one of them is longer than the federal

⁶⁸ Dodson, *supra* note 27, at 739.

⁶⁹ Katherine Barrett & Richard Greene, *Think Federal Workers Have It Bad? It's Worse for State and Local Employees*, GOVERNING (Feb. 11, 2019), <https://www.governing.com/topics/workforce/gov-state-local-government-employee-pay-salary.html>.

⁷⁰ Charles G. Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1147 (1978).

⁷¹ Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1310 (2017) (quoting the chief judge of New York’s high court as saying, “Many of us had grown so federalized, so accustomed to the Supreme Court of the United States as the fount of constitutional wisdom, that we barely remembered that our state even had a constitution.”).

⁷² Massachusetts’s first and only state constitution went into effect on October 25, 1780, and New Hampshire’s current state constitution went into effect on June 2, 1784. *John Adams & The Massachusetts Constitution*, MASS. GOV’T, <https://www.mass.gov/guides/john-adams-the-massachusetts-constitution> (last visited Jan. 16, 2021); *State Constitution*, N.H. GOV’T, <https://www.nh.gov/glance/constitution.htm> (last visited Jan. 16, 2021).

⁷³ G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 9 (2011).

⁷⁴ Brenda Erickson, *Your State’s Constitution—The People’s Document*, NAT’L CONFERENCE STATE LEGISLATURES (Nov. 17, 2017), <https://www.ncsl.org/blog/2017/11/17/your-states-constitution-the-peoples-document.aspx>.

Constitution.⁷⁵ The average length of a state constitution is 39,000 words, compared to 7,591 words in the federal Constitution.⁷⁶

There are a number of reasons for this disparity in size. First, state constitutions are relatively easy to amend, giving rise to the constant temptation to expand them.⁷⁷ There have been 233 state constitutional conventions that churned out more than 7,000 amendments.⁷⁸ Second, because states have plenary power, they must specify everything the government *cannot* do, not only what it can.⁷⁹ And third, as Thomas Cooley told the North Dakota constitutional convention in 1889, a longer constitution was necessary because the state government now had to do many things that were once seen as unimportant.⁸⁰

The federal Constitution was written with “sparring elegance,”⁸¹ and state constitutional drafters expressed appreciation for this verbal minimalism⁸² but ultimately decided to be more comprehensive. Reading through state constitutions now, they feel more like elongated statutes than sacred texts.⁸³ Around the country, one will find constitutional imprimatur given to the organization of “bingo games, the width of ski trails, the taxation of golf courses, the regulation of automatic teller

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Jeffrey S. Sutton, *supra* note 30, at 690.

⁷⁸ *Id.* at 689. Note that roughly 10,000 federal constitutional amendments have been proposed to Congress over the years, but because of the difficulty of amending the document, only one-quarter of one percent have been adopted. *Id.* at 692.

⁷⁹ Levinson, *supra* note 59, at 818.

⁸⁰ Fritz, *supra* note 66, at 964.

⁸¹ Sutton, *supra* note 30, at 690. Likely, the threadbare language was used because delegates could not agree, not because they believe constitutions required parsimony. *See* Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 208 (1998).

⁸² Fritz, *supra* note 66, at 962.

⁸³ For example, Utah’s constitution uses explanatory headers for each section, and indents the text for up to three degrees to subsections. *See, e.g.*, UTAH CONST., art. I, § 1 (titled “Inherent and Inalienable Rights”). The United States Constitution has numbered sections and articles, it but does not give any explanation to the reader about what each section embraces.

machines, and . . . the sale of liquor by the individual glass.”⁸⁴ Florida recently adopted a constitutional provision governing the treatment of pregnant pigs.⁸⁵

All this has led to scathing criticism from academics. The federal Constitution—brief and unchanging—is seen as the model by which all other constitutions are judged.⁸⁶ Deviations from the model undermine the “dignity” of state constitutions, or else “denigrate” them.⁸⁷ One critic remarked that 19th-century state constitutions bore “no more resemblance to a constitution than a garbage dump does to a park.”⁸⁸ Others have said that state constitutional law consists of “a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements,”⁸⁹ or a “perplexing melange [*sic*] of disparate constitutional principles.”⁹⁰ It should thus surprise no one to learn that constitutional scholarship has largely overlooked the states.⁹¹ This likely contributes to why state constitutions are looked down upon. If academics dislike state constitutions, they might teach it less, contributing to lawyers’ and judges’ general ignorance.

4. The United States Constitution Had Famous Drafters

Check the signatures at the end of the Constitution, and one will find some of the most famous names in American history: George Washington, James Madison, Alexander Hamilton, and Benjamin Franklin. These men are synonymous with patriotism, civic virtue, and colonial refinement.

⁸⁴ Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN. ST. L. REV. 837, 840 (2011).

⁸⁵ FLA. CONST. art. 10, § 21.

⁸⁶ Fritz, *supra* note 66, at 958.

⁸⁷ *Id.* at 959.

⁸⁸ Robert S. Allen, *Introduction to OUR SOVEREIGN STATE* i, xvi (Robert S. Allen ed., 1949).

⁸⁹ Landau, *supra* note 84, at 843 (quoting Gardner, *supra* note 26, at 763).

⁹⁰ *Id.* (quoting James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 244 (1996)). See also David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 277 n.18 (1992) (calling judicial federalism “increasingly petulant, shrill, formulaic, and intellectually incoherent”).

⁹¹ Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 190 (2002).

Who wrote the state constitutions? A much more diverse cast of characters, to be sure.⁹² Pictorial records of Michigan's 1961–62 constitutional convention, for instance, tell us that women and people of color were present as delegates, researchers, press, and support staff.⁹³ But what state conventions gained in representation, they lost in notoriety. States conventions held in the founding era did have some notable figures—Daniel Webster, Joseph Story, and Martin Van Buren, to name a few⁹⁴—but because almost every state constitution has since been rewritten, they are not associated with the current state constitutions.

There were some important figures among drafters of modern state constitutions, but no one of comparable status to the Founding Fathers. George Romney—father of Mitt—played a prominent role at the Michigan convention of 1961–62.⁹⁵ New York's 1915 Convention relied on reports written by master builder Robert Moses.⁹⁶ Other conventions invited great figures of the day—such as Theodore Roosevelt, William Jennings Bryan, Dwight Eisenhower, or Earl Warren—to lecture delegates on theories of government in various states.⁹⁷ But these figures are mostly remembered for their work in the federal government, not their work on state constitutions.⁹⁸

5. The Incorporation Doctrine Stifled State Law

In 1833, the Supreme Court ruled that the Bill of Rights only limited the federal government.⁹⁹ Decades later, in the *Slaughter-House Cases*, the Court confirmed that

⁹² *E.g.*, Tarr, *supra* note 73, at 9 (noting that Montana's 1972 convention had 19 women, 13 educators, 20 farmers and ranchers, a beekeeper, an FBI agent, and a Methodist minister).

⁹³ FRED I. CHASE, STATE OF MICHIGAN CONSTITUTIONAL CONVENTION 1961: OFFICIAL RECORD 1–98 (Austin C. Knapp ed., 1961), <https://quod.lib.umich.edu/g/genpub/1749827.0001.001/15:5?rgn=full+text;view=image>.

⁹⁴ WILLIAMS, *supra* note 36, at 83.

⁹⁵ CHASE, *supra* note 93, at 78.

⁹⁶ ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 74 (1974).

⁹⁷ JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 16 (2006).

⁹⁸ The one exception is Massachusetts. John Adams, as famous as any other founder, penned the Massachusetts Constitution, yet the Massachusetts Supreme Judicial Court rarely cites him to interpret his charter. Gardner, *supra* note 26, at 793. State constitutions get no love even when they have a famous drafter, it appears.

⁹⁹ *Barron v. Mayor of Baltimore*, 32 U.S. 243 (1833).

the Fourteenth Amendment's protections did not apply to the states,¹⁰⁰ and repeatedly said that the Fourteenth Amendment did not incorporate the Bill of Rights.¹⁰¹ But starting with dicta in *Gitlow v. New York* (1925), the Court indicated that certain rights could apply to the states through the Fourteenth Amendment.¹⁰² The concept solidified twelve years later in *Palko v. Connecticut*.¹⁰³ Incorporation took off relatively quickly once established.¹⁰⁴

Some posit that incorporation caused state courts to shy away from their own constitutions once federal rights were available.¹⁰⁵ But this explanation does not hold up well against reality. State courts were never engines of civil rights: throughout the nineteenth century, virtually no state cases involved individual liberties, and virtually no laws were struck down by state courts.¹⁰⁶ Business was so slow at the Wisconsin Supreme Court, a journalist recounted, one could hear the justices' arteries clog.¹⁰⁷ One can hardly argue that the Fourteenth Amendment stole the show when nothing was going on prior to its enactment.

6. States Lack Historical Information

At least one academic has argued that there is a shortage of historical materials about state constitutions, which prevents lawyers and judges from citing them.¹⁰⁸ This conclusion is likely unfounded. For one thing, courts could still perform a textual analysis of state constitutions even if historical information did not exist. Second, historical information does exist. Often, it is far more extensive than the federal convention.

¹⁰⁰ 83 U.S. (16 Wall.) 36, 78 (1873).

¹⁰¹ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977).

¹⁰² 268 U.S. 652, 666 (1925).

¹⁰³ 302 U.S. 319, 324–25 (1937).

¹⁰⁴ David A. Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 NOTRE DAME L. REV. 1079, 1082 (1984).

¹⁰⁵ Gardner, *supra* note 26, at 806.

¹⁰⁶ Tarr, *supra* note 26, at 1101–02.

¹⁰⁷ *Id.* at 1097.

¹⁰⁸ Gardner, *supra* note 26, at 811 (citing Peter R. Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13 (1988)).

Montana's 1972 convention, for instance, has a massive verbatim transcript that spans seven volumes and over 3,000 pages.¹⁰⁹ The University of Montana has also compiled newspaper articles, pamphlets, correspondence, and speeches about the convention.¹¹⁰ In Maine, when new constitutional amendments are proposed, the attorney general prepares a summary for the voters that explains what a "yes" and "no" vote means, and this summary must be twice published in the state's daily newspapers.¹¹¹ If someone wanted to argue the meaning of the document that the convention produced, they would have a wealth of information to utilize.

C. *Advantages of Using the State Constitution*

Whatever the reason for the single-minded focus on federal law, it deprives litigants of a trove of arguments. Each of the below-listed reasons would give lawyers or judges a reasonable opportunity to depart from federal precedent. Some courts formally use a similar version of this list when deciding whether to depart from federal law.¹¹²

These reasons are nonideological. That is to say, the arguments do not skew towards any ideological outcome. Judges who rely on state constitutions are often accused of only doing so because they want a more liberal outcome than that of the United States Supreme Court, even though state courts have used state constitutions to advance conservative positions.¹¹³ Each of these factors could be used to expand or contract federal case law.

1. State Constitutions Provide Additional Textual Arguments

The text of many state constitutional rights provisions is different from the federal Constitution, providing a basis for different outcomes. For example, the Eighth Amendment prohibits "cruel *and* unusual" while Article 1, section 16 of the

¹⁰⁹ 7 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, VERBATIM TRANSCRIPT, MARCH 16, 1972–MARCH 24, 1972 (1981), https://courts.mt.gov/portals/189/library/mt_cons_convention/vol7.pdf.

¹¹⁰ Rob Natelson, *Documentary History of the Ratification of the Montana Constitution*, U. MONT., <https://www.umt.edu/law/library/montanaconstitution/default.php> (last visited Jan. 16, 2021).

¹¹¹ *State v. Brown*, 571 A.2d 816, 817 (Me. 1990).

¹¹² *State v. Jorgenson*, 312 P.3d 960, 963 (Wash. 2013).

¹¹³ Many state courts reached the opposite conclusion from *Kelo v. New London*, 545 U.S. 469 (2005), which was written by the Supreme Court's liberal Justices, for example. Liu, *supra* note 71, at 1319. And this Article will document a number of times that state courts used state constitutions to gratify gun advocates.

Michigan Constitution prohibits “cruel *or* unusual.”¹¹⁴ The use of the conjunctive versus the disjunctive suggests the state right is stronger. Further, it does not hurt that many state constitutions were written in the 20th century, so they use language that is more familiar to modern readers.

2. Legislative History Is Not Only Different but Often Far More Extensive

There was no discussion of the Second Amendment at the federal convention for the simple reason that it had not been conceived of yet. But many state constitutions addressed the right to bear arms, and the drafters’ discussions are more reliably documented.¹¹⁵

Even on topics that the federal delegates did discuss, we suffer from problems of reliable narration. James Madison is the best source of what was said at the Philadelphia convention. Madison sat right below George Washington’s prominent spot at the head of the convention, scribbling notes furiously.¹¹⁶ Delegates looked to Madison as the “unofficial reporter,” and several made a point of giving him their speeches and motions so that he could record them.¹¹⁷ But he was not perfect. He could not transcript every word spoken, and he made numerous revisions to his notes 30 years after the fact.¹¹⁸ In contrast, many state constitutions were drafted in public sessions with every committee session and floor debate transcribed faithfully and in real time.¹¹⁹

3. States Have Different Constitutional Histories

Most state constitutional conventions were summoned to address a very different set of problems than the U.S. Constitution.¹²⁰ In the late nineteenth century,

¹¹⁴ U.S. CONST. amend. VIII; MICH. CONST. art. I, § 16.

¹¹⁵ *State v. Mendoza*, 920 P.2d 357, 367 (Haw. 1996); *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 270–71 (Ill. 1984); *Kalodimos v. Vill. of Morton Grove*, 447 N.E.2d 849, 850–51 (Ill. 1983); *State v. Fadness*, 268 P.3d 17, 25 (Mont. 2012); *Klein v. Leis*, 795 N.E.2d 633, 637–38 (Ohio 2003).

¹¹⁶ WALDMAN, *supra* note 14, at 20.

¹¹⁷ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 11 (Max Ferrand ed., 1966).

¹¹⁸ *Id.* at 7.

