Ratifying *Bruen* in the States

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The last fifteen years have revolutionized the application of the Second Amendment. The Amendment's clunkily worded protections have been transformed from mere legal surplusage to a potent force as the U.S. Supreme Court has recognized an individual right to keep and bear arms, incorporated it against the states, and then turbo-charged its meaning with a novel historical test that has empowered constitutional challenges to established methods of regulating firearm possession.

But even as all of this action takes place in federal court, states continue to ratify amendments to their own constitutions that strengthen their own citizens' rights to keep and bear arms. A small but growing number of states have subjected these rights to strict scrutiny and added ancillary protections. Though opponents of these measures warned that many public safety measures could be imperiled, advocates claimed that their only purpose was to lock in existing gun rights—and so far, they have been right. These developments have not yet produced a switch in how gun-control measures are litigated. Most cases are still brought in federal court, and most state courts have opted away from a maximalist interpretation of these new state constitutional rights.

Yet this could very well change in the near future. As the U.S. Supreme Court refines the historical test it introduced in New York State Rifle & Pistol Association, Inc. v. Bruen*, the ultimate impact on modern-day gun control is unclear. If federal courts reject challenges to well-established and politically popular measures of gun control, it seems likely that states might soon be the center of more gun rights litigation. As this happens, litigants will likely be met by much more receptive judiciaries. Ostensibly nonpartisan judicial nominating procedures have been captured by partisan actors, and growing ideological polarization has produced state court judges who are more willing than ever to embrace extremist legal arguments. As a result, state courts may be willing to do what the U.S. Supreme Court may not—and embrace a maximalist view of the right to keep and bear arms.*

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In this Article, I argue that interpreting state constitutional gun rights to invalidate politically popular, uncontroversial gun-control measures would run counter to the intent of the voters who ratified these measures. In developing that argument, I comprehensively survey the development of the right to keep and bear arms in state constitutions from the Founding to the present. I explain the trend in the last fifty years toward creating, strengthening, and developing these rights through discrete amendments in response to fears of gun control and narrow judicial interpretations. I focus specifically on the rights that have been added to state constitutions since the U.S. Supreme Court's decisions in District of Columbia v. Heller *and* McDonald v. City of Chicago *and the campaigns to adopt them. I argue that embracing such a maximalist view would effectively pull a bait-and-switch on the voters who ratified these amendments—and burden them with interpretations they did not intend.*

INTRODUCTION

State constitutions can protect individual rights and liberties more robustly than the U.S. Constitution. The concerted effort to turn to state courts and state constitutions as part of New Judicial Federalism was originally motivated by liberal dissatisfaction with the Burger Court[1] and certainly produced outcomes favored by those in the progressive legal community—like stronger rights for criminal defendants and prisoners,[2] abortion patients and providers,[3] members of the LGBT community,[4] voters,[5] and beyond. Since the inauguration of a 6–3 conservative majority on the U.S. Supreme Court, and especially after the Court's decision in *Dobbs v. Jackson Women's Health Center*, efforts to turn to the states have intensified.[6]

Yet, characterizing the turn to state courts and constitutions as a solely liberal project ignores broad swaths of successful conservative advocacy and litigation. While social conservatives were unable to add the Federal Marriage Amendment to the U.S. Constitution in the early 2000s,[7] they were able to persuade voters in thirty-one states to ratify similar amendments.[8] Similarly, while the multi-decade campaign by conservatives to overturn *Roe v. Wade* only met with success in 2022,[9] voters in four states adopted constitutional amendments barring the recognition of abortion rights under

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1. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 161–65 (1998).

2. Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1189–93 (1985).

3. John Dinan, *The Constitutional Politics of Abortion Policy After* Dobbs*: State Courts, Constitutions, and Lawmaking*, 84 MONT. L. REV. 27, 32–38 (2023); Linda J. Wharton, Roe *at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 501–10 (2009).

4. Mary L. Bonauto, *Equality and the Impossible—State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481, 1499–1505 (2016); Quinn Yeargain, *Litigating Trans Rights Under State Constitutions*, 85 OHIO ST. L.J. 355, 383–92 (2024).

5. *See generally* Joshua A. Douglas, *The Power of the Electorate Under State Constitutions*, 76 FLA. L. REV. 1679 (2024) (discussing protections for voters under state constitutions).

6. *See* Jonathan L. Marshfield, *State Constitutional Rights, State Courts, and the Future of Substantive Due Process Protections*, 76 SMU L. REV. 519, 527–31 (2023); *see also* Robert F. Williams, *From Rights Arguments to Structure Arguments: The Next Stage of the New Judicial Federalism*, 2023 WIS. L. REV. 1615, 1616–17 ("State constitutions contain a number of structural provisions and limitations that may be deployed to resist a variety of state constitutional and statutory changes.").

7. Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 563–71 (2008).

8. Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1753 (2013); Yeargain, *supra* note 4, at 385.

9. Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 739–49 (2024).

their state constitutions.[10] And while abortion-rights advocates turned their attention to the states following the Court's decision in *Dobbs* and have successfully ratified several constitutional amendments recognizing a right to abortion,[11] the record before courts is more mixed, with most post-*Dobbs* decisions finding either no right to abortion or a very weak one.[12] Likewise, though the current Court has been more protective of religious liberties than previous courts,[13] conservatives have been able to achieve potentially stronger protections under state constitutions.[14]

And then there is the right to bear arms.[15] At the beginning of the twentieth century, only two-thirds of states expressly recognized the right to bear arms in their constitutions.[16] By the beginning of the twenty-first, virtually all did.[17] And since that point, voters in several states have ratified constitutional amendments that anticipated or sought to lock in the U.S. Supreme Court's recognition of an individual right in *District of Columbia v. Heller* and the

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10. ALA. CONST. art. I, § 36.06(c); LA. CONST. art. I, § 20.1; TENN. CONST. art. I, § 36; W. VA. CONST. art. VI, § 57.

11. ARIZ. CONST. art. II, § 8.1 (added 2024); CAL. CONST. art. I, § 1.1 (added 2022); COLO. CONST. art. II, § 32 (added 2024); MD. CONST. Dec. of Rts., art. 48 (added 2024); MICH. CONST. art. I, § 28 (added 2022); MO. CONST. art. I, § 36.1 (added 2024); MONT. CONST. art. II, § 36 (added 2024); N.Y. CONST. art. I, § 11 (amended 2024); OHIO CONST. art. I, § 22 (added 2023); VT. CONST. ch. 1, art. 22 (added 2022).

12. Members of the Med. Licensing Bd. v. Planned Parenthood Great Nw., 211 N.E.3d 957, 962 (Ind. 2023) (recognizing "a woman's right to an abortion that is necessary to protect her life or protect her from a serious health risk"); Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1188 (Idaho 2023) (recognizing no right to abortion); Wrigley v. Romanick, 988 N.W.2d 231, 242 (N.D. 2023) (recognizing "fundamental right to receive an abortion to preserve [a pregnant woman's] life or her health"); Okla. Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1128–30 (Okla. 2023) (recognizing "limited right" to abortion if "the continuation of the pregnancy will endanger the woman's life"); Planned Parenthood S. Atl. v. State, 892 S.E.2d 121, 126–27, 130 (S.C. 2023) (recognizing no right to abortion); Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67, 71 (Fla. 2024) (recognizing no right to abortion). Several other courts have rendered decisions on abortion-related matters that have, so far, not answered this question. Planned Parenthood Ariz., Inc. v. Mayes, 545 P.3d 892, 908 (Ariz. 2024); Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 888–91 (Pa. 2024); State v. SisterSong Women of Color Reprod. Just. Collective, 894 S.E.2d 1, 25–26 (Ga. 2023).

13. *See, e.g.*, Michael L. Smith, *Public Accommodations Laws, Free Speech Challenges, and Limiting Principles in the Wake of* 303 Creative, 84 LA. L. REV. 565, 588–98 (2024).

14. *See, e.g.*, ALA. CONST. art. I, § 3.01(2)(5) (adopting the "compelling interest test" for evaluation of laws that burden religious exercise).

15. *See* Michael B. de Leeuw, *The (New) New Judicial Federalism: State Constitutions and the Protection of the Individual Right to Bear Arms*, 39 FORDHAM URB. L.J. 1449, 1450–51 (2012) ("A consequence of *Heller*'s holding . . . is that state constitutions can at least theoretically confer greater protections of individual gun rights than the federal Constitution . . . .").

16. *See infra* Figure 1. *See generally* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006) (collecting provisions).

17. *See infra* Figure 1.

subsequent incorporation of that right in *McDonald v. Chicago*.[18] Some have gone even further than that—adopting specific tests for the review of any gun control measures,[19] broadening the purposes of gun possession and use,[20] prohibiting registration requirements,[21] and explicitly protecting ammunition and gun-related accessories.[22]

Prior to *Heller* and *McDonald*, the purpose of these amendments was to do what the federal courts would not. If the U.S. Supreme Court wouldn't recognize an individual right to bear arms under the Second Amendment, amending state constitutions and then *forcing* state courts to do so was a strategically wise move.[23] After *Heller* and *McDonald*, however, the purpose of these amendments shifted. Advocates then focused on locking in the Court's new recognition of an individual right to bear arms—and thus protecting against erosion in the event of future change at the Court—or strengthening the right even further.[24] But is there such a purpose for these amendments *today*, after the Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*?

In *Bruen*, the Court adopted a new test for evaluating whether a law regulating firearms ran afoul of the Second Amendment. When evaluating such a challenge, the court would first determine whether "the Second Amendment's plain text covers an individual's conduct"; second, the burden would shift to the government to "demonstrat[e] that it is consistent with the Nation's historical tradition of firearm regulation."[25] Following *Bruen*, a host of federal and state regulations were challenged, primarily in federal court, and these laws were inconsistently struck down, creating a patchwork quilt of outcomes and circuit splits several times over.[26] And so, with such a sea

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18. *See infra* Section II.B.