¹¹⁹ Many state conventions actually debated whether there should be transcripts for the conventions. DINAN, *supra* note 97, at 18.

¹²⁰ Williams, *supra* note 91, at 214 (“[P]eriods of distrust of the legislature, Jacksonian democracy, the Industrial Revolution, the Progressive Movement, the settling of the West, bankruptcy in public finance,

many conventions were concerned with curbing excessive corporate power.¹²¹ Thus we see several state constitutions specifically limit the right to bear arms from being used to justify hiring armed men.¹²² These provisions were made to stop large corporations from crushing unions with hired goons.¹²³ In Delaware, the current constitution does not mention bodies of armed men, but its 1776 constitution restricted the use of firearms or military force to influence elections.¹²⁴ Delaware's 1792 constitutional convention was also beset by roving bands of armed Whigs, who sought to suppress Tories from voting.¹²⁵ Other early state constitutions contain language relating to guns for some purpose other than establishing a right to bear arms¹²⁶ or statements condemning the Crown's efforts to threaten them with weapons.¹²⁷

concern for efficient management, and many other matters can be seen clearly in any modern state constitution.”).

¹²¹ Tarr, *supra* note 73, at 10.

¹²² ARIZ. CONST. art. 2, § 26; WASH. CONST. art. 1, § 24; MONT. CONST. of 1889, art. 3, § 31.

¹²³ Tarr, *supra* note 73, at 11. *See also* State v. Kerner, 107 S.E. 222, 225 (N.C. 1921) (“[There are] great corporations, under the guise of detective agents or private police, [that] terrorize their employees by armed force. If the people are forbidden to carry the only arms within their means, among them pistols, they will be completely at the mercy of these great plutocratic organizations.”).

¹²⁴ DEL. CONST. OF 1776, art. 28 (“To prevent any violence or force being used at the said elections, no person shall come armed to any of them, and no muster of the militia shall be made on that day; nor shall any battalion or company give in their votes immediately succeeding each other.”).

¹²⁵ Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632, 647 (Del. 2017).

¹²⁶ PA. CONST. of 1776 § 5 (“The freemen of this commonwealth and their sons shall be trained and armed for its defence under such regulations, restrictions, and exceptions as the general assembly shall by law direct.”); VT. CONST. OF 1777 § 5 (similar); TENN. CONST. of 1796, art. 7, § 7 (“The legislature shall pass laws, exempting citizens belonging to any sect or denomination of religion, the tenets of which are known to be opposed to the bearing of arms, from attending private and general musters.”); *id.* at art. 11, § 28 (“That no citizen of this state shall be compelled to bear arms, provided he will pay an equivalent, to be ascertained by lawn.”); LA. CONST. of 1812, art. 5, § 22 (“The free white men of this State, shall be armed and disciplined for its defence; but those who belong to religious societies, whose tenets forbid them to carry arms, shall not be compelled so to do, but shall pay an equivalent for personal service.”); IND. CONST. of 1816, art. 7, § 2 (similar); MISS. CONST. of 1817, art. 4, § 3 (similar); ILL. CONST. of 1818, art. 5, § 2 (similar); ALA. CONST. of 1819, art. 4, § 2 (similar); MO. CONST. of 1820, art. 13, § 18 (similar).

¹²⁷ N.Y. CONST. of 1777, pmbl. (“He has constrained our fellow citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.”); S.C. CONST. of 1776, pmbl. (“[Royal governors and officials] proclaimed freedom to servants and slaves, enticed or stolen them from, and armed them against their masters.”); VA. CONST. of 1776, pmbl. (“[King George] had endeavored to pervert the same into a detestable and unsupportable tyranny . . . by prompting our negroes to rise in arms among us.”).

States may also have radically different views of their own history. The North Carolina Supreme Court in the Jim Crow era harkened back to Reconstruction to strike down a gun law, saying “in 1870, when Kirk’s militia was turned loose and the writ of habeas corpus was suspended, it would have been fatal if our people had been deprived of the right to bear arms, and had been unable to oppose an effective front to the usurpation.”¹²⁸ The court was referencing George W. Kirk, a former Union officer who led the state militia against a Ku Klux Klan terrorism campaign in 1870.¹²⁹ Evidently, this Dixie court saw Kirk, not the Klan, as the villain in the saga.

4. State Constitutions Operate Within a Larger Body of State Law

State laws might be relevant to constitutional interpretation. When Wyoming had to determine whether a person had a protected property interest in having a concealed carry permit, the court noted that the legislature contemporaneously passed a law forbidding concealed weapons when it adopted the state constitution.¹³⁰ This was taken as strong evidence that concealed carry was a privilege and not a right under the state constitution.¹³¹ Plenty of other states looked to a long history of statutory gun regulations to justify more modern laws.¹³²

II. THE RIGHT TO BEAR ARMS BEFORE *HELLER* AND *MCDONALD*

The right to bear arms is a prime vehicle for studying how state courts interpret their own constitutions in reaction to a sweeping change from the Supreme Court. Academic interest in state constitutions did not really take off until, ironically, a federal Supreme Court Justice started writing about them in the 1970s.¹³³ By that point, the Court had incorporated most of the Bill of Rights already. Had state

¹²⁸ *Kerner*, 107 S.E. at 224.

¹²⁹ Allen W. Trelease, *Kirk, George W.*, NCPEDIA, <https://www.ncpedia.org/biography/kirk-george-w> (last visited Jan. 16, 2021).

¹³⁰ *King v. Wyo. Div. of Criminal Investigation*, 89 P.3d 341, 351 (Wyo. 2004).

¹³¹ *Id.* at 352.

¹³² *State ex rel. J.M.*, 144 So. 3d 853, 866 (La. 2014) (noting that Louisiana passed a concealed carry law a year after statehood to justify limitations on concealed carry); *In re Dailey*, 465 S.E.2d 601, 606 (W. Va. 1995).

¹³³ Brennan, *supra* note 101.

constitutions received more focused attention from legal scholars, perhaps state courts would have been less likely to move in lockstep with federal precedent on an issue where they had vastly more experience.

Like in so much else, state constitutions were largely ignored in raging debates over gun safety legislation.¹³⁴ This came despite an “impressive body of state court decisions extending from 1820 to the present”; the fact that federal law on the matter was slow to pass and hung on by slim margins;¹³⁵ and that, textually, most constitutions offer stronger gun rights protection than the Second Amendment.¹³⁶

A. *The Road to Heller*

When the United States Supreme Court held that the Second Amendment created an individual right to bear arms in 2008,¹³⁷ it showed just how far the legal system was willing to go to avoid relying on state constitutions. As of 2006, almost every state had constitutional protection for gun ownership, and almost all of them were textually stronger than the Second Amendment.¹³⁸ Gun rights advocates could have used these provisions to plead their case. Instead, they took the matter to the Supreme Court. Looking at *Heller* in the rearview mirror, its conclusion may seem inevitable. But winning at One First Street was the culmination of an incredible effort.

Starting in the 19th century, the United States Supreme Court had plainly declared that the Second Amendment did not apply to the states¹³⁹ and did not confer an individual right.¹⁴⁰ No Second Amendment suit at the Supreme Court was

¹³⁴ Thomas B. McAfee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. REV. 781, 889 (1997).

¹³⁵ *Id.* at 889, 892.

¹³⁶ Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 177–78 (1982).

¹³⁷ *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

¹³⁸ *See generally* Volokh, *supra* note 19, at 192.

¹³⁹ *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (“[The second amendment] is one of the amendments that has no other effect than to restrict the powers of the national government.”); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (“The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.”).

¹⁴⁰ *United States v. Miller*, 307 U.S. 174, 178 (1939) (“[W]e cannot say that the Second Amendment guarantees the right to keep and bear [a shotgun]. [I]t is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”).

favorable to the right to bear arms. State courts recognized this.¹⁴¹ The Second Amendment was known as a “constitutional ghost town.”¹⁴² Below the Supreme Court, federal courts refused to confront the meaning of the Second Amendment seriously.¹⁴³ Writing as late as the 1990s, one observer noted, “[t]here is little to suggest, moreover, that this lack of judicial respect is about to end.”¹⁴⁴

For most of American history, the dominant view was that the Second Amendment protected a collective right to maintain state militias, not to own firearms.¹⁴⁵ A respected 19th-century treatise said that “the keeping and bearing of arms has reference only to war, and possibly also to insurrections.”¹⁴⁶ Both the American Bar Association and the American Civil Liberties Union once held this opinion.¹⁴⁷ President Johnson’s Commission on Law Enforcement and Administration of Justice declared in 1967 that “[t]he U.S. Supreme Court and lower Federal courts have consistently interpreted this Amendment only as a prohibition against Federal interference with State militias and not as a guarantee of an individual’s right to keep or carry firearms.”¹⁴⁸ Drafters of Illinois’s state constitution wanted to give individuals a right to use guns for recreation because they believed the Second Amendment did not.¹⁴⁹

¹⁴¹ *State v. Mendoza*, 920 P.2d 357, 360 (Haw. 1996); *Commonwealth v. Cassidy*, 81 N.E.3d 822, at *4 (Mass. App. Ct. 2017); *State v. Kerner*, 107 S.E. 222, 223 (N.C. 1921); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 166 (Ohio 1993); *Andrews v. State*, 50 Tenn. 165, 175 (1871); *Masters v. State*, 685 S.W.2d 654, 655 (Tex. Crim. App. 1985).

¹⁴² Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL’Y REV. 593, 595 (2006) (quoting CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 124 (2001)).

¹⁴³ McAfee & Quinlan, *supra* note 134, at 784.

¹⁴⁴ *Id.* at 785.

¹⁴⁵ *State v. Amos*, 343 So. 2d 166, 169–70 (La. 1977); *State v. Shelby*, 2 S.W. 468, 468–69 (Mo. 1886); *State v. Kerner*, 107 S.E. 222, 223 (N.C. 1921); *Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976); *Ex parte Thomas*, 97 P. 260, 262 (Okla. 1908); *Andrews v. State*, 50 Tenn. 165, 177–78 (1871); *State v. Duke*, 42 Tex. 455, 458 (1874); Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1133 (2011) (citing cases).

¹⁴⁶ *City of Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905) (quoting BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 536 (3d ed. 1901)).

¹⁴⁷ LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 134 (1999).

¹⁴⁸ *Id.*

¹⁴⁹ Leven, *supra* note 18, at 83–84.

This did not deter gun rights advocates. From the earliest days of the Republic, some believed that the federal Constitution granted an individual right to bear arms.¹⁵⁰ An 1893 newspaper chastised the Florida legislature for passing a law requiring people to get a license and put down a \$1 bond to own a rifle, calling it a violation of the Second Amendment.¹⁵¹

Gun rights advocates did not give up. They conjured up images of everything from Communism to a nuclear holocaust to aid their cause.¹⁵² Scholarly support for the individual rights theory of the Second Amendment grew throughout the 1980s and 1990s.¹⁵³ Even among the right-wing intelligentsia, few believed that the Second Amendment reached as far as the Supreme Court now declares. In 1989, conservative judge and former Supreme Court nominee Robert Bork said that the Second Amendment protects only “the right of states to form militias.”¹⁵⁴ Chief Justice Warren Burger called the push to expand the scope of the Second Amendment “one of the greatest pieces of fraud, I repeat the word ‘fraud,’ on the American public by special interest groups that I have ever seen in my lifetime.”¹⁵⁵ Fraud or not, the concerted effort paid off. By 2001, it could be said that the meaning of the Second Amendment was “an area of unparalleled contention—even acrimony—among trained scholars.”¹⁵⁶

Then came *District of Columbia v. Heller*.¹⁵⁷ The case involved a challenge to a Washington, DC law that generally prohibited handguns.¹⁵⁸ The plaintiff applied

¹⁵⁰ Franklin, *Tree of Liberty*, WKLY. FRANKLIN REPOSITORY, Sept. 10, 1805 (“[C]itizens have a right to bear arms in defense of themselves.”); Mr. Miner, *Oakhill Celebration of Independence*, GLEANER, Aug. 4, 1815 (“Every citizen has a right to bear arms in self defense.”).

¹⁵¹ Nonconformist, JETMORE SIFTINGS, Dec. 28, 1893.

¹⁵² *Matthews v. State*, 148 N.E.2d 334, 342 (Ind. 1958) (Emmert, C.J., dissenting).

¹⁵³ McAfee & Quinlan, *supra* note 134, at 784 n.6.

¹⁵⁴ TRIBE & MATZ, *supra* note 5, at 162.

¹⁵⁵ *Id.*

¹⁵⁶ *State v. Hirsch*, 34 P.3d 1209, 1210 (Or. Ct. App. 2001).

¹⁵⁷ 554 U.S. 570 (2008).

¹⁵⁸ *Id.* at 574.

for a handgun permit but was denied.¹⁵⁹ He appealed on Second Amendment grounds and won.¹⁶⁰

Reaching the Court's conclusion in the case was not easy. The Court first had to explain why the Amendment created an individual, rather than a collective right.¹⁶¹ Next, it had to define the prefatory clause and explain why it did not limit the Amendment's reach, which took several pages of work.¹⁶² Finally, it had to dispatch over a century of precedent that had come to the opposite conclusion.¹⁶³ The whole effort produced a 66-page opinion.

B. The Second Amendment Has Multiple Limitations Compared to State Constitutions

Even with *Heller* in place, the Second Amendment has several textual stumbling blocks that gun advocates must surmount—obstacles that could be avoided if a state constitution were used to substantiate their right. The Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Advocates must surmount at least five challenges.

First, the Amendment explicitly mentions a militia, which opens the possibility that it protects militias rather than gun ownership or use.¹⁶⁴ Second, it speaks of the necessity of a “well regulated militia,” which hints at the idea that the right can be regulated. Third, it vests the right in “the people,” which creates the argument that it is a collective right, not an individual one.¹⁶⁵ Fourth, though it mentions a right to

¹⁵⁹ *Id.* at 575.

¹⁶⁰ *Id.* at 575–76.

¹⁶¹ *Id.* at 579–81.

¹⁶² *Id.* at 595–600.

¹⁶³ *Id.* at 619–26.

¹⁶⁴ *Fife v. State*, 31 Ark. 455, 458 (1876) (“It is manifest from the language of the [Second Amendment] . . . that the arms which it guarantees American citizens the right to keep and to bear, are such as are needful to, and ordinarily used by a well regulated militia.”); *Glenn v. State*, 72 S.E. 927, 929 (Ga. Ct. App. 1911); *Carfield v. State*, 649 P.2d 865, 871 (Wyo. 1982).

¹⁶⁵ *See Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 269 (Ill. 1984) (noting that Illinois’s constitutional right to bear arms speaks of the “individual” not “the people” to avoid right being interpreted as a collective right).

“keep and bear arms,” it does not elaborate on what this means.¹⁶⁶ And fifth, it is awkwardly worded, with an inscrutable comma punctuating the sentence, which makes it easy for individuals to interpret it differently. The Supreme Court read much of this troublesome language out of the Amendment, but the ink is still on the page.

State constitutions, on the other hand, do not carry such baggage. Take Alabama’s constitution. Article 1, section 23, reads in full: “That every citizen has a right to bear arms in defense of himself and the state.”¹⁶⁷ There is no mention of a militia, regulated or otherwise. “Every citizen” has the right. The right to bear arms is explicitly linked to self-defense, and it is a simple sentence without any commas or extra clauses. If the Second Amendment provides a meandering path to victory for a client arguing for greater gun rights, the Alabama Constitution is a straight shot. And yet, the Second Amendment is thirteen times more likely to be cited in Alabama state courts.¹⁶⁸

Though all state constitutional provisions protecting the right to bear arms resemble the Second Amendment, few share most of its hurdles. Many share none. None share all. State provisions fall into one of several camps. A few states copy the Second Amendment’s text nearly verbatim—though none replicate its eccentric comma usage.¹⁶⁹ About half of the states with constitutional gun rights explicitly mention self-defense.¹⁷⁰

Admittedly, state constitutions are not without limitations for gun rights advocates. A dozen or so explicitly authorize the legislature to regulate guns or

¹⁶⁶ One research combed through 18th century law books concluded that the terms “bear arms” and “keep arms” appeared in the military context, and never in the self-defense context. CHARLES, *supra* note 13, at 13.

¹⁶⁷ ALA. CONST. art. I, § 23.

¹⁶⁸ Using the same methodology as described in footnote 21, there are 15 state court cases mentioning the state constitutional provision, and 200 mentioning the Second Amendment.

¹⁶⁹ ALASKA CONST. art. I, § 19; HAW. CONST. art. I, § 17; N.C. CONST. art. I, § 30; S.C. CONST. art. I, § 20.

¹⁷⁰ ALA. CONST. art. I, § 26; ARIZ. CONST. art. II, § 26; COLO. CONST. art. II, § 13; CONN. CONST. art. I, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. I, § 8; IND. CONST. art. I, § 32; KAN. CONST. § 4; KY. CONST. § 1; MICH. CONST. art. I, § 6; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 11; N.H. CONST. pt. 1, art. II-a; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 4; OKLA. CONST. art. II, § 26; OR. CONST. art. I, § 27; PA. CONST. art. I, § 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. I, § 24; W. VA. CONST. art. III, § 22; WIS. CONST. art. I, § 25; WYO. CONST. art. I, § 24.

delimit the right.¹⁷¹ But courts and litigants are far more likely to mention the Second Amendment regardless of whether their state has a strong gun rights provision or a weak one.¹⁷²

C. *State Courts Have Not Been Kind to Gun Rights*

Why do gun rights litigants refrain from using state constitutions when they seem like a much surer path to victory? In addition to all of the general reasons that explain why litigants skip over state constitutions, it might simply be that, for all of the perils of the Second Amendment, it still gives better odds than state courts. State constitutions may offer powerful textual arguments, but in practice, state courts seldom rule in favor of challenges to gun laws. Reasonable attorneys might therefore conclude that they might as well take a gamble on federal law rather than a surefire loss in the states.

The right to bear arms can be restricted much more pervasively than many other constitutional rights. Consider the scope of permissible firearm regulations. For example, some states give police discretionary power to grant or deny a firearm license.¹⁷³ Habitual drug users may be denied the right.¹⁷⁴ People who are merely indicted may be barred from having a firearm.¹⁷⁵ Those convicted for a crime as non-violent as passing bad checks may forfeit the right.¹⁷⁶ Moreover, those accused of gun crimes may find that they, not the government, bear the burden of proof for key portions of their case.¹⁷⁷ Courts justify the “extraordinary degree of control” that the

¹⁷¹ COLO. CONST. art. II, § 13; FLA. CONST. art. I, § 8; GA. CONST. art. I, § 1; IDAHO CONST. art. I, § 11; ILL. CONST. art. I, § 22; KY. CONST. § 1; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; N.C. CONST. art. I, § 30; N.M. CONST. art. II, § 6; MONT. CONST. art. II, § 12; OKLA. CONST. art. II, § 26; TENN. CONST. art. I, § 26; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6.

¹⁷² Textually, Louisiana has one of the strongest rights to bear arms, and North Carolina has one of the weakest. *Compare* LA. CONST. art. I, § 11, *with* N.C. CONST. art. I, § 30. Yet there the Second Amendment is three times more likely to be cited in state courts than their respective state constitutions.

¹⁷³ *Commonwealth v. Williams*, No. 09-P-813, 2011 Mass. App. LEXIS 934, at *9–10 (Mass. App. Ct. Aug. 3, 2011); *Kasprowicz v. Finck*, 574 N.W.2d 564, 565 (N.D. 1998). *But see* *Gadomski v. Tavares*, 113 A.3d 387, 390 (R.I. 2015).

¹⁷⁴ *State v. Wheatley*, 94 N.E.3d 578, 589 (Ohio Ct. App. 2018).

¹⁷⁵ *State v. Philpotts*, 132 N.E.3d 743, 746–47 (Ohio Ct. App. 2019). *Contra* *State ex rel. Okla. State Bureau of Investigation v. Warren*, 975 P.2d 900, 901 (Okla. 1998).

¹⁷⁶ *State v. Lerch*, No. 15CA39, 2016 WL 1734991 at *1 (Ohio Ct. App. 2016).

¹⁷⁷ *Smith v. State*, 882 A.2d 762 (Del. 2005) (unpublished table decision) (stating the defendant had the burden to show he had a licensed to conceal carry); *Pittman v. State*, 45 N.E.3d 805, 820–21 (Ind. Ct. App. 2015) (holding that it is not unconstitutional for a statute to place the burden of proof upon a

police power offers “because firearms pos[e] such an extraordinary threat to the safety of society.”¹⁷⁸

1. The “Police Power” Enables State Courts to Uphold Gun Safety Laws

States, unlike the national government, can rely on their “police power” to regulate guns.¹⁷⁹ Nebulous in scope, the police power was likened to “liveries of heaven stolen to serve the devil in” by one of Washington State’s first state supreme court justices.¹⁸⁰ This police power has been used to justify regulations for firearms at the state level, notwithstanding state constitutional provisions.¹⁸¹

Under the auspices of the police power, state courts have upheld all sorts of gun regulations, including felon-in-possession offenses,¹⁸² concealed carry laws,¹⁸³

defendant to prove he possessed a valid firearm license when it was not an element of the crime); *State v. Thomas*, No. 27266, 2015 WL 4464893 at *3 (Ohio Ct. App. July 22, 2015) (rejecting without deciding an argument that defendant had the burden to prove self-defense). *Cf. Cruz v. State*, 189 So. 3d 822, 827–29 (Fla. Dist. Ct. App. 2015) (showing that a defendant had to give inculpatory testimony in order to assert self-defense claim).

¹⁷⁸ *City of Chicago v. Taylor*, 774 N.E.2d 22, 28 (Ill. App. Ct. 2002). This is not to say that no stern federal regulations exist either. For example, under federal law, a misdemeanor for domestic violence can be enough to impose a lifetime ban on a possessing a firearm. 18 U.S.C. § 922(g)(9) (2018); *Schrader v. Holder*, 704 F.3d 980, 990–91 (D.C. Cir. 2013) (upholding 18 U.S.C. § 922(g)(1) “because disarmament of common-law misdemeanants as a class is substantially related to the important governmental objective of crime prevention”).

¹⁷⁹ *Dowlut & Knoop*, *supra* note 136, at 184.

¹⁸⁰ *Weden v. San Juan Cty.*, 958 P.2d 273, 297 (Wash. 1998) (en banc) (quoting Justice Theodore L. Stiles in C.S. REINHART, HISTORY OF THE SUPREME COURT OF THE TERRITORY AND STATE OF WASHINGTON 49–50 (n.d.)).

¹⁸¹ *State v. McAdams*, 714 P.2d 1236, 1237 (Wyo. 1986) (“In practically all states, the police power has been invoked to regulate the manner in which constitutional rights are exercised.”) (internal citations omitted); *Winkler*, *supra* note 142, at 601.

¹⁸² *State v. Fadness*, 268 P.3d 17, 25 (Mont. 2012); *State v. Comeau*, 448 N.W.2d 595, 600 (Neb. 1989); *City of Akron v. Williams*, 177 N.E.2d 802, 804–05 (Ohio Ct. App. 1960); *Carfield v. State*, 649 P.2d 865, 872 (Wyo. 1982); *State v. Johnson*, 139 N.E.3d 963, 971 (Ohio Ct. App. 2019) (barring a firearm to a person who committed a crime as a juvenile).

¹⁸³ *Deputy Sheriffs Ass’n v. Smith*, 195 N.W.2d 12, 13 (Mich. Ct. App. 1971); *Kasprowicz v. Finck*, 574 N.W.2d 564, 566 (N.D. 1998); *Mosby v. Devine*, 851 A.2d 1031, 1043 (R.I. 2004); *State v. Fisher*, 714 N.W.2d 495, 508 (Wis. 2006); *Dano v. Collins*, 802 P.2d 1021 (Ariz. Ct. App. 1990).

denial of restoration of gun rights,¹⁸⁴ bans on organizing an armed body of men,¹⁸⁵ gun-free zones,¹⁸⁶ prohibitions on possessing arms while intoxicated,¹⁸⁷ bans on certain types of weapons,¹⁸⁸ high capacity magazines,¹⁸⁹ firearm taxes,¹⁹⁰ regulations on shooting ranges,¹⁹¹ weapon confiscation,¹⁹² and unlawful use of a weapon.¹⁹³ A 1948 newspaper article observed that, regarding the right to bear arms, “In most states this right is restricted by the state laws under their police powers. It is granted and controlled to a proper extent.”¹⁹⁴ Many rulings in favor of gun safety laws came over the dissenters’ strident objections, pointing out the state constitutions’ unambiguity.¹⁹⁵ But courts have often rejected strict textualism in interpreting state

¹⁸⁴ Rohrbaugh v. State, 607 S.E.2d 404, 410 (W. Va. 2004).

¹⁸⁵ State v. Gohl, 90 P. 259, 260 (Wash. 1907).

¹⁸⁶ State v. Dees, 669 P.2d 261, 264 (N.M. Ct. App. 1983).

¹⁸⁷ State v. Richard, 298 S.W.3d 529, 532 (Mo. 2009).

¹⁸⁸ Robertson v. City & Cty. of Denver, 874 P.2d 325, 331 (Colo. 1994) (assault weapons); Lacy v. State, 903 N.E.2d 486, 489–90 (Ind. Ct. App. 2009) (switchblade); Commonwealth v. Davis, 343 N.E.2d 847, 850 (Mass. 1976) (short-barreled shotguns).

¹⁸⁹ Rocky Mt. Gun Owners v. Polis, 467 P.3d 314, 323 (Colo. 2020).

¹⁹⁰ Guns Save Life, Inc. v. Ali, 2020 IL App. No. 1-18-1846, ¶ 52 (2020).

¹⁹¹ Fort Discovery Corp. v. Jefferson City, No. 53245-0-II, at *23 (Wash. Ct. App. Sept. 9, 2020).

¹⁹² Redington v. State, 992 N.E.2d 823, 834–35 (Ind. Ct. App. 2013).

¹⁹³ People v. Williams, 377 N.E.2d 285, 287 (Ill. App. Ct. 1978).

¹⁹⁴ Betty Holmes, *Our American Heritage: No Other Nation Has Bill of Rights Like Ours*, CEDAR RAPIDS GAZETTE, Apr. 18, 1948.

¹⁹⁵ Mason v. State, 103 So. 2d 341, 343 (Ala. 1958) (Coleman, J., dissenting); Matthews v. State, 148 N.E.2d 334, 339 (Ind. 1958) (Emmert, C.J., dissenting); State v. Dawson, 159 S.E.2d 1, 14 (N.C. 1968) (Lake, J., dissenting); Arnold v. City of Cleveland, 616 N.E.2d 163, 176 (Ohio 1993) (Hoffman, J., dissenting); State *ex rel.* W. Va. Div. of Nat. Res. v. Cline, 488 S.E.2d 376, 384 (W. Va. 1997) (Maynard, J., dissenting); State v. Fisher, 714 N.W.2d 495, 509 (Wis. 2006) (Crooks, J., dissenting).

constitutional provisions that protect gun rights.¹⁹⁶ One only finds a gun law struck down under the reasonable regulation standard once in a blue moon.¹⁹⁷

State courts often deflect challenges to gun laws with a flourish. The Arkansas Supreme Court said in 1842 that firearms needed to be regulated or else “their unrestrained exercise” would “unhinge society, and most probably soon cause it . . . to fall back to its natural state . . . [and] surely defeat every object for which the government was formed.”¹⁹⁸ Forty years later, the same court said that it would be a “perversion” of the constitution (it was not clear whether the court meant state or federal) to allow an individual to carry a pistol uninhibited.¹⁹⁹ Kentucky’s supreme court complained that a challenge to the state’s felon-in-possession law was a “specious argument [that] is almost patently meritless and would not warrant comment except that both movant and respondent state that it is a point of first impression in this jurisdiction.”²⁰⁰ A Florida case devoted a lengthy, tangential paragraph to talk about the scourge of gun violence after rejecting a defendant’s appeal on a gun crime.²⁰¹

Using state police power, courts typically subjected gun laws to a “reasonable regulation” standard.²⁰² This usually meant rational basis analysis—an exceedingly low bar to clear.²⁰³ Occasionally, courts used a slightly stronger test, one that weighed the individual’s arguments against those of the government and tended to

¹⁹⁶ *Haile v. State*, 38 Ark. 564, 567 (1882); *Landers v. State*, 299 S.E.2d 707, 709–10 (Ga. 1983); *Strickland v. State*, 72 S.E. 260, 265 (Ga. 1911); *State v. Brown*, 571 A.2d 816, 819 (Me. 1990); *State v. Dees*, 669 P.2d 261, 263 (N.M. Ct. App. 1983); *State v. Dawson*, 159 S.E.2d 1, 11 (N.C. 1968); *State v. Comeau*, 448 N.W.2d 595, 597 (Neb. 1989); *State v. Cole*, 665 N.W.2d 328, 340 (Wis. 2003); *but see City of Junction City v. Mevis*, 601 P.2d 1145, 1152 (Kan. 1979) (striking down a law as overbroad after refusing to add judicial exceptions that would make it more reasonable).