19. *See infra* Section II.A.4; Todd E. Pettys, *The N.R.A.'s Strict Scrutiny Amendments*, 104 IOWA L. REV. 1455, 1465–66 (2019).

20. *See infra* Section II.A.3.

21. *Id.*

22. *Id.*

23. *See infra* Section II.B.2.

24. *See, e.g.*, Tim Lockette, *Loaded Language: Voters to Decide Whether to Add More Protection for Gun Rights to State Constitution*, ANNISTON STAR, Sept. 17, 2014, at 1A (noting that Michael Sullivan, "the Alabama lobbyist for the National Rifle Association," explained that "the purpose of the bill was to protect the 'individual right' to bear arms," and that "the Alabama amendment would protect that personal right, at least in Alabama courts, even if the U.S. Supreme Court changes its interpretation of gun rights").

25. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022).

26. *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 146–50 (2023).

change in Second Amendment jurisprudence, what is the purpose behind state constitutional amendments modifying the right to bear arms today?

Take Iowa. For most of its history, it never explicitly recognized a state constitutional right to bear arms. Its 1846 and 1857 constitutions—as well as its failed 1844 constitution—included no such right.[27] But in 2022, just months after *Bruen*, voters overwhelmingly added an affirmative right to bear arms to their constitution,[28] not only recognizing the right as "fundamental," but also requiring "[a]ny and all restrictions of this right" to "be subject to strict scrutiny."[29]

Because the Iowa Constitution requires that constitutional amendments receive legislative approval in two successive sessions before they can be submitted to voters,[30] the process to amend the constitution began several years before the decision in *Bruen*.[31] Republican State Senator Brad Zaun, the sponsor of the proposal, explained that "[w]hat this bill is about—let's put cards on the table—is judicial activism."[32] The supporters of the amendment argued that Iowa, one of the few states without an express right to bear arms at the time, was potentially vulnerable to retrenchment because "if the federal jurisprudence changes on the Second Amendment, Iowans are left out to

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27. State v. Downey, 893 N.W.2d 603, 605 (Iowa 2017) ("The framers of the Iowa Constitution chose not to include any language in our constitution concerning the right to bear arms."). *See generally* IOWA CONST. of 1846, art. I (no right to bear arms in the bill of rights); IOWA CONST. of 1857, art. I (same); IOWA CONST. of 1844, art. II (constitution not ratified) (same).

28. *See* IOWA SEC'Y OF STATE, 2022 GENERAL ELECTION CANVASS SUMMARY 208–17 https://sos.iowa.gov/elections/pdf/2022/general/canvsummary.pdf [https://perma.cc/79UA-MB7B] (showing that Amendment 1 passed with 60.8 percent of the vote).

29. IOWA CONST. art. I, § 1A (amended 2022).

30. *Id.* art. X, § 1.

31. The measure was first approved in 2018, which would have queued up the amendment's placement on the ballot at the 2020 election. *See* H.R.J. Res. 2009, 87th Gen. Assemb., 2d Reg. Sess. (Iowa 2018); William Petroski, *Pro-Gun Amendment to Iowa Constitution Could Be on 2020 Election Ballot*, DES MOINES REG. (Mar. 22, 2018), https://www.desmoinesregister.com/story/news/politics/2018/03/21/pro-gun-amendment-iowa-constitution-2020-election-ballot/441583002 [https://perma.cc/7HW8-KN73]. However, the Iowa Constitution requires that proposed amendments be "published . . . for three months previous" to the intervening general election. IOWA CONST. art. X, § 1. This did not happen because of a "bureaucratic oversight" by the Secretary of State. Stephen Gruber-Miller & Barbara Rodriguez, *Iowa Gun Rights Amendment Is Back to Square One After 'Bureaucratic Oversight*,*'* DES MOINES REG. (Jan. 15, 2019), https://www.desmoinesregister.com/story/news/politics/2019/01/14/iowa-legislature-state-constitution-gun-rights-amendment-2nd-amendment-firearms-coalition-paul-pate/2567619002 [https://perma.cc/M4V8-EHFZ].

32. Rod Boshart, *Iowa Senate Passes Gun Rights Constitutional Amendment*, GAZETTE (Mar. 22, 2018), https://www.thegazette.com/government-politics/iowa-senate-passes-gun-rights-constitutional-amendment [https://perma.cc/TH3J-SNG8].

dry."[33] Despite the connection between the proposed state constitutional amendment and the Second Amendment, however,[34] the Iowa Senate voted down a revision that would have simply added the text of the Second Amendment to the state constitution.[35] As one supporter observed, "If we were in different times, Second Amendment language might be appropriate. But we're not in another time. We have an army of lawyers out there, and an army of advocacy groups that have launched an assault against the Constitution."[36]

After the measure received its second passage in 2021, it was scheduled for the November 2022 general election.[37] Yet just months before a single vote was cast, the U.S. Supreme Court released its opinion in *Bruen*, in which it struck down New York's concealed-carry rules and adopted its new "historical" test for evaluating compliance with the Second Amendment.[38] Observers at the time, including Professor Todd Pettys, suggested that the constitutional amendment on the ballot in Iowa "would be even more protective of gun rights" than the Second Amendment as interpreted in *Bruen*, and could potentially displace "[l]aws restricting gun rights for felons."[39] In the end, voters backed the measure with over 60% of the vote.[40]

Iowa's experience is not unique. Across the country, states have ratified new gun-rights amendments, which not only protect an individual right to bear arms but also extend the protections to ammunition and other accessories, expressly adopt strict-scrutiny review, and recognize new purposes for owning guns.[41] So far, however, these state constitutional protections have only been sparingly cited or applied by courts in the decade-

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33. Shane Vander Hart, *Iowa Lawmakers Send Proposed Gun Rights Amendment to Voters*, IOWA TORCH (Jan. 29, 2021), https://iowatorch.com/2021/01/29/iowa-lawmakers-send-proposed-gun-rights-amendment-to-voters [https://perma.cc/6Q4V-AVW7].

34. Petroski, *supra* note 31 ("'I trust the Iowa voter,' [Zaun] said. 'They are going to tell us if they don't like the language in front of us. They are going to tell us how important their Second Amendment rights are.'").

35. *See* S.J. Res. 18, 88th Gen. Assemb., 1st Reg. Sess. (Iowa 2019); S. JOURNAL, 88th Gen. Assemb., 1st Reg. Sess. 610 (Iowa 2019).

36. Vander Hart, *supra* note 33.

37. *See Iowa Amendment 1, Right to Keep and Bear Arms Amendment (2022)*, BALLOTPEDIA, https://ballotpedia.org/Iowa_Amendment_1,_Right_to_Keep_and_Bear_Arms_Amendment_(2022) [https://perma.cc/L3YV-FAHS].

38. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022).

39. Tom Barton, *Iowa Gun Rights Amendment: What a 'Yes' or 'No' Vote Could Change*, GAZETTE (Aug. 21, 2022), https://www.thegazette.com/government-politics/iowa-gun-rights-amendment-what-a-yes-or-no-vote-could-change [https://perma.cc/TM9S-49ML].

40. IOWA SEC'Y OF STATE, *supra* note 28, at 208–17.

41. *See infra* Part II.

plus after *Heller* and *McDonald*.[42] Where they have been invoked, courts have frequently read them narrowly.[43]

On one hand, this silence makes sense. The favorability of federal courts to Second Amendment claims incentivizes litigating claims under the Second Amendment—because doing so can achieve national outcomes and raise the floor for protected conduct. At the same time, the perpetual uncertainty of state court litigation and inherent difficulties of litigating state constitutional rights likely *disincentivize* litigation that is oriented around these rights.[44]

Yet there are good reasons to believe that this state constitutional silence will not last. Federal courts have struggled to apply the test laid out in *Bruen*, reaching divergent results, calling into doubt the constitutionality of ostensibly settled federal and state laws, and queueing up the need for continued intervention by the U.S. Supreme Court.[45] Though the Court pulled back from the furthest reaches of *Bruen* in *United States v. Rahimi*,[46] the fate of gun-control measures, even politically popular and largely uncontroversial ones, remains unclear.

In the years to come, it is possible that the Court's decision in *Rahimi* will prove to have meaningfully clipped *Bruen*'s wings—such that challenges to laws that prohibit people convicted of felonies from possessing firearms or that limit domestic abusers' ability to own firearms will be rejected.[47] If that

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42. Nino C. Monea, *State Constitutional Rights to Bear Arms Ten Years After* Heller/McDonald, 82 U. PITT. L. REV. 381, 431–33 (2020).

43. In Iowa, for example, in the first case to apply the new right to bear arms, the state supreme court upheld, by a 4–3 vote, the state's procedure for restoring firearm rights following an involuntary commitment to a hospital for mental health treatment. *In re* Int. of N.S., 13 N.W.3d 811 (Iowa 2024).

44. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 764–66 (1992) (summarizing practical difficulties of developing state constitutional arguments given the "poverty of state constitutional discourse").

45. I do not seek to summarize this litigation in this article. For a deeper analysis of how lower federal courts have responded to *Bruen*, see Charles, *supra* note 26, at 122–45. *See also* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 115–27 (2023).

46. 602 U.S. 680, 691–92 (2024) ("[S]ome courts have misunderstood the methodology of our recent Second Amendment cases. . . . As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."). *But see* Jacob D. Charles, *On Guns, the Supreme Court Can't Shoot Straight*, WASH. MONTHLY (June 29, 2024), https://washingtonmonthly.com/2024/06/29/on-guns-the-supreme-court-cant-shoot-straight [https://perma.cc/4G8F-WFTP] (arguing that the Court "certainly has not cleaned up the cacophonous confusion in the lower courts since *Bruen*").