¹⁹⁷ *Lakewood v. Pillow*, 501 P.2d 744, 745 (Colo. 1972).

¹⁹⁸ *State v. Buzzard*, 4 Ark. 18, 21 (1842).

¹⁹⁹ *Haile*, 38 Ark. at 566.

²⁰⁰ *Eary v. Commonwealth*, 659 S.W.2d 198, 200 (Ky. 1983).

²⁰¹ *Alexander v. State*, 450 So. 2d 1212, 1214 (Fla. Dist. Ct. App. 1984).

²⁰² *E.g.*, *Dickerson v. State*, 517 So. 2d 625, 627 (Ala. Crim. App. 1986); *State v. Dees*, 669 P.2d 261, 264 (N.M. Ct. App. 1983); *State v. Robinson*, 343 P.2d 886, 889 (Or. 1959).

²⁰³ *E.g.*, *State v. Mendoza*, 920 P.2d 357, 368 (Haw. 1996); *Hunt v. Daley*, 677 N.E.2d 456, 461 (Ill. App. Ct. 1997); *State v. Blanchard*, 749 So. 2d 19, 24–25 (La. Ct. App. 1999).

use actual justifications for laws, rather than imaginary ones.²⁰⁴ Additionally, courts sometimes noted that a regulation should be narrowly drawn, which is language that typically comes from heightened scrutiny cases.²⁰⁵ But on the whole, it was a low standard.

Many state courts have even refused to restore a person's right to bear arms when all of their other rights have been restored.²⁰⁶ It is common for a defendant to lose many rights upon conviction. For example, the right to vote,²⁰⁷ serve on juries,²⁰⁸ hold certain offices of trust,²⁰⁹ and, most relevant here, possess firearms.²¹⁰ The right to keep and bear arms is not viewed as a "core" citizen right subject to automatic restoration.²¹¹

And when courts do restore gun rights, the government may appeal that decision.²¹² In Tennessee, a man was denied the right to own a gun because of a prior felony conviction in Georgia.²¹³ It did not matter that his rights under Georgia law had been fully restored by pardon because Tennessee law did not make an exception for pardoned crimes.²¹⁴ His appeal to have his rights restored in Tennessee were ultimately unsuccessful.²¹⁵ Many other states have taken the same approach.²¹⁶

²⁰⁴ See, e.g., *State v. Burger*, No. 36758-7-I, 1997 Wash. App. LEXIS 122, at *4–5 (Wash. Ct. App. Jan. 27, 1997).

²⁰⁵ *State v. Spencer*, 876 P.2d 939, 943 (Wash. Ct. App. 1994).

²⁰⁶ E.g., *Walker v. United States*, 800 F.3d 720, 722 (6th Cir. 2015).

²⁰⁷ *United States v. Wegrzyn*, 106 F. Supp. 2d 959, 961 (W.D. Mich. 2000).

²⁰⁸ *United States v. Jennings*, 323 F.3d 263, 270 (4th Cir. 2003).

²⁰⁹ *Walker*, 800 F.3d at 722.

²¹⁰ *State v. Schmidt*, 23 P.3d 462, 475 (Wash. 2001).

²¹¹ *United States v. Indelicato*, 97 F.3d 627, 630 (1st Cir. 1996).

²¹² *Rohrbaugh v. State*, 607 S.E.2d 404, 406 (W. Va. 2004).

²¹³ *Blackwell v. Haslam*, No. M2011-00588-COA-R3-CV, 2012 Tenn. App. LEXIS 23, at *2 (Tenn. Ct. App. Jan. 11, 2012).

²¹⁴ *Id.* at *5.

²¹⁵ *Blackwell v. Haslam*, No. M2012-01991-COA-R3-CV, 2013 Tenn. App. LEXIS 436, at *65–66 (Tenn. Ct. App. June 28, 2013).

²¹⁶ *Perito v. City of Brooke*, 597 S.E.2d 311 (W. Va. 2004).

In Kansas, a defendant was convicted of burglary.²¹⁷ When he was released, the order stated, “all civil rights lost by operation of law upon commitment are hereby restored.”²¹⁸ Later, he committed another crime and was charged under the state law that prohibited anyone convicted of burglary, among other crimes, from possessing a gun.²¹⁹ The Kansas Supreme Court affirmed the civil disability barring gun ownership.²²⁰

2. State Courts Have Only Rarely Struck Down Gun Safety Legislation

The earliest courtroom victory for gun advocates came in 1822 from the Kentucky Supreme Court.²²¹ *Bliss v. Commonwealth* took an absolutist view of gun rights, claiming that any law that “whatever restrains the . . . complete exercise” of the right to bear arms violated its state constitution.²²² But this case was an aberration. This was the only antebellum case to strike down a gun regulation.²²³ It was severely criticized in its era and not followed by other states.²²⁴ The state legislature also amended the constitution to overturn the decision.²²⁵

Over the next 190 years, gun supporters did not get much to smile about. In reviewing hundreds of state court decisions over hundreds of years mentioning the state constitutional right to bear arms, only about thirty cases sided with the gun owner. Of these, most of the laws struck down were total bans of weapons²²⁶—the

²¹⁷ *State v. Bolin*, 436 P.2d 978, 978 (Kan. 1968).

²¹⁸ *Id.*

²¹⁹ *Id.* at 978–79.

²²⁰ *Id.* at 979.

²²¹ 2 Ky. (2 Litt.) 90, 91–92 (1822).

²²² *Id.* at 91.

²²³ *State v. Hirsch*, 34 P.3d 1209, 1212 (Or. Ct. App. 2001).

²²⁴ *Strickland v. State*, 72 S.E. 260, 261 (Ga. 1911); *State v. Keet*, 190 S.W. 573, 575 (Mo. 1916) (stating *Bliss* has never been cited with approval).

²²⁵ *State v. Hirsch*, 114 P.3d 1104, 1118 (Or. 2005).

²²⁶ *Id.* at 320; *see also* *Robarge v. State*, 432 So. 2d 669, 671 (Fla. Dist. Ct. App. 1983); *Nunn v. State*, 1 Ga. 243, 251 (1846); *In re Brickley*, 70 P. 609, 610 (Idaho 1902); *Junction City v. Mevis*, 601 P.2d 1145, 1152 (Kan. 1979); *State v. Kerner*, 107 S.E. 222 (N.C. 1921); *City of Las Vegas v. Moberg*, 485 P.2d 737 (N.M. App. 1971); *Klein v. Leis*, 767 N.E.2d 286, 294 (Ohio App. 2002); *City of Akron v. Rasdan*, 663 N.E.2d 947, 953 (Ohio App. 1995); *State v. Delgado*, 692 P.2d 610, 614 (Or. 1984); *State v. Blocker*, 630 P.2d 824, 827 (Or. 1981); *State v. Kessler*, 614 P.2d 94 (Or. 1980); *State v. Stevens*, 833 P.2d 318 (Or.

same sort that were abrogated in *Heller* and *McDonald*—and the rest being a smattering of various issues.²²⁷

Aside from those, gun safety legislation has held up well in court. Courts upheld bans on weapons in sensitive areas, such as schools,²²⁸ churches,²²⁹ large gatherings,²³⁰ or legislatively-designated gun-free zones.²³¹ The West Virginia Supreme Court upheld a ban on hunting on Sunday.²³² Assault weapons bans have survived,²³³ as have bans on dangerous weapons.²³⁴ In reviewing the set of state gun cases, defendants convicted of felon-in-possession are the predominant types of

App. 1992); *Glasscock v. Chattanooga*, 11 S.W.2d 678, 679 (Tenn. 1928); *Heaton v. State*, 169 S.W. 750, 752 (Tenn. 1914); *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 149 (W. Va. 1988).

²²⁷ *State v. Woodward*, 74 P.2d 92 (Idaho 1937) (not including a jury instruction that implied he lacked a right to carry a weapon); *Shettle v. Shearer*, 425 N.E.2d 739, 741 (Ind. Ct. App. 1981) (describing that the state constitution said that un rebutted assertion of need for self-defense enough to get a firearm license); *Schubert v. De Bard*, 398 N.E.2d 1339, 1342 (Ind. Ct. App. 1980) (holding that a police superintendent could not revoke a firearm license on purely subjective grounds); *State v. Blanchard*, 776 So. 2d 1165, 1174 (La. 2001) (explaining that the defendant argued that his state constitutional rights would be violated if constructive possession of a firearm could be used to convict him, and the court reversed his conviction); *State v. Garcia*, 92 P.3d 41, 50 (N.M. App. 2004) (holding that the mere presence of a gun cannot create suspicion that person is armed and dangerous); *State v. Gutierrez*, 94 P.3d 18 (N.M. App. 2004) (holding that the mere possession of a lawful weapon does not create probable cause to search a car); *State ex rel. Okla. State Bureau of Investigation v. Warren*, 975 P.2d 900, at *904–05 (Okla. 1998) (explaining that a person could not be denied a gun simply because they were indicted); *Stillwell v. Stillwell*, No. E2001-00245-COA-R3-CV, 2001 Tenn. App. LEXIS 562, at *11 (Tenn. Ct. App. July 30, 2001) (holding that a father cannot be barred from owning a gun without evidence he might harm his child); *State v. Rupe*, 683 P.2d 571, 597 (Wash. 1984) (holding that adverse inference cannot be drawn from mere ownership of firearms); *State v. Spiers*, 79 P.3d 30, 35 (Wash. Ct. App. 2003) (holding that ownership of firearms cannot be banned for being charged with a crime); *State v. Walker*, 425 S.E.2d 616, 623 (W. Va. 1992) (holding that adverse inference cannot be drawn from mere ownership of firearms); *State v. Hamdan*, 665 N.W.2d 785 (Wis. 2003).

²²⁸ *Univ. of Utah v. Shurtleff*, 144 P.3d 1109, 1117 (Utah 2006).

²²⁹ *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921).

²³⁰ *State v. Wilforth*, 74 Mo. 528, 529 (1881).

²³¹ *Mich. Coal. for Responsible Gun Owners v. City of Ferndale*, 662 N.W.2d 864, 867 (Mich. Ct. App. 2003).

²³² *Hartley Hill Hunt Club v. Cty. Comm'n of Ritchie Cty.*, 647 S.E.2d 818 (W. Va. 2007).

²³³ *State v. LaChapelle*, 451 N.W.2d 689, 691 (Neb. 1990); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993); *Ford v. State*, 868 S.W.2d 875, 878 (Tex. App. 1993); *Morrison v. State*, 339 S.W.2d 529 (Tex. Crim. App. 1960).

²³⁴ *State v. Fennell*, 382 S.E.2d 231 (N.C. Ct. App. 1989) (sawed-off shotguns).

litigants challenging gun laws, but they have been wildly unsuccessful: “No state law banning felons from possessing guns has ever been struck down.”²³⁵

Several states have had lines of cases creating ad hoc exceptions to gun laws, but they end up showing how hard it is for challengers to win. In *Britt v. State*,²³⁶ the plaintiff was convicted for felon-in-possession with intent to deal drugs in 1979.²³⁷ He got out and had his civil rights restored, including the right to bear arms, in 1987.²³⁸ But a 2004 law banned anyone convicted of a felony from having a gun.²³⁹ Though the plaintiff asserted his state constitutional rights, the North Carolina Court of Appeals ruled that felons could be stripped of their right to bear arms if the law had a rational relation to a legitimate state interest, and this one did.²⁴⁰

On appeal, the North Carolina Supreme Court reversed.²⁴¹ Based on state constitutional grounds alone, the court said that it was not reasonable to deprive a man of his right to bear arms given the equities of the case.²⁴² After his single felony conviction, the plaintiff spent 30 years as a law-abiding citizen, and he voluntarily surrendered his weapons after the 2004 law was passed.²⁴³ There was no discussion of the meaning of the state constitution’s history or text, but the ruling appears to be a rare case that flunked a law on the rational basis test.

The state supreme court’s decision encouraged other defendants to seek an as-applied challenge to the felon-in-possession law. Some claims were easily rejected.²⁴⁴ Others proved more difficult.²⁴⁵ One claimant committed his

²³⁵ *State v. Beeman*, 417 P.3d 541, 544 (Or. Ct. App. 2018).

²³⁶ 649 S.E.2d 402 (N.C. Ct. App. 2007).

²³⁷ *Id.* at 404.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 405–06.

²⁴¹ *Britt v. State*, 681 S.E.2d 320, 323 (N.C. 2009).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *State v. Price*, 757 S.E.2d 309, 317 (N.C. Ct. App. 2014); *State v. Coffey*, 736 S.E.2d 647, *9–10 (N.C. Ct. App. 2013); *State v. Buddington*, 707 S.E.2d 655, 656 (N.C. Ct. App. 2011); *State v. Yuckel*, 719 S.E.2d 254, *13 (N.C. Ct. App. 2011).