47. *See, e.g.*, Andrew Willinger, *History and Tradition as Heightened Scrutiny*, 60 WAKE FOREST L. REV. 415, 467–69 (2025) (arguing that the Court's decision in *Rahimi* will bring *Bruen*'s "text, history, and tradition" test back from the strict end of strict scrutiny).

were to happen, analogous claims against state statutes could be brought in state courts instead, especially in the states that have ratified stronger gun-rights protections.[48] At the same time, even if *Bruen*'s legacy continues uninterrupted, a sprawling interpretation of the Second Amendment will not *always* lead to success for gun-rights advocates in federal court, so developing a parallel litigation strategy focused on state courts and constitutions may well make sense, too.[49] In any event, regardless of how the Court deals with the inconsistent application of *Bruen*, it has clearly staked out a role for itself in resolving the constitutionality of gun control measures, guaranteeing that cases are all but assured to be litigated for the foreseeable future and that many gun regulations are at risk.[50]

In this Article, I argue that modern state constitutional protections of the right to bear arms could very well be used by gun-rights advocates and pliable state judiciaries to lock in *Bruen*-type outcomes. To be clear, there would certainly be some basis for such an interpretation. The amendments that have been adopted in the last several decades, and especially those ratified after *Heller* and *McDonald*, have used unequivocally stronger language than the Second Amendment, in striking contrast to the tempered language historically used in many state constitutions.[51] And though state judiciaries have been reluctant to apply a broad reading to these provisions so far, the rise of "movement judges" around the country and the growing extremism within state judiciaries suggests that any such reluctance may be temporary. Armed with textually stronger gun-rights protections, willing judges could very well recognize sprawling conceptions of the right to bear arms, regardless of how the U.S. Supreme Court manages its own docket of Second Amendment cases. Yet at the same time, overly ambitious readings would likely clash with voter intent. The legislative history makes clear that, when opponents of the amendments argued that they *could* lead to the invalidation of widely supported gun control measures like felon-possession restrictions, the amendments' supporters vehemently denied any such possibility—and the amendments were subsequently ratified with that understanding in mind.[52]

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48. *See infra* Section III.C.

49. *See* Yeargain, *supra* note 4, at 370–75.

50. Brandon E. Beck, *The Federal War on Guns: A Story in Four-and-a-Half Acts*, 26 U. PA. J. CONST. L. 53, 120–22 (2023); Bonnie Carlson, *Salvaging Federal Domestic Violence Gun Regulations in* Bruen*'s Wake*, 99 WASH. L. REV. 1, 23–42 (2024).

51. *See infra* Section II.A.

52. *See infra* Section III.C.

I develop this argument in three main parts. First, Part I surveys the development of rights to bear arms as originally conceived in state constitutions and graphs out the changes in how state constitutions protected the right to bear arms. While other scholarship in this arena has commented generally on changes to these rights over time, this Part makes a significant contribution to the existing literature—and broader understanding of state constitutional rights to bear arms—by comprehensively cataloging the changes and visualizing them over the last two-and-a-half centuries. I focus here on the changes to rights to bear arms brought about by state constitutional conventions or broad rewrites, not individual amendments—which are discussed in Part II. In separate sections, I discuss the existence of an express right to bear arms, whether the right is conceived as individual or collective, the recognition of specific purposes of the right, and state legislatures' express powers to limit the right. In this discussion, I also include for the first time the nearly thirty *proposed*, but rejected, state constitutions and how they treated the right to bear arms.

Then, in Part II, drawing on an original, near-comprehensive database of state constitutional amendments nationwide, I explore the development of rights to bear arms by individual, single-purpose amendments from 1970 to the present—and demonstrate how these new rights look quite different from their older counterparts. Beginning with New Mexico in 1971,[53] eighteen states have ratified nineteen different constitutional amendments that have altered the scope of gun-rights protection.[54] Some of these amendments have added express rights to bear arms in states that previously lacked them, while others have specified the level of scrutiny, broadened the permissible purposes for gun ownership, and expanded the coverage of the protection itself.[55] In outlining these amendments, I sketch out the available legislative intent, focusing specifically on the arguments made in favor of the constitutional changes.

Finally, in Part III, I argue that despite the widespread silence of state courts on gun rights over the last two decades, the ratification of these new amendments is queueing up the possibility of extreme decisions in the coming years. The breadth of the rights, coupled with the new incentives to bring cases as the scope of federal protection remains unclear, means that state cases are likely to bubble up in the next decade. Moreover, while state court judges have, so far, been uninterested in developing individualized, state-specific interpretations of their rights to bear arms, the growing

53. *See* N.M. CONST. art. II, § 6.
54. *See infra* Appendix, Table 1.
55. *See infra* Section II.A.

influence of Christian nationalist thought in far-right legal circles and the rise of judicial extremism means that many judges may be primed to embrace new and radical conceptions of gun rights. Additional state constitutional protections that recognize new and different versions of the right to bear arms are also likely to appear on ballots in years to come—both because Republican state legislators may view them as turnout "candy" for their own base and because gun-rights groups may organize to initiate constitutional amendments of their own.

I. RIGHTS TO BEAR ARMS IN STATE CONSTITUTIONS

Today, almost all state constitutions contain an express right to bear arms.[56] After Iowa's 2022 constitutional amendment, only California, Maryland, Minnesota, New Jersey, and New York lack such a provision.[57] They are joined by the three territories with constitutions—American Samoa,

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56. ALA. CONST. art. I, § 26; ALASKA CONST. art. I, § 19; ARIZ. CONST. art. II, § 26; ARK. CONST. art. II, § 5; CONN. CONST. art. I, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. I, § 8; GA. CONST. art. I, § 1, para. 8; HAW. CONST. art. I, § 17; ILL. CONST. art. I, § 22; IND. CONST. art. I, § 32; IOWA CONST. art. I, § 1A; KAN. CONST. Bill of Rts., § 4; KY. CONST. § 1; LA. CONST. art. I, § 11; ME. CONST. art. I, § 16; MASS. CONST. pt. 1, art. XVII; 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. 2-a; N.M. CONST. art. II, § 6; N.C. CONST. art. I, § 30; 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; R.I. CONST. art. I, § 22; S.C. CONST. art. I, § 20; S.D. CONST. art. VI, § 24; TENN. CONST. art. I, § 26; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; VT. CONST. ch. 1, art. 16; VA. CONST. art. I, § 13; WASH. CONST. art. I, § 24; W. VA. CONST. art. III, § 22; WIS. CONST. art. I, § 25; WYO. CONST. art. I, § 24. Though Guam and the U.S. Virgin Islands lack territorial constitutions, Congress extended the Second Amendment to them through their organic acts, which operate as constitutions. *See* 48 U.S.C. § 1421b(u) (extending "the first to ninth amendments inclusive" to Guam); *id.* § 1561 (extending "the first to ninth amendments inclusive" to the U.S. Virgin Islands).

57. *See, e.g.*, Kasler v. Lockyer, 2 P.3d 581, 586 (Cal. 2000) ("If plaintiffs are implying that a right to bear arms is one of the rights recognized in the California Constitution's declaration of rights, they are simply wrong. No mention is made in it of a right to bear arms."); Williams v. State, 982 A.2d 1168, 1170 (Md. Ct. Spec. App. 2009) ("[T]here is no Maryland corollary of the federal constitutional right codified in the Second Amendment."); *In re* Application of Atkinson, 291 N.W.2d 396, 398 (Minn. 1980) ("[T]he Minnesota Constitution, unlike that of other states, contains no express reference to the right to bear arms for self-defense . . . ."); Burton v. Sills, 248 A.2d 521, 528 (N.J. 1968) (noting that New Jersey is among the jurisdictions that "have no express state constitutional provisions dealing with the right to bear arms"); People v. Persce, 97 N.E. 877, 879 (N.Y. 1912) ("Neither is there any constitutional provision securing the right to bear arms which prohibits legislation with reference to such weapons as are specifically before us for consideration . . . . There is no provision in the state Constitution at least directly bearing on this subject, but only in the statutory Bill of Rights.").

the Northern Mariana Islands, and Puerto Rico—which also lack express rights.[58]

However, the ubiquity of subnational rights to bear arms is a comparatively recent phenomenon. For most of American history, though a majority of states have had such a right, a sizable minority have not.[59] Moreover, even in states with an explicit right to bear arms, many have historically been framed as the Second Amendment, with only an *implied* individual right,[60] if that, or have been cabined with narrower purposes, like for the common defense of the state.[61]

The first discrete constitutional amendment to deal exclusively with the right to bear arms was placed on the ballot in New Mexico in 1971.[62] Before that point, any changes to how state constitutions recognized the right to bear arms—addition, modification, or the much-rarer subtraction—took place solely through wholesale constitutional rewrites.[63] And though several states have held constitutional conventions since the 1980s,[64] none of these conventions has produced a textual change to a state constitution's right to bear arms. Accordingly, in this Part, I focus exclusively on how state constitutional rights to bear arms developed through pre-1970s constitutional revisions. Drawing on an original survey of ratified and proposed state

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58. *See generally* AM. SAMOA CONST. art. I (right to bear arms not included in territorial constitution's bill of rights); N. MAR. I. CONST. art. I (same); P.R. CONST. art. II (same). However, the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, which formally affiliated the Northern Mariana Islands with the United States as an unincorporated, organized territory, expressly adopted the Second Amendment. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, N. Mar. I.-U.S., Feb. 15, 1975, art. V, § 501(a), 90 Stat. 263 (codified at 48 U.S.C. § 1801); *see also* Murphy v. Guerrero, 2016 U.S. Dist. LEXIS 135684, at *11 (D. N. Mar. I. Sept. 28, 2016). The Puerto Rico Supreme Court has viewed the U.S. Supreme Court as having incorporated the Bill of Rights, including the Second Amendment, to Puerto Rico, and has applied it accordingly. Pueblo v. Rodríguez López, 210 P.R. Dec. 752, 766–67 (P.R. 2022).

59. *See, e.g.*, Volokh, *supra* note 16, at 193–204.

60. *E.g.*, LA. CONST. of 1921, art. I, § 8 ("A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be abridged.").

61. *E.g.*, ARK. CONST. of 1868, art. I, § 5 ("The citizens of this State shall have the right to keep and bear arms for their common defense.").

62. *See infra* Appendix, Table 1.

63. Revised constitutions most commonly come from constitutional conventions, but some states allow for other methods of wholesale revision, including through special sessions of the state legislature or, in Florida's case, the Constitution Revision Commission. *See* Jonathan L. Marshfield, *American Democracy and the State Constitutional Convention*, 92 FORDHAM L. REV. 2555, 2579–82 (2024).

64. *Id.* at 2579; Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 71–74, 82 (1982).

constitutions, I focus on the existence of state rights to bear arms in Section I.A; on the individual or collective nature of the right in Section I.B; the delineated purposes for the rights in Section I.C; and express legislative power to limit the right in Section I.D.

A. The Growth of State Constitutional Rights to Bear Arms

Prior to the Second Amendment's incorporation to the states in *McDonald v. City of Chicago* in 2010,[65] and certainly prior to the ruling in *District of Columbia v. Heller* that the Second Amendment contains an individual right to bear arms,[66] state constitutions represented the only plausible way to enforce any such right.[67] In the earliest days of the United States, however, as the first state constitutions were ratified, most did not contain rights to bear arms. Of the thirteen original colonies, only Massachusetts, North Carolina, and Pennsylvania did.[68] Other than Connecticut and Rhode Island, which did not adopt constitutions until well into the nineteenth century,[69] the remaining states added rights to bear arms either much later[70] or never did.[71]

After that point, most states admitted to the Union in the eighteenth or nineteenth centuries had constitutions with express rights to bear arms.[72] By

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65. 561 U.S. 742, 787–88, 791 (2010).

66. 554 U.S. 570, 635–36 (2008).

67. *See, e.g.*, Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 744 (2005) (arguing that state constitutions "are . . . solid evidence of the currency of the right to arms"); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1436 (noting that state courts in the nineteenth century "affirmed the right of citizens to carry firearms openly for protection but held that *concealed* carry could be regulated, or even banned, by the legislature"); *see also* David B. Kopel et al., *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177, 1187–93 (1995).

68. MASS. CONST. pt. 1, art. XVII (adopted 1780); N.C. CONST. of 1776, Declaration of Rts., § 17; PA. CONST. of 1776, Declaration of Rts., art. XIII.

69. WESLEY W. HORTON, THE CONNECTICUT STATE CONSTITUTION 8–10, 16–19 (2d ed. 2012); PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION 24–26 (2011).

70. DEL. CONST. art. I, § 20 (amended 1987); GA. CONST. of 1865, art. I, para. 4; N.H. CONST. pt. 1, art. 2-a (amended 1982); S.C. CONST. of 1868, art. I, § 28; VA. CONST. art. I, § 13.

71. As noted, Maryland, New Jersey, and New York do not have explicit state constitutional rights to bear arms. *See supra* note 57 and accompanying text.

72. ALA. CONST. of 1819, art. I, § 23; ARK. CONST. of 1836, art. II, § 21; COLO. CONST. art. II, § 3 (adopted 1876); FLA. CONST. of 1838, art. I, § 21; IDAHO CONST. art. I, § 11 (adopted 1890); IND. CONST. of 1816, art. I, § 20; KAN. CONST. Bill of Rts., § 4 (adopted 1859); KY. CONST. of 1792, art. XII, § 23; MICH. CONST. of 1835, art. I, § 13; MISS. CONST. of 1817, art. I, § 23; MO. CONST. of 1820, art. XIII, § 3; MONT. CONST. of 1889, art. III, § 13; OHIO CONST. of 1802,

the early 1800s—and, specifically, with Missouri's admission in 1820—a majority of states included rights to bear arms in their constitutions. However, California, Illinois, Iowa, Louisiana, Nebraska, Nevada, North Dakota, West Virginia, and Wisconsin were all admitted without any right.[73] Most of these states added such a right in the late twentieth century,[74] or, in Iowa's case, 2022.[75] A substantial minority of states in the South or Mid-Atlantic—Delaware, Georgia, Louisiana, Maryland, and South Carolina—did not articulate rights to bear arms in their original constitutions, and only did so much later, if at all.[76] Arkansas, Florida, and Tennessee contained a right, but originally limited it to "free white men" or "freemen."[77] Reconstruction-era constitutional conventions added these rights or removed the racist limitations on them.[78] Thereafter, in the twentieth century, *every* new state admitted to the Union recognized an express right to bear arms.[79] However, the three territories that successfully drafted constitutions—American Samoa, the Northern Mariana Islands, and Puerto Rico—included no such protection.[80] Likewise, the failed constitutions drafted in Guam in 1977 and the U.S. Virgin Islands in 2009 did not include an express right to bear arms, either.[81]

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art. VIII, § 20; OR. CONST. art. I, § 27 (adopted 1857); S.D. CONST. art. VI, § 24 (adopted 1889); TENN. CONST. of 1796, art. XI, § 26; TEX. CONST. of 1845, art. I, § 13; UTAH CONST. art. I, § 6 (adopted 1895); VT. CONST. ch. 1, art. 16 (adopted 1793); WASH. CONST. art. I, § 24 (adopted 1889); WYO. CONST. art. I, § 24 (adopted 1889).

73. *See, e.g.*, Volokh, *supra* note 16, at 194, 196–97, 199, 201, 204.

74. ILL. CONST. art. I, § 22 (adopted 1970); LA. CONST. of 1879, Bill of Rts., art. 3; NEB. CONST. art. I, § 1 (amended 1988); NEV. CONST. art. I, § 11 (amended 1982); N.D. CONST. art. I, § 1 (amended 1984); W. VA. CONST. art. III, § 22 (amended 1986); WIS. CONST. art. I, § 25 (amended 1998).

75. IOWA CONST. art. I, § 1A (amended 2022).

76. *See* Volokh, *supra* note 16, at 194–95, 197, 202.

77. ARK. CONST. of 1836, art. II, § 21 ("free white men"); ARK. CONST. of 1864, art. II, § 21 ("free white men"); FLA. CONST. of 1838, art. I, § 21 ("free white men"); TENN. CONST. of 1796, art. XI, § 26 ("freemen"); TENN. CONST. of 1834, art. I, § 26 ("free white men").

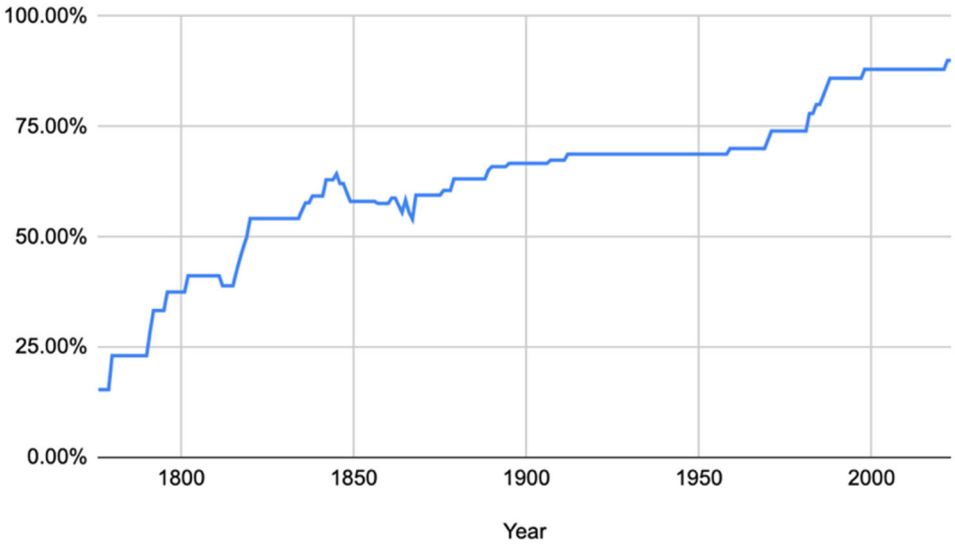
78. *See* Johnson, *supra* note 67, at 733–34.

79. ALASKA CONST. art. I, § 19 (adopted 1959) (amended 1994); ARIZ. CONST. art. II, § 26 (adopted 1910); HAW. CONST. art. I, § 17 (adopted 1959); N.M. CONST. art. II, § 6 (adopted 1910); OKLA. CONST. art. II, § 26 (adopted 1907).

80. *See supra* note 58 and accompanying text.

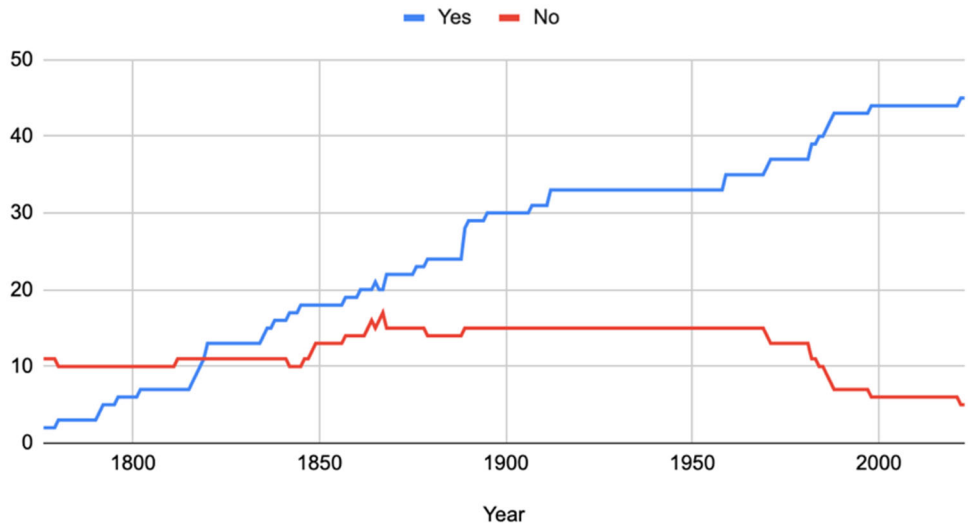
81. *See generally* GUAM CONST. of 1977 art. II (constitution not ratified), *printed in* DRAFT CONSTITUTION OF GUAM (Micronesian Area Rsch. Ctr. 1977) (containing no right to bear arms); V.I. CONST. of 2009 art. I (constitution not ratified), *printed in* Letter from Gerard Luz James II, President, Fifth Const. Convention of the Virgin Islands, to John P. de Jongh, Jr., Governor, U.S. Virgin Islands (May 31, 2009), https://www.uvi.edu/files/documents/College_of_Liberal_Arts_and_Social_Sciences/social_sciences/OSDCD/Fifth_Constitution_Proposed_US_Virgin_