²⁴⁵ *State v. Whitaker*, 689 S.E.2d 395 (N.C. Ct. App. 2009) (rejecting appeal after lengthy analysis).

disqualifying crime 40 years ago and was later pardoned for it.²⁴⁶ He served in Iraq and worked in the Department of Defense.²⁴⁷ He voluntarily complied with the felon disarmament law and surrendered his weapons when it was passed in 2004, and he never violated the disarmament law.²⁴⁸ The court said it would be unreasonable to prevent him from ever owning a gun again in these circumstances, and, because there was no statutory mechanism to return guns, judicial relief was the only option.²⁴⁹ Sometimes North Carolina courts would remand for a determination of whether the law was reasonable in the context presented.²⁵⁰

Wisconsin saw a similar line of cases. Munir A. Hamdan was an incredibly compelling defendant. He owned a grocery store and kept a handgun under the counter for protection.²⁵¹ He had good cause.²⁵² His little store was in a high crime area and suffered four armed robberies and two fatal shootings.²⁵³ During one incident, an assailant pulled the trigger of a loaded gun aimed at his head—he only survived due to a miraculous misfire.²⁵⁴ Another time, a nearby shooting marked his store with bullets.²⁵⁵

One evening while closing up, two police officers entered to conduct a license check.²⁵⁶ When they asked if Hamdan had a gun, he answered yes.²⁵⁷ Hamdan surrendered the gun, and police later charged him with carrying a concealed

²⁴⁶ Baysden v. State, 718 S.E.2d 699 (N.C. Ct. App. 2011).

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 701–02.

²⁴⁹ *Id.* at 704–05.

²⁵⁰ Johnston v. State, 735 S.E.2d 859, 875 (N.C. Ct. App. 2012).

²⁵¹ State v. Hamdan, 665 N.W.2d 785, 789 (Wis. 2003).

²⁵² *Id.* at 812.

²⁵³ *Id.* at 791.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 789.

²⁵⁷ *Id.*

weapon.²⁵⁸ This was in spite of the fact that police in the area allowed other small business owners to possess weapons.²⁵⁹

The Wisconsin Supreme Court held that while Hamdan violated the concealed weapon law, the state constitution did not allow the complete destruction of the right to bear arms.²⁶⁰ It applied an interest balancing test, saying that Hamdan's interest in carrying a weapon substantially outweighed the state's interest in regulating it, based on the particular facts of the case.²⁶¹

This case spawned copycat appeals where defendants tried to plead sympathetic stories of their own.²⁶² These appeals were not successful. The cases did inspire Delaware to borrow from Wisconsin an interest-balancing test to decide if a law was reasonable in the context of the case.²⁶³

These as-applied challenges to felon-in-possession laws were occasionally successful, but they gave gun rights advocates little cause for celebration overall. Collectively they showed that it was not enough *merely* to have the disqualifying offense pardoned, or to live decades without committing a crime, or voluntarily surrender weapons, or have a compelling life story. Claimants may very well have had to show *all* of these things for a shot at winning.

III. STATE COURTS REACT TO *HELLER* AND *MCDONALD*

In *Heller*, the Supreme Court looked to the states to help flesh out its reasoning,²⁶⁴ just as it had when it adopted the exclusionary rule in *Weeks v. United States*,²⁶⁵ and again when incorporating it in *Mapp v. Ohio*.²⁶⁶ But how did states look to the Supreme Court? What has the impact of *Heller* been on the ground? In state courts, relatively little has changed. State courts racked up 200 years of

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 791.

²⁶⁰ *Id.* at 799.

²⁶¹ *Id.* at 811.

²⁶² *E.g.*, *State v. Fisher*, 714 N.W.2d 495 (Wis. 2006); *State v. Renfro*, No. 2019AP193-CR, 2019 Wis. Ct. App. LEXIS 507, at *6 (Wis. Ct. App. Sept. 17, 2019).

²⁶³ *Griffin v. State*, 47 A.3d 487, 490–91 (Del. 2012).

²⁶⁴ *District of Columbia v. Heller*. 554 U.S. 570, 585 (2008).

²⁶⁵ 232 U.S. 383, 396 (1914).

²⁶⁶ 367 U.S. 643, 651 (1961).

precedent allowing gun safety legislation, and they have largely continued to respect the legislature.

Some states have been more dramatic than others. Delaware's supreme court made a point to say that it was not dependent on Second Amendment jurisprudence and that the state constitution offered broader protections under independent analysis.²⁶⁷ Illinois's intermediate appellate court declared, "Illinois is not bound to interpret the Illinois Constitution provisions in lockstep with the Supreme Court's interpretation of the federal Constitution."²⁶⁸ The Washington Supreme Court concluded that its own constitution should be interpreted differently.²⁶⁹

But most states have not been so bold. They have found subtler ways to respond.

A. State Courts Trying to Limit Application of Heller and McDonald

Heller may have declared that the Second Amendment created an individual right to bear arms in 2008, but it was not until *McDonald* incorporated it two years later that it became binding on the states. The writing may have been on the wall as soon as *Heller* was decided, but many states held out as long as possible. During the interregnum, many courts stubbornly refused to apply *Heller* until they had to. In *Wilson v. Cook City*,²⁷⁰ an Illinois Court of Appeals rejected the argument that *Heller* created a fundamental right to keep and bear arms that applied to the states, clinging to the state precedent for as long as possible. Massachusetts,²⁷¹ Minnesota,²⁷² New York,²⁷³ and New Jersey²⁷⁴ all did the same thing. The Alaska Court of Appeals

²⁶⁷ Doe v. Wilmington Hous. Auth., 88 A.3d 654, 665 (Del. 2014).

²⁶⁸ People v. Mimes, 953 N.E.2d 55, 77 (Ill. App. Ct. 2011).

²⁶⁹ State v. Jorgenson, 312 P.3d 960, 963 (Wash. 2013) (en banc).

²⁷⁰ 914 N.E.2d 595, 604 (Ill. App. Ct. 2009).

²⁷¹ Commonwealth v. Runyan, 922 N.E.2d 794, 797–98 (Mass. 2010).

²⁷² State v. Turnbull, 766 N.W.2d 78, 80 (Minn. Ct. App. 2009).

²⁷³ *In re* Friedman v. Kelly, No. 1103672007, slip op. at ¶ 9 (N.Y. Sup. Ct. Oct. 16, 2009); *In re* Steinfeld v. Kelly, No. 1017152009, slip op. at ¶ 4 (N.Y. Sup. Ct. June 23, 2009); *In re* Vasiliou v. Kelly, No. 1028202009, slip op. at ¶ 12 (N.Y. Sup. Ct. June 2, 2009).

²⁷⁴ Crespo v. Crespo, 972 A.2d 1169, 1178 (N.J. Super. Ct. App. Div. 2009).

declined to rule on whether *Heller* incorporated the Second Amendment.²⁷⁵ Only Washington State jumped the gun and incorporated the right before *McDonald* so commanded.²⁷⁶ Even after *McDonald* closed that issue, state courts have found some wiggle room on issues surrounding the right to bear arms.

1. Meaning of “Arms”

In *Heller*, the Supreme Court adopted the 18th-century definition of “arms” as “[w]eapons of offence, or armour of defence,” or “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.”²⁷⁷ This definition is broad enough to encompass weapons with no connection to the military—and really, any object that someone uses to strike or shield.

The definition of “arms” has not been held up with reverence by state courts. Indeed, the precise definition from *Heller* is only directly quoted a handful of times.²⁷⁸ When determining if something is a constitutionally protected arm, state courts have ignored *Heller*’s definition. In 2017, the Alaska Court of Appeals had to decide whether a brass knuckle with a knife attached was a constitutionally protected arm under state and federal law.²⁷⁹ To decide, it cited pamphlets distributed to voters who ratified the state right to bear arms and legislative history of the law that banned brass knuckles to conclude that the weapon was not protected.²⁸⁰ *Heller*’s definition of “arms” was not mentioned.

²⁷⁵ *Wilson v. State*, 207 P.3d 565, 567 (Alaska Ct. App. 2009). The cases in the 2008 to 2010 period are in addition to the many state decisions that had held the Second Amendment did not apply to the states in the years before *Heller*. *E.g.*, *State v. Hamlin*, 497 So. 2d 1369, 1371 (La. 1986); *State v. Amos*, 343 So. 2d 166, 168 (La. 1977); *State v. Friel*, 508 A.2d 123, 125 (Me. 1986), *cert. denied*, 479 U.S. 843 (1986); *State v. Keet*, 190 S.W. 573, 574 (Mo. 1916); *State v. Kerner*, 107 S.E. 222, 223 (N.C. 1921); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 175 (1871); *Ex Parte Perez*, No. 05-03-00363-CR, 2003 Tex. App. LEXIS 4670, at *8 (Tex. App. June 3, 2003); *Masters v. State*, 685 S.W.2d 654, 655 (Tex. Crim. App. 1985).

²⁷⁶ *State v. Sieyes*, 225 P.3d 995, 1003 (Wash. 2010).

²⁷⁷ *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (citations omitted).

²⁷⁸ A Lexis search on November 24, 2019 of the phrase “[w]eapons of offence, or armour of defence,” which is how it appears in *Heller* reveals only seven cases. The other phrase of *Heller*, “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another,” is only cited twelve times—and many of the same cases appear in both searches.

²⁷⁹ *Thrift v. State*, No. A-11888, 2017 Alaska Ct. App. LEXIS 107, at *1 (Alaska Ct. App. June 21, 2017).

²⁸⁰ *Id.* at *7–8.

Indiana's Court of Appeals looked to an old Oregon decision addressing the protection of knives, along with the Seventh Circuit and federal law, to conclude that switchblades were not protected.²⁸¹

Heller's definition of "arms" does get mentioned by state courts,²⁸² but as the above examples illustrate, state courts are unafraid to chart their own path on this point. It may not seem profound, but the threshold question of whether the Second Amendment even applies can make or break a case.

In defining "arms," *Heller* excluded "dangerous and unusual weapons" from the Second Amendment's protection, but offered little illumination of what this meant.²⁸³ This gives another opportunity for state courts to define the law in their own terms. The Massachusetts Supreme Judicial Court explicitly cited the lack of guidance from the Supreme Court to support its ruling that the Second Amendment does not apply to stun guns.²⁸⁴ The inclusion promptly led the Supreme Court to vacate the Massachusetts opinion.²⁸⁵

The Connecticut Supreme Court had to consider whether a dirk knife and a police baton were dangerous and unusual weapons under the Second Amendment,²⁸⁶ and it opted to use primarily state, rather than federal sources. To analyze the dirk knife, it looked to an Oregon case before launching into an original exegesis on the history of knives.²⁸⁷ As for police batons, it started with an eighty-year-old case from Michigan, followed by Arizona, West Virginia, and Oregon.²⁸⁸

2. Unprotected Conduct

The Supreme Court did not give gun owners absolute freedom. Both the *Heller* and *McDonald* Courts took pains to emphasize that they were not calling into question certain gun safety laws, specifically: those barring possession of weapons

²⁸¹ *Lacy v. State*, 903 N.E.2d 486, 491–92 (Ind. Ct. App. 2009).

²⁸² *People v. Webb*, 131 N.E.3d 93, 96 (Ill. 2019); *People v. Yanna*, 824 N.W.2d 241, 244 (Mich. Ct. App. 2012).

²⁸³ *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

²⁸⁴ *Commonwealth v. Caetano*, 26 N.E.3d 688, 692 (Mass. 2015).

²⁸⁵ *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

²⁸⁶ *State v. DeCiccio*, 105 A.3d 165 (Conn. 2014).

²⁸⁷ *Id.* at 190–92.

²⁸⁸ *Id.* at 198–99.

by felons or the mentally ill, those barring weapons from sensitive areas, and those establishing licensing requirements.²⁸⁹ State courts have taken full advantage of each of these laws.

State courts have been all too happy to deny claims brought by felons who unlawfully possess firearms. Courts have always taken a dim view of challenges to felon-in-possession laws, denying them en masse.²⁹⁰ Today, felon-in-possession laws are still upheld consistently, except now courts pay homage to the dicta in *Heller* or *McDonald* that seemingly permits them to do so.²⁹¹

Relatedly, prohibitions on gun ownership by the mentally ill have never wavered. Courts have allowed these sorts of laws, including confiscation of weapons from the mentally ill, before *Heller*,²⁹² and there is every reason to believe these laws will remain.²⁹³ Missouri has even written this policy into its constitution.²⁹⁴ Additionally, bans on guns in sensitive areas, like schools and courthouses, have endured.²⁹⁵

3. Narrowing the Holding of *Heller*

Even if state courts cannot reverse the Supreme Court, they can play defense. *Heller* involved a categorical handgun ban, not merely a regulation of handguns. The Supreme Judicial Court of Massachusetts noted this distinction by saying that stun

²⁸⁹ *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

²⁹⁰ *State v. Beeman*, 417 P.3d 541, 544 (Or. Ct. App. 2018).

²⁹¹ *State v. Culver*, 918 N.W.2d 103, 115 (Wis. Ct. App. 2018); *State v. Pocian*, 814 N.W.2d 894, 896 n.2 (Wis. Ct. App. 2012); *State v. Johnson*, 471 P.3d 732 (Kan. Ct. App. 2020); *Chardin v. Police Comm'r of Bos.*, 989 N.E.2d 392, 402 (Mass. 2013); *State v. Meadows*, No. A13-1023, 2014 Minn. App. Unpub. LEXIS 716, at *4 (July 14, 2014).

²⁹² *People v. Pflugbeil*, 834 P.2d 843 (Colo. App. 1992); *Rawlings v. Ill. Dep't of Law Enf't*, 391 N.E.2d 758 (Ill. App. Ct. 1979); *State v. Brown*, 571 A.2d 816, 818 (Me. 1990) (noting that the state constitution did not entitle the mentally ill to firearms); *R.H.S. v. Allegheny Cty. Dep't of Human Servs.*, 936 A.2d 1218, 1221 (Pa. Commw. Ct. 2007); *State v. Owenby*, 826 P.2d 51 (Or. Ct. App. 1992); *Morris v. Blaker*, 821 P.2d 482, 488 (Wash. 1992).