Figure 1. Percentage of States with Explicit "Right to Bear Arm" Provisions



Islands_to_Governor_deJongh2009.pdf [https://perma.cc/A6FF-SSYH] (containing no right to bear arms). While a briefing paper produced for the 1977 constitutional convention in the Northern Mariana Islands noted that an "issue for the delegates is whether to recognize a right to bear arms within the Commonwealth," WILMER, CUTLER & PICKERING, BRIEFING PAPERS FOR THE DELEGATES TO THE NORTHERN MARIANAS CONSTITUTIONAL CONVENTION: BRIEFING PAPER NO. 7: BILL OF RIGHTS 51 (1977) (on file with author), none of the delegates' proposals appear to have advanced such an idea, and there is little discussion otherwise. *Cf.* Howard P. Willens & Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L.J. 1373, 1387–1400 (1977) (discussing development of bill of rights). Likewise, though the proposed Guam Constitution of 1977 was ultimately rejected by voters, no right to bear arms was included in the proposed constitution, *see* GUAM CONST. of 1977 art. II (constitution not ratified), *printed in* DRAFT CONSTITUTION OF GUAM (Micronesian Area Rsch. Ctr. 1977) (lacking a right to bear arms in the proposed bill of rights), and no discussion of such a right appears to have been broached in its convention, either. *Cf.* Neal S. Solomon, *The Guam Constitutional Convention of 1977*, 19 VA. J. INT'L L. 725, 762–63 (1979) (discussing the debate on the bill of rights).

Figure 2. Number of States with and without Explicit "Right to Bear Arms" Provisions



Many of the states without express rights to bear arms contained thematically related provisions regarding state militias.[82] For example, the California Constitution has never included a right to bear arms, but the 1879 Constitution added a militia provision for the first time.[83] In the state constitutional debates surrounding the adoption of the militia provision, delegates acknowledged the conceptual link between the proposed addition and the Second Amendment.[84] However, the provision was never interpreted by state courts to confer a right to bear arms, and most of it was unceremoniously removed by a 1966 constitutional amendment that sought to modernize the California Constitution's language and eliminate outdated and archaic language.[85] Though state militia provisions endure in state constitutions, many have been significantly modified as state national guards

82. Michael J. Golden, *The Dormant Second Amendment: Exploring the Rise, Fall, and Potential Resurrection of Independent State Militias*, 21 WM. & MARY BILL RTS. J. 1021, 1063–67 (2013); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 15–18 (1989).

83. CAL. CONST. art. VIII, §§ 1–2 (adopted 1879).

84. 2 CAL. CONST. CONVENTION, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878, at 729–31 (E.B. Willis & P.K. Stockton eds., 1881). *But see* Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169, 1172–80 (warning about reliability of state constitutional convention records).

85. CAL. SEC'Y OF STATE, PROPOSED AMENDMENTS TO CONSTITUTION: PROPOSITIONS AND PROPOSED LAWS TOGETHER WITH ARGUMENTS TO BE SUBMITTED TO THE ELECTORS OF THE STATE OF CALIFORNIA AT THE GENERAL ELECTION, TUESDAY, NOV. 8, 1966, at 1–2 (1966).

have been established,[86] and in any event, they have not been interpreted to independently confer individual rights to keep and bear arms.

B. Individual Versus Collective Right

Prior to the Court's decision in *Heller* that the Second Amendment protected an individual right to keep and bear arms, the Court had possibly reached the opposite conclusion.[87] However, regardless of anyone's view on the appropriate and historically accurate scope of the Second Amendment's protection, it hardly seems controversial to point out that the plain text does not *unambiguously* establish an individual right to "possess and use guns for nonmilitary purposes."[88] As Justice John Paul Stevens pointed out in his dissent in *Heller*, the use of "the people" as the class of individuals entitled to protection under the Second Amendment does not necessarily mean that the "right to bear arms" extends to the individual.[89]

At the state level, however, this textual observation has not always been true. While some state rights have mirrored the text of the Second Amendment, many states' rights have framed much more clearly as *individual* rights.[90] Accordingly, I coded each state constitutional right to bear arms as "individual" or "collective" in nature based on the text of each guarantee, and the context in which the guarantee is framed. Where a right referred to the rights-holder as an individual,[91] or included a purpose that

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86. *See* Golden, *supra* note 82, at 1033–37.

87. In *Heller*, Justice Stevens argued that *United States v. Miller*, 307 U.S. 174 (1939), interpreted the Second Amendment to "protect[] the right to keep and bear arms for certain military purposes" without "curtail[ing] the Legislature's power to regulate the nonmilitary use and ownership of weapons," and that "hundreds of judges have relied on the view of the Amendment [the Court] endorsed there." 554 U.S. 570, 637–38 (2008) (Stevens, J., dissenting). The majority opinion disputed this reading of *Miller*, however, arguing that "the case did not even purport to be a thorough examination of the Second Amendment" and that "[t]he most Justice Stevens can plausibly claim for *Miller* is that it declined to decide the nature of the Second Amendment right, despite the Solicitor General's argument (made in the alternative) that the right was collective." *Id.* at 622–23. Instead, "*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons." *Id.* at 623.

88. *Id.* at 636 (Stevens, J., dissenting).

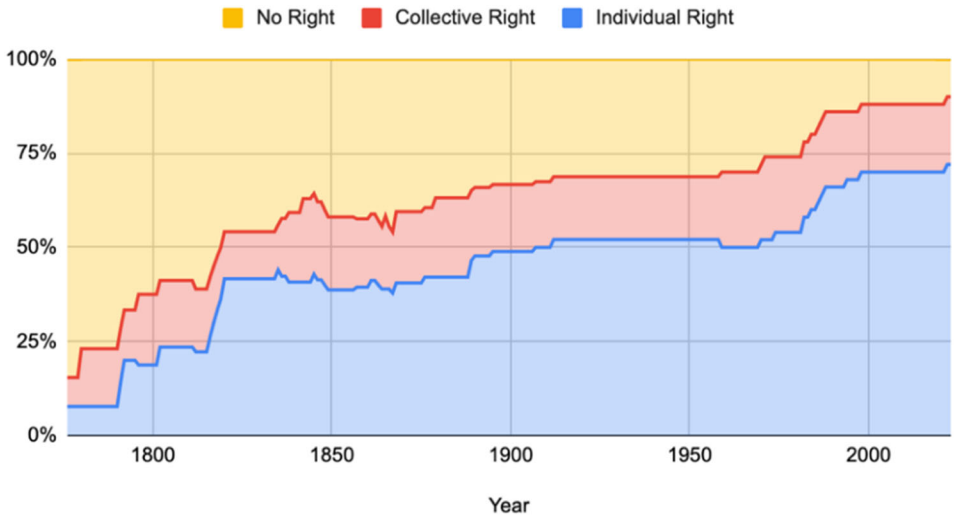
89. *Id.* at 644–46. To be clear, the point of this observation is not to relitigate *Heller*, but instead to point out a basic difference between the Second Amendment and state constitutional rights to keep and bear arms.

90. *See infra* Figure 3.

91. *See, e.g.*, ARIZ. CONST. art. II, § 26 ("The right of *the individual citizen* to bear arms . . . ." (emphasis added)); CONN. CONST. of 1818, art. I, § 17 ("*Every citizen* has a right to bear arms . . . ." (emphasis added)).

naturally and obviously referred to the rights-holder's individual use,[92] like "defense of himself," I coded it as an "individual" right. But where a right only referred to a *group* of rights-holders, with no identification of any individual holder or any reference to an unmistakably individual purpose,[93] I coded it as a "collective" right.

Figure 3. Percentage of States Based on Type of Right to Bear Arms



The long-term preference of state constitutional drafters has been toward an individual, non-collective conception of the right to bear arms. While the percentage of states with a collectively framed right has remained somewhat steady over time, the growth in the percentage of states with an individual right has come almost entirely at the expense of states with no right at all.[94]

However, the textual difference in an individual or collective right has historically produced little meaningful difference in how cases interpreting the right have been decided. State supreme courts have long recognized that

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92. *See, e.g.*, FLA. CONST. of 1868, Declaration of Rights, § 22 ("The people shall have the right to bear arms *in defense of themselves* and of the lawful authority of the State." (emphasis added)); IDAHO CONST. art. I, § 11 (amended 1978) ("The people have the right to bear arms for *their security and defense* . . . ." (emphasis added)); MISS. CONST. art. III, § 12 ("The right of every citizen to keep and bear arms *in defense of his home, person, or property* . . . ." (emphasis added)).

93. *See, e.g.*, ARK. CONST. art. II, § 5 ("The citizens of this State shall have the right to keep and bear arms, for their *common defense*." (emphasis added)); GA. CONST. art. I, § 1, para. VIII ("The right of the people to keep and bear arms shall not be infringed . . . .").

94. *See supra* Figure 3.

rights to bear arms that are *ostensibly* framed as collective rights—just as the Second Amendment is—indeed protect the individual right to bear arms.[95] Only a handful of state supreme courts have reached decisions to the contrary,[96] including the Hawai'i Supreme Court most recently.[97]

C. Purpose of the Right

The Second Amendment contains an implied purpose for the right to keep and bear arms: the maintenance of a "well regulated [m]ilitia."[98] But state constitutional rights have long contained far clearer, and more specific, purposes. For most of American history, a majority of state constitutional rights to bear arms have contained some sort of specified purpose.

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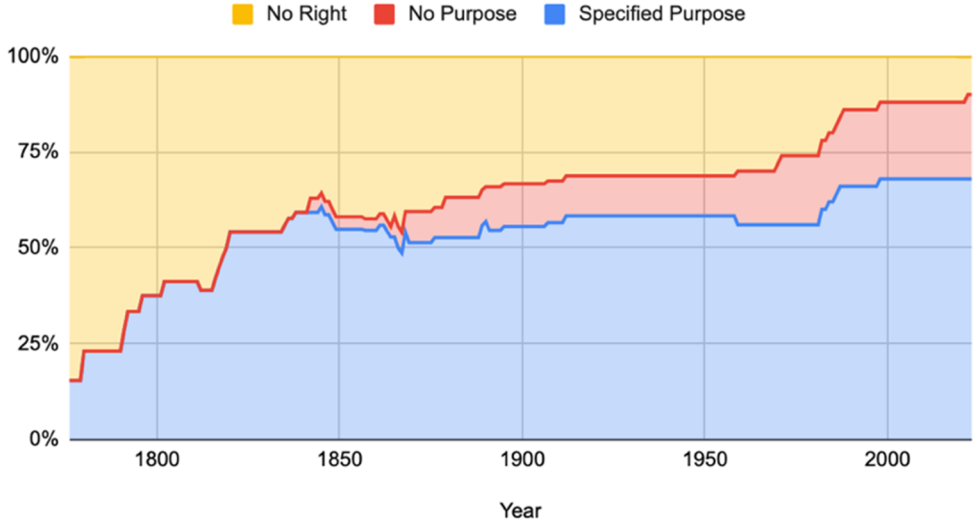
95. Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 75–79 (1989).

96. City of Salina v. Blaksley, 83 P. 619, 620–21 (Kan. 1905) (holding that the "right" of "the people . . . to bear arms for their defense and security" "applies only to the right to bear arms as a member of the state militia, or some other military organization provided for by law," and that where someone is not a member in any such organization, they are "not within the provision of the Bill of Rights, and . . . not protected by its terms"); Commonwealth v. Davis, 343 N.E.2d 847, 848–49 (Mass. 1976) (holding that the "right" of "[t]he people . . . to keep and to bear arms for the common [defense]," and provisions like it, "were not directed to guaranteeing individual ownership or possession of weapons").

97. State v. Wilson, 543 P.3d 440, 449 (Haw. 2024) ("No words in article I, section 17 and the Second Amendment describe an individual right. No words mention self-defense. . . . The Hawai'i Constitution leaves out an individual right to bear arms. Our framers had options. They could have worded the constitution to plainly secure an individual right to possess deadly weapons for self-defense. But they didn't.").

98. U.S. CONST. amend. II.

Figure 4. Percentage of States Based on Purpose of Right



Where a purpose was specified, it was usually organized around self-defense or societal defense—and it was not until the second half of the twentieth century that more diverse purposes were added.[99] Even within these two main purposes, however, small variations emerged. The earliest statements of self-defense were generally non-specific, merely providing that a holder of the right could "bear arms in defense of himself,"[100] or "for the defen[s]e of themselves."[101] However, some states went further, clarifying that the right extended to defense of "home," "property," or "person."[102]

Up until the mid-nineteenth century, defense of society was commonly framed as "defense of . . . the State"[103] or "common defense."[104] After the Civil War, however, as state conventions added rights to bear arms to their state constitutions, or modified existing ones, the language sometimes specified that invoking the right in defense of the state was conditioned on

99. *See infra* Section II.A.2.

100. *See, e.g.*, WASH. CONST. art. I, § 24.

101. *See, e.g.*, IND. CONST. of 1816, art. I, § 20.

102. COLO. CONST. art. II, § 13; MISS. CONST. art. III, § 12; MO. CONST. of 1875, art. II, § 17; MO. CONST. art. I, § 23 (amended 2014); MONT. CONST. of 1889, art. III, § 13; MONT. CONST. art. II, § 12; OKLA. CONST. art. II, § 26.

103. *See, e.g.*, MISS. CONST. of 1832, art. I, § 23 ("Every citizen has a right to bear arms in defence of himself and of the state.").

104. *See, e.g.*, FLA. CONST. of 1838, art. I, § 21 ("That the free white men of this State shall have the right to keep and to bear arms, for their common defense.").

being "lawfully summoned" to do so.[105] While these modifications have a logical connection to Reconstruction-era concerns about preventing insurrections similar to the Civil War, in the 1880s and 1890s, they were also motivated by a desire to guard against the use of private militias, like Pinkerton detectives.[106]

More recently, however, state constitutional rights to bear arms have gotten *less* specific. While most still specify purposes—and have expanded the list rather substantially, as I discuss later[107]—a sizable minority list no purpose at all.[108] Here, too, however, it does not seem that the textual differences have produced meaningful divergences in how courts have interpreted the rights.[109]

D. Historical Strengthening of Regulatory Power

Nothing in the U.S. Constitution's Bill of Rights expressly allows Congress to limit any of the rights that are laid out[110]—including the text of the Second Amendment itself. The earliest language of state constitutions' rights to bear arms similarly granted no such limiting power to state constitutions. However, beginning in the late nineteenth century, a growing

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105. *See, e.g.*, COLO. CONST. art. II, § 13 (ratified in 1876 and establishing "[t]hat the right of no person to keep and bear arms . . . in aid of the civil power when thereto legally summoned, shall be called in question").

106. *See, e.g.*, MONT. CONST. CONVENTION, PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION HELD IN THE CITY OF HELENA, MONTANA, JULY 4TH 1889, AUGUST 17, 1889 129–30 (1921) (statement of Delegate J. R. Toole) ("I hope it will never come to a pass here when we are not competent and capable of managing affairs of this kind as citizens of our own state, and I must here say that we should endeavor to guard against the possibility of such contingencies as have occurred in the United States; bodies of men such as Pinkerton's men have gone into certain states and intimidated citizens of those states for pay.").

107. *See infra* Section II.A.2.

108. *See, e.g.*, ALA. CONST. art. I, § 19; GA. CONST. art. I, § 1, para. VIII.

109. *See* Monea, *supra* note 42, at 418–22.

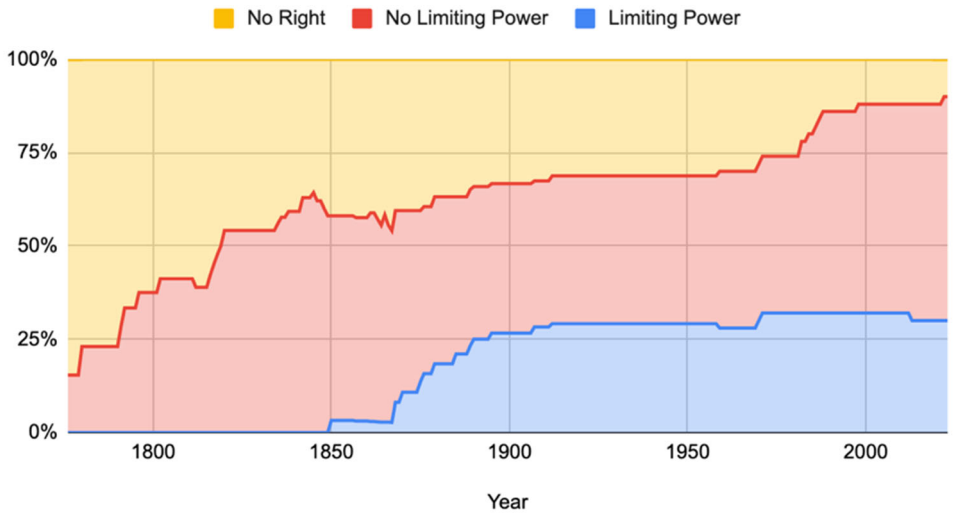
110. For example, Justice Hugo Black, who adopted an absolutist view of the First Amendment, remarked:

> I understand that it is rather old-fashioned and shows a slight naivete to say that "no law" means no law. It is one of the most amazing things about the ingeniousness of the times that strong arguments are made, which *almost* convince me, that it is very foolish of me to think "no law" means no law. But what it *says* is "Congress shall make no law respecting an establishment of religion," and so on.

Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U. L. REV. 549, 553 (1962) (quoting Justice Hugo Black at a public interview held on April 14, 1962, at the biennial convention of the American Jewish Congress).

number of states modified the language of their right to bear arms to expressly allow their state legislatures to limit the right.[111]

Figure 5. Percentage of States with Legislative Powers to Limit Right to Bear Arms



These limitations came in two common forms: (1) a general power to regulate the keeping and bearing of firearms[112] and (2) a more specific power to regulate, prohibit, or punish the carrying of concealed weapons.[113] State legislative powers to regulate the right to bear arms grew dramatically in the late nineteenth century, and since the start of the twentieth century, about a quarter of all states have included some kind of power.[114]

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111. *See* Volokh, *supra* note 16, at 193–204.

112. *See, e.g.*, FLA. CONST. of 1885, Decl. of Rts., § 20 ("[T]he Legislature may prescribe the manner in which [arms] may be borne."); IDAHO CONST. of 1889, art. I, § 11 ("[T]he legislature shall regulate the exercise of this right [to bear arms] by law."). The Georgia Constitution allows the state legislature "to prescribe the manner in which arms may be borne." GA. CONST. art. I, § 1, ¶ 8. Since the mid-nineteenth century, the Georgia Supreme Court has recognized that this provision "operates as an express 'qualification to the very guarantee itself' that was 'intended to limit the broad words of the previous guarantee.'" Stephens v. State, No. S25A0334, 2025 Ga. LEXIS 106, at *7–8 (Ga. May 28, 2025) (citation omitted). The Georgia Supreme Court recently affirmed this interpretation and rejected a state constitutional challenge to a state law that prohibits people under the age of 21 from carrying a handgun in public. *Id.* at *2–3.