²⁹³ *Redington v. State*, 992 N.E.2d 823 (Ind. Ct. App. 2013) (noting that state may still prohibit “dangerous” persons from possessing firearms).

²⁹⁴ MO. CONST. art. 1, § 23.

²⁹⁵ *Fla. Carry, Inc. v. Univ. of Fla.*, 180 So. 3d 137 (Fla. Dist. Ct. App. 2015) (schools); *State v. Draughter*, 130 So. 3d 855 (La. 2013) (prisons); *Wade v. Univ. of Mich.*, 905 N.W.2d 439 (Mich. Ct. App. 2017) (schools); *State v. Sullivan*, 691 S.E.2d 417 (N.C. Ct. App. 2010) (courthouses).

guns could not be banned altogether; they were still subject to various rules.²⁹⁶ The Bay State also used the fact that *Heller* said nothing about firearm ownership outside of the home to further restrict the right to bear arms.²⁹⁷ Moreover, it said *Heller* created only a “limited, individual right.”²⁹⁸ Colorado pointedly declined to move its state constitution in lockstep with federal constitutional law.²⁹⁹

Massachusetts was not alone. An Illinois appellate court justified its refusal to extend Second Amendment protections outside of the home because the Supreme Court had not demanded such.³⁰⁰ A different Illinois court made the same point.³⁰¹ Likewise, Delaware courts have indicated that a person’s right to bear arms under the state constitution is not protected outside the home.³⁰²

In *New York State Rifle & Pistol Ass’n v. City of New York*, the Court implied that state efforts to limit firearms to the home may be in peril. That case involved a New York City rule that allowed firearms at home but forbade taking them outside.³⁰³ While on appeal, the city amended the rule to allow transportation of firearms to a person’s second home or a shooting range, mooting the case.³⁰⁴ Presumably, the city would not have done so unless they were confident they would lose. The Court dismissed the case as moot and remanded it to the lower court over a lengthy dissent from Justice Alito, joined by Justice Gorsuch and Justice Thomas, in part.³⁰⁵ In a concurrence, Justice Kavanaugh echoed Justice Alito’s concern that some state courts may not be faithfully applying *Heller* and *McDonald* and called for the Court to step in to police these transgressions.³⁰⁶

²⁹⁶ *Ramirez v. Commonwealth*, 94 N.E.3d 809, 815 (Mass. 2018).

²⁹⁷ *Commonwealth v. Williams*, No. 09-P-813, 2011 Mass. App. LEXIS 934, at *10 (Mass. App. Ct. Aug. 3, 2011).

²⁹⁸ *Commonwealth v. Runyan*, 922 N.E.2d 794, 797 (Mass. 2010).

²⁹⁹ *Rocky Mt. Gun Owners v. Polis*, 467 P.3d 314, 323–24 (Colo. 2020).

³⁰⁰ *People v. French*, No. 1-11-1570, 2012 Ill. App. LEXIS 2668, at *15 (Ill. App. Ct. Nov. 2, 2012), *vacated*, *People v. French*, 4 N.E.3d 1114 (Mem) (Ill. 2014).

³⁰¹ *People v. Williams*, 940 N.E.2d 95, 98 (Ill. App. Ct. 2010).

³⁰² *Feliciano v. State*, 29 A.3d 245 (Del. 2011); *see also Dickerson v. State*, 975 A.2d 791, 795 (Del. 2009).

³⁰³ 140 S. Ct. 1525, 1526 (2020).

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 1527 (Alito, J., dissenting).

³⁰⁶ *Id.* (Kavanaugh, J., concurring).

B. State Courts Changing Their Behavior

1. The Shift from Rational Basis to Intermediate Scrutiny

Students of constitutional law will be familiar with the different levels of scrutiny. Rational basis is an extremely weak standard that holds a law must be upheld if there is “any reasonably conceivable state of facts that could provide a rational basis” for it.³⁰⁷ The government may offer up justifications that are “probably not true” in order to satisfy rational basis.³⁰⁸ The burden is on the challenger to show that rational basis has not been met.³⁰⁹

For comparison, a typical formulation for intermediate scrutiny is that the law must be “substantially related to an important governmental objective.”³¹⁰ The justification for the law must be “genuine, not hypothesized or invented *post hoc* in response to litigation.”³¹¹ The government bears the burden of showing that the law passes intermediate scrutiny.³¹²

Prior to *Heller*, state courts “universally reject[ed] strict scrutiny or any heightened level of review” in favor of a highly deferential “reasonable regulation” test.³¹³ Sometimes they did not even bother to articulate a standard.³¹⁴ These courts were in for a rude awakening with *Heller*. The Court actually declined to articulate a

³⁰⁷ *Heller v. Doe*, 509 U.S. 312, 320 (1993).

³⁰⁸ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000).

³⁰⁹ *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

³¹⁰ *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

³¹¹ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

³¹² *Id.*

³¹³ Winkler, *supra* note 142, at 595; *Bleiler v. Chief, Dover Police Dep’t*, 927 A.2d 1216, 1122 (N.H. 2007) (noting that the year before *Heller*, no state applied heightened scrutiny to substantive due process challenges to gun control). As deferential as the reasonable regulation test is, some courts have gone even further in certain contexts. Depending on the procedural posture of the case, the right to bear arms may be restricted using a different burden. Indiana law permits police to confiscate weapons and suspend firearms licenses upon a showing of clear and convincing evidence they are dangerous. *Redington v. State*, 992 N.E.2d 823, 830 (Ind. Ct. App. 2013). A person’s denial of the right to bear arms may even be subject to a nearly insurmountable abuse of discretion standard. *Tucci v. Police Dep’t of Wareham*, No. 07-P-1409, 2008 Mass. App. LEXIS 629, at *1 (Mass. App. Ct. July 2, 2008); *In re Chrosniak*, 96 N.E.3d 1083, 1086 (Ohio Ct. App. 2017); *State v. Lerch*, No. 15CA39, 2016 Ohio App. LEXIS 1870, at *P1 (Ohio Ct. App. Apr. 12, 2016); *State v. Casalicchio*, No. 79431, 2002 Ohio App. LEXIS 547, at *28 (Ohio Ct. App. Feb. 14, 2002). A Colorado court said that defendants had to show a gun law was unconstitutional beyond a reasonable doubt. *People v. Blue*, 544 P.2d 385, 387 (Colo. 1975).

³¹⁴ *State v. Delgado*, 692 P.2d 610, 614 (Or. 1984).

standard of scrutiny to apply to gun laws but said that the law in question—a total ban on handguns—would bomb any test.³¹⁵ It did, however, explicitly reject rational basis and an “interest-balancing” approach.³¹⁶

Thus, state courts should have been free to set any standard within those parameters when assessing federal claims and to set their own standard entirely for state claims. That is not what happened. States hewed close to federal courts, and federal courts used intermediate scrutiny. The states have uniformly adopted intermediate scrutiny themselves when confronted with the issue.³¹⁷ This was even the case in states that had previously rejected arguments that heightened scrutiny should apply.³¹⁸

Imitation of federal courts drove this change. No sooner had *Heller* been decided than federal courts started applying intermediate scrutiny.³¹⁹ State courts

³¹⁵ *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008).

³¹⁶ *Id.* at 628 n.27, 634.

³¹⁷ *E.g.*, *Del. State Sportsmen’s Ass’n v. Garvin*, 196 A.3d 1254, 1272 (Del. Super. Ct. 2018); *Norman v. State*, 215 So. 3d 18, 37 (Fla. 2017); *Hertz v. Bennett*, 751 S.E.2d 90, 94 (Ga. 2013); *Wilson v. Cook Cty.*, 943 N.E.2d 768, 776 (Ill. App. Ct. 2011); *People v. Deroche*, 829 N.W.2d 891, 896 (Mich. Ct. App. 2013); *Pohlabel v. State*, 268 P.3d 1264, 1267 (Nev. 2012); *State v. Murillo*, 347 P.3d 284, 289 (N.M. App. 2015); *Johnston v. State*, 735 S.E.2d 859, 868 (N.C. Ct. App. 2012); *State v. Henderson*, No. 2010-P-0046, 2012 Ohio App. LEXIS 1117, at *52 (Ohio Ct. App. Mar. 26, 2012); *State v. Beeman*, 417 P.3d 541, 544 (Or. Ct. App. 2018); *Commonwealth v. McKown*, 79 A.3d 678, 690 (Pa. Super. Ct. 2013); *Webb v. Schlagal*, 530 S.W.3d 793, 810 (Tex. App. 2017); *Baird v. Baird*, 99 Va. Cir. 432, 434–35 (Va. Cir. Ct. 2018); *City of Seattle v. Evans*, 327 P.3d 1303, 1309 (2014) (Wash. Ct. App. 2014); *State v. Culver*, 918 N.W.2d 103, 115 (Wis. 2018).

³¹⁸ *See State v. Turnbull*, 766 N.W.2d 78, 80 (Minn. Ct. App. 2009) (declining to apply heightened scrutiny); *Klein v. Leis*, 795 N.E.2d 633, 639 (Ohio 2003) (O’Connor, J., dissenting) (noting that the majority declined to apply heightened scrutiny); *State v. Cole*, 665 N.W.2d 328, 336 (Wis. 2003) (declining to apply heightened scrutiny); *State v. Thomas*, 683 N.W.2d 497, 505 (Wis. Ct. App. 2004) (declining to apply heightened scrutiny). *Cf. Robertson v. City & Cty. of Denver*, 874 P.2d 325, 341 (Colo. 1994) (Vollack, J., concurring) (holding that the right to bear arms was an important right, but refusing to determine whether it was a fundamental right and thus subject to heightened scrutiny); *State v. Mendoza*, 920 P.2d 357, 367–68 (Haw. 1996) (same); *People v. Williams*, 940 N.E.2d 95, 98 (Ill. App. 2010) (stating that the right to bear arms was not fundamental); *Bleiler v. Chief, Dover Police Dep’t*, 927 A.2d 1216, 1221–23 (N.H. 2007) (rejecting arguments to apply strict scrutiny and instead using a balancing test); *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993) (Hoffman, J., dissenting) (arguing unsuccessfully that strict scrutiny should be used); *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004) (“Even in jurisdictions that have declared the right to keep and bear arms to be a fundamental constitutional right, a strict scrutiny analysis has been rejected in favor of a reasonableness test.”).

³¹⁹ *Brown v. United States*, 979 A.2d 630, 641 n.18 (D.C. 2009) (citing cases applying intermediate scrutiny).

followed suit. They often cited the fact that federal courts applied intermediate scrutiny to justify their reliance.³²⁰ This is the clearest example of state courts lock-stepping on gun rights jurisprudence: a near-universal shift to mimic the federal courts that sharply broke from states' own traditions.

The shift to intermediate scrutiny may appear dramatic at first glance, but it is not clear that it had much impact. *People v. Williams* in Illinois shows why.³²¹ The defendant was convicted of aggravated unlawful use of a weapon, and he challenged his conviction under the newly incorporated Second Amendment.³²² The court said that it had previously upheld the challenged law using a rational basis test, but now was forced to apply intermediate scrutiny.³²³ After going through the motions, it declared that intermediate scrutiny was satisfied.³²⁴ The decision shows how easy it is for a court to reach the same outcome under a seemingly more exacting standard. Only a couple of the post-*Heller* decisions that struck down gun laws cited the shift to intermediate scrutiny as the reason.³²⁵

With a little creativity, state courts might have been able to devise something other than intermediate scrutiny. In *Britt v. State*, the North Carolina Supreme Court said a gun regulation must be “reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.”³²⁶ As one North Carolina Court of Appeals judge noted, “The standard articulated by the [North Carolina]

³²⁰ *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 654 (Del. 2017); *Norman v. State*, 215 So. 3d 18, 38 (Fla. 2017); *Hertz v. Bennett*, 751 S.E.2d 90, 94 (Ga. 2013); *People v. Robinson*, 964 N.E.2d 551, 555–56 (Ill. App. Ct. 2011); *People v. Deroche*, 829 N.W.2d 891, 897 (Mich. Ct. App. 2013); *Pohlabel v. State*, 268 P.3d 1264, 1267 (Nev. 2012); *State v. Fernandez*, 808 S.E.2d 362, 366 (N.C. Ct. App. 2017); *State v. Murillo*, 347 P.3d 284, 288 (N.M. Ct. App. 2015); *State v. Shover*, 8 N.E.3d 358, 365 (Ohio App. 2014); *State v. Christian*, 307 P.3d 429, 442–44 (Or. 2013); *Webb v. Schlagal*, 530 S.W.3d 793, 809 (Tex. Ct. App. 2017); *Baird v. Baird*, 99 Va. Cir. 432, 434–35 (Va. Cir. Ct. 2018); *State v. Jorgenson*, 312 P.3d 960, 967 (Wash. 2013); *Kitsap City v. Kitsap Rifle & Revolver Club*, 405 P.3d 1026, 1038 (Wash. Ct. App. 2017); *State v. Herrmann*, 873 N.W.2d 257, 260 (Wis. Ct. App. 2015).

³²¹ 964 N.E.2d 557 (Ill. App. Ct. 2011).

³²² *Id.*

³²³ *Id.* at 569.

³²⁴ *Id.* at 571. The decision was overturned on appeal, but not on the basis of intermediate scrutiny analysis. *People v. Williams*, 4 N.E.3d 1112 (Ill. 2014).

³²⁵ See *People v. Deroche*, 829 N.W.2d 891, 896–97 (Mich. Ct. App. 2013); *State v. Herrmann*, 873 N.W.2d 257, 261 (Wis. Ct. App. 2015).

³²⁶ 681 S.E.2d 320, 322 (N.C. 2009) (quoting *State v. Dawson*, 159 S.E.2d 1 (N.C. 1968)).