113. *See, e.g.*, KY. CONST. of 1850, art. XIII, § 25 ("[T]he General Assembly may pass laws to prevent persons from carrying concealed arms.").

114. *See supra* Figure 5.

Much of this activity seems to have been motivated by public safety concerns relating to the carrying of concealed weapons.[115] Delegates to several state constitutional conventions during this era expressed their concerns quite clearly. A delegate to the 1875 Missouri constitutional convention, for example, noted, "[t]he wearing of concealed weapons is a practice which I presume meets with the general reprobation of all thinking men. It is a practice which cannot be too severely condemned. It is a practice which is fraught with the most incalculable evil."[116] Likewise, at the 1879 Louisiana constitutional convention, a grand jury report shared with the delegates explained that it had "presented eighteen bills of indictment against citizens who have infringed this law" and "hoped that a law will be enacted by the Constitutional Convention . . . making it not merely a matter of fine and imprisonment in the parish jail, but a penal offense" so as to protect "the lives of citizens . . . from the casualties which are the result of the reprehensible practice."[117]

E. Late Twentieth-Century Changes

A series of state constitutional rewrites were proposed from the 1960s to the late 1970s, either in the form of constitutional conventions or legislatively drafted constitutions, most of which proposed no meaningful change to how state constitutions spelled out the right to bear arms.[118] In Illinois and

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115. Kopel, *supra* note 67, at 1416–17; Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 513–15 (2004).

116. 1 STATE HIST. SOC'Y OF MO., DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875 439–40 (Isidor Loeb & Floyd C. Shoemaker eds., 1930) (remarks of Delegate Thomas T. Gantt).

117. LA. CONST. CONVENTION, OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA HELD IN NEW ORLEANS, MONDAY, APRIL 21, 1879 186 (1879).

118. CONN. CONST. art. I, § 15; FLA. CONST. art. I, § 8 (amended 1990); FLA. CONST. of 1978 art. I., § 8 (constitution not ratified), *printed in* FLA. CONST. REVISION COMM'N, PROPOSED REVISION OF THE FLORIDA CONSTITUTION (1978) (defining the right to bear arms under article I, section 8); GA. CONST. of 1976, art. I, § 1, para. V; GA. CONST. art. I, § 1, para. VIII; IDAHO CONST. of 1970 art. I, § 12 (constitution not ratified), *printed in* IDAHO CONST. REVISION COMM'N, PROPOSED REVISION OF THE IDAHO CONSTITUTION 5 (1970) (defining the right to bear arms under article I, section 12); KY. CONST. of 1966 art. I, § 1 (constitution not ratified), *printed in Proposed Constitution Revision*, KY. STATE BAR J., May 1966, at 33 (defining the right to bear arms under article I, section 1); MICH. CONST. art. I, § 6; MINN. CONST. art. I, § 14; MONT. CONST. art. II, § 12; OR. CONST. of 1970 art. I, § 17 (constitution not ratified), *printed in* COMM'N FOR CONST. REVISION, A NEW CONSTITUTION FOR OREGON (1962), *reprinted in* 67 OR. L. REV. 127, 133 (1988) (defining the right to bear arms under article I, section 17); PA. CONST. art. I, § 21; S.D.

Virginia, the rewrites proposed the addition of a new right to bear arms where it had not otherwise existed.[119] The 1974 Louisiana Constitution clarified the text of the existing individual right,[120] and the 1971 North Carolina Constitution added some new restrictions.[121]

Electorates in four states, however, saw more significant changes proposed to them as part of wholesale constitutional rewrites. All of these proposals foreshadowed the changes that would be proposed over the next fifty years by discrete constitutional amendments. Each of them lost, but for reasons that were entirely unconnected to the changes to how the rights to bear arms were modified.[122] The first of these proposals was developed in 1969, when a constitutional convention convened in New Mexico proposed a new constitution with a totally rewritten right to bear arms.[123] Though the Constitution Revision Commission convened just a few years earlier recommended a much more minor change to the right,[124] the convention opted for more sprawling language:

CONST. of 1976 art. VI, § 14 (constitution not ratified), *printed in* 3 S.D. CONST. REVISION COMM'N, RECOMMENDATIONS OF THE CONSTITUTIONAL REVISION COMMISSION 29 (1975). Rhode Island held a constitutional convention in 1986. Thomas R. Bender, *For a More Vigorous State Constitutionalism*, 10 ROGER WILLIAMS U. L. REV. 621, 665 (2005). The convention declined to propose amendments to the provision protecting a right to bear arms, R.I. CONST. art. I, § 22. *See* Mosby v. Devine, 851 A.2d 1031, 1054 (R.I. 2004) (Flanders, J., dissenting) (noting that the constitutional right to keep and bear arms has remained unamended for more than 160 years).

119. ILL. CONST. art. I, § 22; VA. CONST. art. I, § 13.

120. LA. CONST. art. I, § 11 (amended 2012). The previous text, which had remained largely untouched from its original addition in the 1879 Constitution, mirrored the text of the Second Amendment in the first sentence and then allowed the legislature to "punish those who carry weapons concealed" in the second sentence. LA. CONST. of 1921, art. I, § 8. The 1974 Constitution removed the textual similarity with the Second Amendment, more clearly establishing the right as individual. LA. CONST. art. I, § 11 (amended 2012).

121. N.C. CONST. art. I, § 30. The revision expressly allowed the legislature to "enact[] penal statutes against" the practice of carrying concealed weapons and provided that "[n]othing herein shall justify the practice of carrying concealed weapons." *Id.*

122. DIANE D. BLAIR & JAY BARTH, ARKANSAS POLITICS AND GOVERNMENT 145–46 (Univ. of Neb. Press 2d ed. 2005) (discussing the rejection of the 1970 and 1980 proposed constitutions in Arkansas); DONALD CROWLEY & FLORENCE HEFFRON, THE IDAHO STATE CONSTITUTION 20 (2011) (discussing the rejection of the 1970 proposed constitution in Idaho); CHUCK SMITH, THE NEW MEXICO STATE CONSTITUTION 23 (2011) (discussing the rejection of the 1969 proposed constitution in New Mexico); Carter Wood, *'Con-Con' Paved Way for Future Decisions*, BISMARCK TRIB., Feb. 16, 1992, at 2C (discussing the rejection of the 1972 proposed constitution in North Dakota).

123. *See* State v. Dees, 669 P.2d 261, 263 (N.M. Ct. App. 1983).

124. The Commission recommended that the language be modified to read: "No law shall be made respecting the right of the people to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons." N.M. CONST. REVISION

1910 Constitution	*Proposed 1969 Constitution*
"The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons."[125]	"No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use, and for other lawful purposes not prohibited on December 9, 1969. Nothing herein shall permit the carrying of concealed weapons."[126]

Then, in 1970, voters in Arkansas and Idaho rejected new constitutions that would have made smaller changes. The proposed Arkansas Constitution kept the original protection of the people's "right to keep and bear arms for their common defense," but would have added a new sentence: "No license or registration tax or fee shall ever be imposed on this right."[127] The proposed change in Idaho was similarly minor. It simply proposed the removal of the purpose—"for their security and defense"—behind the right to bear arms.[128]

In North Dakota, voters rejected a proposed constitution in 1972 that would have added, for the first time, an express right to bear arms.[129] The right included broader, more wide-ranging purposes than had been previously

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COMM'N, REPORT OF THE CONSTITUTIONAL REVISION COMMISSION, TO HONORABLE DAVID F. CARGO, GOVERNOR OF NEW MEXICO, AND TO MEMBERS OF THE TWENTY-EIGHTH LEGISLATURE OF THE STATE OF NEW MEXICO 15 (1966). The Commission's report specifically noted that the right "is of unique significance to New Mexico farmers, ranchers, sportsmen and citizens" given "New Mexico's geographical situs and its vast expanses of open lands." *Id.* at 18.

125. N.M. CONST. art. II, § 6 (amended 1971 and 1986).

126. N.M. CONST. of 1969 art. II, § 19 (constitution not ratified), *printed in* N.M. CONST. CONVENTION, PROPOSED NEW MEXICO CONSTITUTION 7 (1969) (defining the right to bear arms under article II, section 19).

127. ARK. CONST. of 1970 art. II, § 20 (constitution not ratified), *printed in* ARK. CONST. CONVENTION, PROPOSED ARKANSAS CONSTITUTION OF 1970 WITH COMMENTS: A REPORT TO THE PEOPLE OF THE STATE OF ARKANSAS BY THE SEVENTH ARKANSAS CONSTITUTIONAL CONVENTION 7 (1970). The constitutional convention published and distributed a report that summarized the changes that it proposed. It apparently viewed this change as comparatively minor, noting, that it "does not restrict the State's authority to regulate the keeping or bearing of arms." *Id.*

128. *Compare* IDAHO CONST. of 1970 art. I, § 12 (constitution not ratified), *printed in* IDAHO CONST. REVISION COMM'N, PROPOSED REVISION OF THE IDAHO CONSTITUTION 742 (1970) (defining the right to bear arms under article 1, section 12), *with* IDAHO CONST. art. I, § 11 (amended 1978).

129. N.D. CONST. of 1972, art. I, § 9 (constitution not ratified), *printed in* ch. 529, 1972 N.D. Laws 1389, 1390 (providing under article I, section 9 that "[t]he right of the citizens to keep arms for self defense, lawful hunting, recreational use and other lawful purposes shall not be abridged, but nothing herein shall be held to permit the unlawful carrying of concealed weapons").

recognized in any state constitution up until that point—"self defense, lawful hunting, recreational use, and other lawful purposes"—and allowed the legislature to bar the "carrying of concealed weapons."[130] In 1980, when Arkansans were again presented with a constitutional rewrite, the proposed constitution included language nearly identical to the 1972 North Dakota Constitution, and would have broadened the right to bear arms "for their common defense, for hunting and recreational use, and for other lawful purposes."[131]

While none of these constitutions was ever ratified, the failure to expand state constitutional rights to bear arms in the manner they proposed would be short-lived. These changes were part of a national effort to broaden the reach of state constitutional rights in this space. Many of the individual amendments that came in the years after would accomplish many of these purposes—and beyond.