Supreme Court in *Britt II* is more stringent than rational basis, although certainly less stringent than intermediate or strict scrutiny.³²⁷

Wisconsin applied a balancing test to a concealed weapon ban in *State v. Hamdan*,³²⁸ but it was stronger than garden variety balancing tests. The court went through the proffered justifications for restricting concealed firearms and said they did not apply to the small business owner defense in the case at bar.³²⁹ A small business owner, the court reasoned, was less likely to act on impulse or commit a violent crime in his own store, and all those who enter a store should presume the owner is armed.³³⁰ In essence, the court demanded that the government's justifications for the concealed carry law be genuine, not merely contrived.³³¹ Some commentators have termed this sort of analysis "rational basis with bite."³³²

Another potential standard comes from Washington State. In *State v. Jorgenson*, the defendant challenged a state law that criminalized possessing a firearm while he was released on bond after a judge found probable cause that he committed a serious offense.³³³ The Washington Supreme Court opted to analyze its own constitution independently to conclude that, *Heller* notwithstanding, the standard it would use for state claims was whether a gun safety law was "reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought."³³⁴

It is not exactly clear how this standard is different from intermediate scrutiny. Both require a substantial relationship between the law's objective and the ends sought. The standard from *Jorgenson* requires that the law be "reasonably necessary"

³²⁷ *State v. Whitaker*, 689 S.E.2d 395, 407 (N.C. Ct. App. 2009) (Elmore, J., dissenting).

³²⁸ 665 N.W.2d 785, 800 (Wis. 2003).

³²⁹ *Id.* at 803–04.

³³⁰ *Id.*

³³¹ *Id.* Using slightly different vocabulary, the Wisconsin Supreme Court also said it would apply "something more" than rational basis to a gun law by saying whether the law was a reasonable *limitation* on the right to bear arms, not merely a reasonable law in general. *State v. Cole*, 665 N.W.2d 328, 338 (Wis. 2003).

³³² Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987) ("[R]ational basis with bite is simply intermediate scrutiny without an articulation of the factors that triggered it.").

³³³ 312 P.3d 960, 961 (Wash. 2013).

³³⁴ *Id.* at 964 (quoting *City of Seattle v. Montana*, 919 P.2d 1218 (Wash. 1996)).

to promote public safety, while intermediate scrutiny requires an “important governmental objective.”³³⁵ If anything, the *Jorgenson* standard appears stronger; the law must actually be necessary to some degree, rather than merely serve an important goal.

A third alternative would be to uphold gun laws except those that impose an “undue burden” on the right to keep and bear arms.³³⁶ In Wyoming, the court fleshed out an “undue restraint” standard by saying the means adopted must be “reasonable and designed to accomplish the end in view,” “have relation to the public weal, must be within the scope and in furtherance of that power,” and “must be reasonable and appropriate for the accomplishment of and have a substantial connection with the end in view.”³³⁷ Again, if one squints, this looks similar to intermediate scrutiny.³³⁸

Any one of these standards might have held up in the United States Supreme Court as an acceptable method to screen challenges to gun laws under the Second Amendment, but we cannot know because no state has tried. Rather than risk being overturned by the Supreme Court, states choose to toe the line set by the federal circuits.

2. Courts Resist State Constitutional Amendments

Over the past decade, several states amended their own constitutions to beef up protections for gun rights, sometimes in reaction to the Supreme Court. But state judges were unmoved. Many state courts treated these new constitutional provisions as inconsequential, no matter how strenuous the wording.

In Louisiana, state legislators were inspired by *Heller* and *McDonald*. State senator Neil Riser set out with the goal to create the “strongest Second Amendment law in the nation.”³³⁹ From a textual standpoint, he may have succeeded.

³³⁵ *Id.* at 964, 968.

³³⁶ See *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 666 (Del. 2017) (explaining that the law in question did not place an undue burden on the plaintiffs’ right to bear arms, but declining to explain what the term meant); see also *Jorgenson*, 312 P.3d at 965 (holding the test for finding that a law was an undue burden was whether that law “unduly frustrates” the right to bear arms).

³³⁷ *Bulova Watch Co. v. Zale Jewelry Co.*, 371 P.2d 409, 417 (Wyo. 1962).

³³⁸ The phrase “undue burden” is mostly closely associated with the standard to assess restrictions to abortions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992). There, the Court said, “A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.” *Id.*

³³⁹ *State v. Eberhardt*, 145 So. 3d 377, 384 (La. 2014).

From 1974 to 2012, Louisiana's Constitution had relatively strong language: "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person."³⁴⁰ Strong, but not strong enough for Senator Riser's liking. And courts read it to provide only rational basis review.³⁴¹

In 2012, this provision was expanded to read: "The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny."³⁴² Voters approved this addition overwhelmingly.³⁴³

The new provision mattered little to the Louisiana courts. Though strict scrutiny was applied on paper, gun safety regulations continued to survive. Courts said that gun rights could be restricted if a gun was not used for a lawful purpose,³⁴⁴ if the restriction was due to a workplace policy,³⁴⁵ if the gun owner was under the supervision of the prison system,³⁴⁶ if a minor possessed a gun,³⁴⁷ if the weapon was concealed,³⁴⁸ if a gun was used in connection with drugs,³⁴⁹ or if a weapon was in a sensitive environment like a prison.³⁵⁰ The biggest beneficiary of the change may have been appellate defense attorneys, who got the chance to file a torrent of unsuccessful felon-in-possession appeals.³⁵¹

³⁴⁰ LA. CONST. of 1974, art. 1, § 11.

³⁴¹ *State v. Hamlin*, 497 So. 2d 1369, 1371 (La. 1986).

³⁴² LA. CONST. art. 1, § 11.

³⁴³ *Eberhardt*, 145 So. 3d at 379.

³⁴⁴ *State v. Tucker*, 181 So. 3d 590, 609 (La. 2015).

³⁴⁵ *McDowell v. Dep't of Revenue*, No. 2014-0390, 2014 La. App. LEXIS 758, at *4 (La. Ct. App. Dec. 23, 2014).

³⁴⁶ *State v. Draughter*, 130 So. 3d 855, 868 (La. 2013).

³⁴⁷ *State ex rel. J.M.*, 144 So. 3d 853, 863 (La. 2014); *State ex rel. D.V.*, 144 So. 3d 1097, 1102 (La. Ct. App. 2014); *State ex rel. C.M.*, 128 So. 3d 1118, 1133 (La. Ct. App. 2013); *In re D.W.*, 125 So. 3d 1180, 1193 (La. Ct. App. 2013).

³⁴⁸ *State ex rel. J.M.*, 144 So. 3d at 866.

³⁴⁹ *State v. Webb*, 144 So. 3d 971, 982 (La. 2014).

³⁵⁰ *State v. Perkins*, 149 So. 3d 206, 209 (La. 2014).

³⁵¹ *State v. Eberhardt*, 145 So. 3d 385 (La. 2014); *State v. Griffin*, 167 So. 3d 31, 40 (La. Ct. App. 2014); *State v. Jackson*, 154 So. 3d 722, 726 (La. Ct. App. 2014); *State v. Frith*, 151 So. 3d 946, 959 (La. Ct. App. 2014); *State v. Brown*, 184 So. 3d 51 (La. Ct. App. 2014); *State v. Zeno*, 155 So. 3d 4, 14 (La. Ct. App. 2014).

Despite being arguably the strongest right to bear arms in the country, there are no examples of the Louisiana provision being used to strike down a law. The court has said the amendment was not intended to disturb preexisting gun laws,³⁵² so unless the legislature passes new restrictions, it does not look like the state constitution will get much play.

In Missouri, voters adopted a 2014 amendment to the state constitution that significantly strengthened the state right to bear arms.³⁵³ The amendment's purpose was ostensibly to lock in protections for gun owners in case the United States Supreme Court ever reversed *Heller* and *McDonald*, which were both decided by slim majorities.³⁵⁴ Among other changes, the amendment mandated that all gun laws be subject to strict scrutiny.³⁵⁵ The Missouri Supreme Court downplayed the importance of the amendment, emphasizing that the right to bear arms "is not unlimited" and delineating multiple scenarios where gun safety laws would be upheld, notwithstanding strict scrutiny.³⁵⁶ It later said that the amendment "did not [s]ubstantially [c]hange the [r]ight to [b]ear [a]rms"—it merely constitutionalized the status quo.³⁵⁷ Courts continued to uphold gun laws following the amendment.³⁵⁸

App. 2014); *State v. Lail*, No. 2014-0883, 2014 La. App. LEXIS 2104 (La. Ct. App. Sept. 8, 2014); *State v. Watson*, 147 So. 3d 1169, 1177 (La. Ct. App. 2014); *State v. Dixon*, 146 So. 3d 662, 675 (La. Ct. App. 2014); *State v. Gailes*, No. 2013 KA 2209, 2014 La. App. LEXIS 367, at *5 (La. Ct. App. June 6, 2014); *State v. Kennedy*, 140 So. 3d 1201 (La. Ct. App. 2014); *State v. Williams*, 138 So. 3d 727, 731 (La. Ct. App. 2014); *State v. Wiggins*, 139 So. 3d 1, 8 (La. Ct. App. 2014); *Alpert v. State*, 543 S.W.3d 589, 597 (Mo. 2018); *State v. Clay*, 481 S.W.3d 531, 532 (Mo. 2016).

³⁵² *Eberhardt*, 145 So. 3d at 385.

³⁵³ "That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity." MO. CONST. art. 1, § 23.

³⁵⁴ *Dotson v. Kander*, 464 S.W.3d 190, 202 (Mo. 2015) (Fischer, J., concurring).

³⁵⁵ MO. CONST. art. 1, § 23.

³⁵⁶ *Id.* at 198 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

³⁵⁷ *State v. Clay*, 481 S.W.3d 531, 536 (Mo. 2016).

³⁵⁸ *State v. Robinson*, 479 S.W.3d 621, 624 (Mo. 2016) (no retroactive effect for amendment); *Hill v. Boyer*, 480 S.W.3d 311, 314 (Mo. 2016) (same); *State v. McCoy*, 468 S.W.3d 892, 899 (Mo. 2015) (felon-in-possession); *State v. Merritt*, 467 S.W.3d 808, 816 (Mo. 2015) (same); *State v. White*, 253 S.W. 724,

As in Louisiana, the Missouri amendment has not been invoked to strike down any laws.

These cases were part of a long tradition of state courts downplaying state constitutional amendments. North Dakota adopted a constitutional right to bear arms in 1984. The state supreme court said that guns were still subject to reasonable regulations.³⁵⁹ Utah amended its constitution in 1985 to strengthen gun rights, and courts said the amendment did not change the status quo³⁶⁰ and deflected appeals by finding there was no retroactive effect.³⁶¹ Wisconsin passed a constitutional amendment on gun rights to respond to municipal handgun bans in the 1990s, but the state supreme court still allowed concealed carry bans and continued using a reasonable regulation test.³⁶² Maine amended its constitution in 1987 to affirm that firearm ownership was an individual right.³⁶³ Its courts still applied a rational basis standard.³⁶⁴

3. More Successful Cases for Gun Advocates

Looking at challenges to gun laws after 2010, we see an increase in the number of successful appeals for gun owners. Over the nation's first 200 years, roughly three-dozen state cases regarding the state constitutional right to bear arms sided with the challenger. In the decade since *McDonald*, there have been about a dozen.³⁶⁵ In other words, these cases have increased in frequency from twice a decade to about once a year.

Even this might not be as significant as it first appears. Almost all successful cases were challenges to total bans on weapon ownership, normally firearms but

727 (Mo. 1923) (exhibiting a deadly weapon conviction); *Dortch v. State*, 531 S.W.3d 126, 129 (Mo. Ct. App. 2017) (same).

³⁵⁹ *State v. Ricehill*, 415 N.W.2d 481, 483 (N.D. 1987).

³⁶⁰ *State v. Willis*, 100 P.3d 1218, 1222 (Utah 2004).

³⁶¹ *State v. Wacek*, 703 P.2d 296, 297 (Utah 1985).

³⁶² *State v. Cole*, 665 N.W.2d 328, 332, 338, 348 (Wis. 2003).

³⁶³ *State v. Brown*, 571 A.2d 816, 816 (Me. 1990).

³⁶⁴ *Hilly v. Portland*, 582 A.2d 1213, 1215 (Me. 1990).

³⁶⁵ A December 19, 2020 search of Lexis's citing decisions found the cases cited in the four following footnotes. Seventeen of the cases which involved a law or executive order being struck down as violative of a constitutional right to bear arms.

sometimes switchblades or tasers.³⁶⁶ These are the same sorts of gun laws that were most likely to be struck down by state courts *before* the Supreme Court got involved. And a majority of these cases came from Illinois, where a firearm ownership ban was the most heartily enforced, and thus created more convictions that could be appealed after *McDonald*. Virginia is an important exception. In *Elhert v. Settle*, a Virginia court held that a law was unconstitutional to the extent it barred adults under 21 from possessing firearms, relying heavily on *Heller*.³⁶⁷ Of the remaining cases, Supreme Court precedent played a relatively minor role in the decision³⁶⁸ or no role at all.³⁶⁹

4. State Courts More Likely to Consult Federal Law

In the years before *Heller*, it was perfectly common for litigants and judges to cite their state constitutions without relying on the Second Amendment.³⁷⁰ In the

³⁶⁶ *People v. Aguilar*, 2 N.E.3d 321, 323 (Ill. 2013) (failing to place a total ban on operable firearms, called aggravated unlawful use of a weapon, or AUUW); *Coram v. State*, 996 N.E.2d 1057 (Ill. 2013); *People v. Henderson*, 12 N.E.3d 519 (Ill. App. Ct. 2013); *People v. Sephan P. (In re Stephan P.)*, No. 1-11-1517, 2014 Ill. App. LEXIS 635 (Ill. Ct. App. Mar. 31, 2014); *People v. Domanick D. (In re Domanick B.)*, No. 1-13-0689, 2014 Ill. App. LEXIS 1235 (Ill. Ct. App. June 13, 2014); *People v. Williams*, No. 1-09-3350, 2014 Ill. App. LEXIS 1318 (Ill. Ct. App. June 20, 2014); *People v. Bourdeau*, No. 1-11-1179, 2014 Ill. App. LEXIS 1465 (Ill. App. Ct. June 30, 2014); *People v. Montyce H. (In re Montyce H.)*, No. 1-10-1788, 2014 Ill. App. LEXIS 1467 (Ill. Ct. App. June 30, 2014); *People v. Yanna*, 824 N.W.2d 241, 246 (Mich. Ct. App. 2012); *State v. Herrmann*, 873 N.W.2d 257 (Wis. Ct. App. 2015). *Cf.* *People v. Deroche*, 829 N.W.2d 891 (Mich. Ct. App. 2013) (striking down a law that forced people to choose between having guns or alcohol at home).

³⁶⁷ 105 Va. Cir. 326, 330–33 (Va. Cir. Ct. 2020). Virginia courts have split on whether the governor’s closure of indoor shooting ranges as a public health measure during the COVID-19 pandemic. *SEG Props., L.L.C. v. Northam*, 105 Va. Cir. 216, 222 (Va. Cir. Ct. 2020) (affirming closure); *Lynchburg Range & Training, L.L.C. v. Northam*, 105 Va. Cir. 159, 165 (Va. Cir. Ct. 2020) (disallowing closure).

³⁶⁸ *State v. Tarango*, 434 P.3d 77, 83 (Wash. Ct. App. 2019) (noting Supreme Court precedent only in passing).

³⁶⁹ *Johnson v. State*, No. 49A04-1002-CR-98, 2010 Ind. App. LEXIS 1457 (Ind. Ct. App. Oct. 20, 2010); *Pulley v. Commonwealth*, 481 S.W.3d 520 (Ky. Ct. App. 2016); *Baysden v. State*, 718 S.E.2d 699 (N.C. Ct. App. 2011); *Ray v. Wal-Mart Stores, Inc.*, 359 P.3d 614 (Utah 2015). In addition to these cases, a trial court in Illinois held that a law violated the state constitution’s right to bear arms, but it was reversed on appeal. *People v. Brown*, 2020 IL 124100, ¶ 1 (2020). A justice of the Pennsylvania Supreme Court argued that some laws violated the state constitutional right to bear arms, but only in dissent. *Commonwealth v. Smith*, 234 A.3d 576, 602 (Pa. 2020) (Wecht, J., dissenting); *Civil Rights Def. Firm, P.C. v. Wolf*, 226 A.3d 569, 571 (Pa. 2020) (Wecht, J., dissenting). A high-capacity magazine ban in Vermont is on appeal to the state supreme court. *Vt. Fed’n of Sportsmen’s Clubs v. Birmingham*, 229 A.3d 704 (Vt. 2020).

³⁷⁰ *E.g.*, *Hyde v. Birmingham*, 392 So. 2d 1226, 1227 (Ala. Crim. App. 1980); *Demars v. State*, No. A-7002, 1999 Alas. App. LEXIS 76, at *6 (Alaska Ct. App. Aug. 18, 1999); *Junction City v. Mevis*, 601 P.2d 1145, 1148 (Kan. 1979); *State v. Hamlin*, 497 So. 2d 1369, 1371 (La. 1986); *State v. Amos*, 343 So.

years since, such an occurrence is a rarity.³⁷¹ Decisions relying on the Second Amendment alone,³⁷² treating the state constitution as indistinguishable from federal rights,³⁷³ or resolving a matter on the basis of the Second Amendment first and declining to analyze the state constitution, have all grown in number.³⁷⁴ The barest example of this comes from Illinois, where one appellate court said, “in light of the application of the second amendment to the states by *McDonald*, there is no need to resort to constructions of the Illinois Constitution’s provision applicable to the right to bear arms.”³⁷⁵ In one Colorado case, the plaintiff appealed only on state constitutional grounds, but the court still looked to *Heller* and *McDonald* to define the right.³⁷⁶

2d 166, 168 (La. 1977); *Dupont v. Chief of Police of Pepperell*, 786 N.E.2d 396 (Mass. App. Ct. 2003); *Dano v. Collins*, 802 P.2d 1021 (Ariz. Ct. App. 1990).

³⁷¹ *E.g.*, *Del. State Sportsmen’s Ass’n v. Garvin*, 196 A.3d 1254, 1259 (Del. Super. Ct. 2018); *People v. Reeves*, No. 1-14-304, 2016 IL App. LEXIS 2766 (Ill. App. Ct. Dec. 23, 2016); *Redington v. State*, 992 N.E.2d 823, 830 (Ind. Ct. App. 2013); *State v. Webb*, 149 So. 3d 310, 313 (La. Ct. App. 2014); *State v. Sullivan*, 691 S.E.2d 417, 419 (N.C. Ct. App. 2010); *State v. Shaw*, 215 P.3d 105, 111 (Or. Ct. App. 2009); *Grisham v. State*, No. 03-14-00137-CR, 2017 Tex. App. LEXIS 2438 (Tex. App. Mar. 23, 2017); *Simon v. Wilson (In re B.F.S.)*, No. 2015AP1769, 2016 Wisc. App. LEXIS 346 (Wisc. Ct. App. June 7, 2016).

³⁷² *E.g.*, *Jensen v. Pinellas Cty.*, No. 12-009391CI-007, 2014 Fla. Cir. LEXIS 19555 (Fla. Cir. December 16, 2014); *Mich. Gun Owners, Inc. v. Ann Arbor Pub. Sch.*, 918 N.W.2d 756, 766 n.6 (Mich. 2018) (Viviano, J., concurring) (talking about Second Amendment rights, but not state constitution); *Wade v. Univ. of Mich.*, 905 N.W.2d 439, 442 (Mich. Ct. App. 2017); *People v. Rooks*, No. 313934, 2014 Mich. App. LEXIS 676, at *5–*6 (Mich. Ct. App. Apr. 15, 2014); *State v. Wheatley*, 94 N.E.3d 578, 592 (Ohio Ct. App. 2018); *Firearm Owners Against Crime v. Papenfuse*, 218 A.3d 497, at 502 (Pa. Commw. Ct. 2019) (McCullough, J., concurring and dissenting) (arguing for more robust gun rights based on federal constitution alone); *Gun Range, LLC v. City of Philadelphia*, 189 A.3d 28 (Pa. Commw. Ct. 2018) (Pellegrini, J., dissenting); *Madziva v. Phila. Hous. Auth.*, 93 A.3d 535 (Pa. Commw. Ct. 2014); *State v. Jones*, 786 S.E.2d 132, 140 (S.C. 2016).

³⁷³ *Norman v. State*, 215 So. 3d 18, 42 (Fla. 2017); *People v. French*, No. 1-11-1570, 2012 Ill. App. LEXIS 2668, at *42 (Ill. App. Ct. Nov. 2, 2012).

³⁷⁴ *People v. Bourdeau*, No. 1-11-1179, 2014 Ill. App. LEXIS 1465, at *47 (Ill. App. Ct. June 30, 2014); *People v. Montyce H. (In re Montyce H.)*, No. 1-10-1788, 2014 Ill. App. LEXIS 1467, at *40 (Ill. Ct. App. June 30, 2014); *People v. Williams*, 962 N.E.2d 1148, 1151 (Ill. App. Ct. 2011); *State v. Glover*, 34 N.E.3d 1000, 1001 (Ohio Ct. App. 2015).

³⁷⁵ *Williams*, 962 N.E.2d at 1151.

³⁷⁶ *Rocky Mountain Gun Owners v. Hickenlooper*, 371 P.3d 768 (Colo. App. 2016).

In a similar vein, before *Heller*, when state courts had to marinate on the right to bear arms, they would consult sister states without reference to federal courts.³⁷⁷ As one court said, federal cases “provide no guidance” to the meaning of the state constitution in this realm.³⁷⁸ Now, no gun rights case is complete without an analysis of *Heller* and *McDonald*.³⁷⁹ This was most jarring in Illinois, where the courts were forced to reverse a conviction under a law that had been upheld many times before 2010.³⁸⁰ Federal courts are quite content to resolve Second Amendment questions without looking to state constitutions for help.³⁸¹

IV. CONCLUSION

In 1976, the Massachusetts Supreme Judicial Court, fresh off of rejecting a firearm challenge, said, “Should the [Second] amendment perchance be held in the future to restrain the States in some fashion, one would suppose that the States’ regulatory authority would remain.”³⁸² Forty-five years later, this prediction has been proven correct. Though the mode of analysis has changed, and total bans on weapons will rarely survive, state courts handle pleas to allow freer use of firearms in largely the same way they always have: skeptically.

³⁷⁷ *State v. Brown*, 571 A.2d 816, 818–19 (Me. 1990); *James v. State*, 731 So. 2d 1135, 1137 (Miss. 1999); *State v. Keet*, 190 S.W. 573, 575 (Mo. 1916); *State v. Wilforth*, 74 Mo. 528, 530 (1881); *State v. Comeau*, 448 N.W.2d 595, 598 (Neb. 1989); *State ex rel. N.M. Voices for Children, Inc. v. Denko*, 90 P.3d 458, 461 (N.M. 2004); *Bleiler v. Chief, Dover Police Dep’t*, 927 A.2d 1216, 1222–23 (N.H. 2007); *State v. Dawson*, 159 S.E.2d 1, 10 (N.C. 1968); *State v. Robinson*, 343 P.2d 886, 888 (Or. 1959).

³⁷⁸ *People v. Swint*, 572 N.W.2d 666, 669 (Mich. Ct. App. 1997).

³⁷⁹ *E.g.*, *Commonwealth v. Cassidy*, 96 N.E.3d 691, 778 (Mass. 2018); *Alpert v. State*, 543 S.W.3d 589, 598 (Mo. 2018); *Pohlabel v. State*, 268 P.3d 1264, 1265 (Nev. 2012); *Johnston v. State*, 735 S.E.2d 859, 865–66 (N.C. Ct. App. 2012); *State v. Philpotts*, 132 N.E.3d 743, 748 (Ohio Ct. App. 2019); *State v. Beeman*, 417 P.3d 541, 542 (Or. Ct. App. 2018); *Embody v. Cooper*, No. M2012-01830-COA-R3-CV, 2013 Tenn. App. LEXIS 343, at *1 (Tenn. Ct. App. May 22, 2013); *Baird v. Baird*, 99 Va. Cir. 432, 434 (Va. Cir. Ct. 2018); *Moran v. Wis. Dep’t of Justice*, 932 N.W.2d 430, 444–45 (Wis. Ct. App. 2019).

³⁸⁰ *People v. Dawson*, 934 N.E.2d 598, 604–08 (Ill. App. Ct. 2010) (citing cases refusing to strike down Illinois’s aggravated unlawful use of a weapon law, even though it looked as though the United States Supreme Court was going to expand *Heller*); *People v. Aguilar*, 2 N.E.3d 321, 328 (Ill. 2013) (reversing a conviction under Illinois’s aggravated unlawful use of a weapon law after a federal circuit did so).

³⁸¹ *E.g.*, *Holloway v. Attorney Gen. U.S.*, 948 F.3d 164 (3d Cir. 2020); *Beers v. Attorney Gen. U.S.*, 927 F.3d 150 (3d Cir. 2019); *Ass’n of N.J. Rifle & Pistol Clubs v. Attorney Gen. N.J.*, 910 F.3d 106 (3d Cir. 2018). *But see* *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 389–90 (3d Cir. 2016).

³⁸² *Commonwealth v. Davis*, 343 N.E.2d 847, 848 (Mass. 1976).

According to Lexis data, *Heller*³⁸³ and *McDonald*³⁸⁴ have been cited more often by federal than state courts. But state courts still make up a significant percentage. Upholding gun safety legislation around the country illustrates how even tire-squealing turns in Supreme Court precedent are constrained by lower courts.

Appellate records do not tell us the full impact of *Heller* and *McDonald*. It is possible that legislatures repealed other gun laws or that prosecutors stopped enforcing ones they believed would violate the Supreme Court's edicts. But the watershed decisions did little to disrupt the order of business in state courts. This should serve as a reminder that for all its luster, the Supreme Court may struggle to get its decisions enforced.

Over the 2010s, litigants and judges routinely cited federal *and* state constitutions when considering gun rights.³⁸⁵ Amici, too, bring up both.³⁸⁶ This shows that though state constitutions are no longer the only show in town when it comes to the right to bear arms, they still have a vitality about them.

³⁸³ A September 19, 2020 search of Lexis's citing decisions found 1,483 federal cases citing *Heller*, and 909 state cases.

³⁸⁴ A September 19, 2020 search of Lexis's citing decisions found 850 federal cases citing *McDonald*, and 695 state cases.

³⁸⁵ *E.g.*, *Walker v. State*, 222 S.W.3d 707, 711 (Tex. App. 2007); *Prekker v. Commonwealth*, 782 S.E.2d 604, 605 (Va. Ct. App. 2016); *City of Seattle v. Evans*, 366 P.3d 906, 907 (Wash. 2015); *State v. Jorgenson*, 312 P.3d 960, 962 (Wash. 2013); *Moran v. Wis. Dep't of Justice*, 932 N.W.2d 430, 444 n.15 (Wis. Ct. App. 2019).

³⁸⁶ *State v. Carnes*, 116 N.E.3d 138, 143 (Ohio 2018); *Ex parte Reynolds*, No. 12-19-00028-CR, 2019 Tex. App. LEXIS 8720, at *5 (Tex. App. Sept. 27, 2019); *Wells v. Tex. Dep't of Pub. Safety*, No. 14-17-00547-CV, 2019 Tex. App. LEXIS 1502, at *2 (Tex. App. Feb. 28, 2019); *Webb v. Schlagal*, 530 S.W.3d 793, 806-07 (Tex. App. 2017); *Roberts v. State*, No. 01-16-00059-CR, 2016 Tex. App. LEXIS 12598, at *5-6 (Tex. App. Nov. 29, 2016).