II. RIGHTS BY AMENDMENT

In the last fifty years, voters[132] in eighteen states have ratified nineteen separate state constitutional amendments that have materially altered their respective constitution's right to bear arms.[133] The first such amendment—indeed, the *first* discrete state constitutional amendment relating to gun rights in American history—was proposed to and ratified by New Mexico voters in 1971.[134] In the half-century that has followed, a combination of state legislatures, voters, and constitutional conventions or revision commissions have proposed an additional nineteen amendments, all of which I lay out in the Appendix.

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130. *Id.*

131. ARK CONST. of 1980 art. II, § 19 (constitution not ratified), *printed in* ARK. CONST. CONVENTION, PROPOSED ARKANSAS CONSTITUTION OF 1980 WITH COMMENTS: A REPORT TO THE PEOPLE OF THE STATE OF ARKANSAS BY THE EIGHTH ARKANSAS CONSTITUTIONAL CONVENTION 4 (Aug. 1980) (defining the right to bear arms under article II, section 19). The convention report likewise described the proposed change as "broaden[ing] these rights with the added language following 'defense.'" *Id.*

132. In every state but Delaware, state constitutional amendments must be approved by voters before they are ratified. In Delaware, however, an amendment must receive two-thirds approval from both houses of the state legislature in two successive legislative sessions, and no voter approval is required. DEL. CONST. art. XVI, § 1. However, to avoid awkward phrasing, I refer to the "electorate" or "voters" to refer to the entire universe of state constitutional amendments, including Delaware's 1987 constitutional amendment.

133. *See infra* Appendix, Table 1.

134. H.R.J. Res. 5, 30th Leg., 1st Reg. Sess., 1971 N.M. Laws 1378.

These provisions have had a variety of different motivations, like responding to strict gun regulations adopted by localities (or precluding the *possibility* of such regulations), nullifying state supreme court decisions, or locking in the U.S. Supreme Court's Second Amendment jurisprudence following *Heller* and *McDonald*.[135] Many of these amendments were supported by the National Rifle Association and other gun-rights organizations.[136]

Whatever their motivation, however, these amendments have accomplished several distinct changes to the universe of state constitutional rights to bear arms. In the last fifty years, nine states that previously lacked any such right added one to their constitution.[137] In many of these states, as well as in states that had long recognized an individual right to bear arms, the new rights were conceptually different from the guarantees that have long been in state constitutions. These new rights include broader protections and more protected conduct and have started to specify the level of scrutiny.[138] At the same time, many of these amendments have also *removed* restrictions or state legislatures' powers to impose restrictions, which has further strengthened the right.[139]

However, despite the material modification of state constitutional rights to bear arms, the modifications have produced extremely little change, if any at all, in state-level litigation. Comparatively, few cases have been brought in state court since the Court's decisions in *Heller* and *McDonald*, and of those that have, few have relied on the plaintiffs' *state* constitutional rights.[140] Given the favorability of federal courts to such claims, the silence of state constitutional litigation—so far, anyway—is unsurprising.

In Section II.A, I lay out a comprehensive survey of the individual amendments that have proposed modifications to state constitutional rights to bear arms. I categorize the changes effected by each successful amendment and how they fit into the broader trends laid out in Part I. Then, in Section II.B, I outline the intent, where available, behind these measures, drawing on state legislative journals, voter guides, and contemporaneous newspaper coverage.

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135. *See infra* Section II.B.
136. *See* Pettys, *supra* note 19, at 1465–66.
137. *See infra* Section I.A.
138. *See infra* Sections II.A.1–4.
139. *See infra* Section II.A.5.
140. Monea, *supra* note 42, at 386–88.

A. The Amendments

From 1971 to the present, nineteen amendments to state constitutions have created or modified the right to bear arms in eighteen states.[141] Beyond these nineteen amendments, only one has ever failed: a 1978 proposal in New Hampshire that, despite receiving 64.7% of the vote, failed to receive the requisite two-thirds supermajority required by the state constitution.[142] To better structure the discussion that follows, I break the nineteen amendments down into categories based on what they accomplished, each of which is discussed separately: (1) creation of a new right; (2) broadening the recognized purposes of rights to bear arms; (3) expanding the coverage of the rights; (4) specifying the level of scrutiny and type of protection; and (5) changes to state legislative power to regulate.

1. Existence of the Right

Since 1982, eight separate states—Delaware, Iowa, Nebraska, Nevada, New Hampshire, North Dakota, West Virginia, and Wisconsin—have added *new* rights to bear arms to their constitutions where they did not previously exist.[143] Separately, voters in Kansas and Maine ratified amendments that nullified state supreme court decisions holding that the only right protected was a collective one that conferred no individual right.[144]

Accordingly, of the rights to bear arms that have been added to state constitutions in the last fifty years, all of them have been through individual constitutional amendments, not constitutional rewrites. The last convention-backed effort to add such a right took place in Illinois in 1970, after the state's 1818, 1848, and 1870 constitutions, as well as the constitutions that were rejected by voters in 1862 and 1922, did not include any express right to bear arms.[145]

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141. *See infra* Appendix, Table 1.

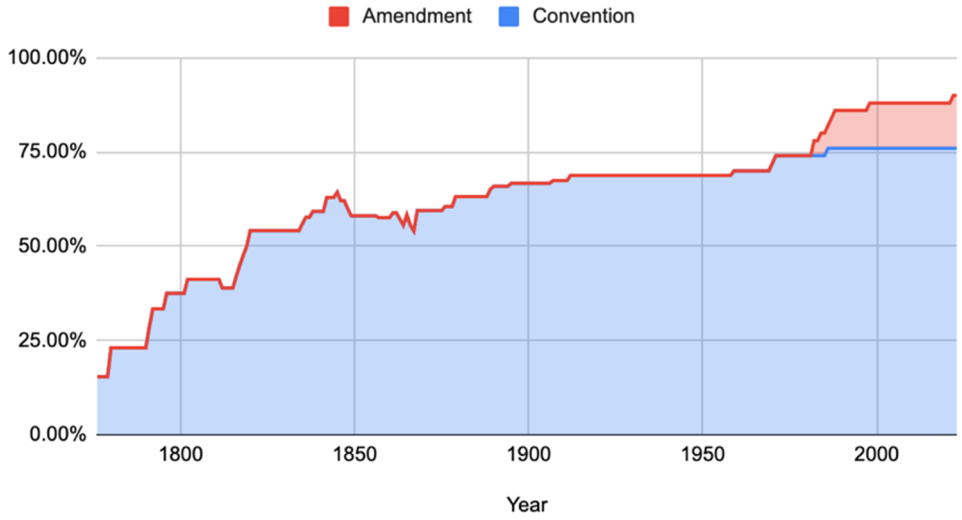
142. *See* N.H. DEP'T OF STATE, MANUAL FOR THE GENERAL COURT 297 (1979), https://scholars.unh.edu/court/46; N.H. CONST. pt. 2, art 100.

143. DEL. CONST. art. I, § 20 (amended 1987); IOWA CONST. art. I, § 1A (amended 2022); NEB. CONST. art. I, § 1 (amended 1988); NEV. CONST. art. I, § 11 (amended 1982); N.H. CONST. pt. 1, art. 2-a (amended 1982); N.D. CONST. art. I, § 1 (amended 1984); W. VA. CONST. art. III, § 22 (amended 1986); WIS. CONST. art. I, § 25 (amended 1998).

144. KAN. CONST. Bill of Rts., § 4 (amended 2010); ME. CONST. art. I, § 16 (amended 1987).

145. *See generally* ILL. CONST. of 1818, art. VIII (no such right in the bill of rights); ILL. CONST. of 1848, art. XIII (same); ILL. CONST. of 1870, art. II (same); ILL. CONST. of 1862 art. I (constitution not ratified) (same); ILL. CONST. of 1922 art. I. (constitution not ratified) (same).

Figure 6. Source of State Constitutional Right to Bear Arms



2. Broadened Purposes

Until the 1970s, while most state constitutional rights to bear arms delineated specific purposes, all of the specified purposes were organized around personal defense or security.[146] Beginning in the 1970s, however, the amendments added new, further-reaching purposes. The first such expansion took place by New Mexico's 1971 amendment, which established an individual right "to keep and bear arms," not just for "security and defense," but also "for lawful hunting and recreational use and for other lawful purposes."[147] That trio of uses—hunting, recreation, and lawful purposes generally—had never before been recognized as constitutionally protected reasons for keeping and bearing arms, but today, it is specifically protected in eight state constitutions.[148]

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146. *See supra* Section I.C.

147. N.M. CONST. art. II, § 6 (amended 1971).

148. DEL. CONST. art. I, § 20 ("hunting and recreational use"); KAN. CONST. Bill of Rts., § 4 ("lawful hunting and recreational use, and for any other lawful purpose"); NEB. CONST. art. I, § 1 ("lawful . . . hunting, recreational use, and all other lawful purposes"); NEV. CONST. art. I, § 11 ("lawful hunting and recreational use and for other lawful purposes"); N.M. CONST. art. II, § 6 ("lawful hunting and recreational use and for other lawful purposes"); N.D. CONST. art. I, § 1 ("lawful hunting, recreational, and other lawful purposes"); W. VA. CONST. art. III, § 22 ("lawful hunting and recreational use"); WIS. CONST. art. I, § 25 ("hunting, recreation or any other lawful purpose").

The development of these uses may be connected to a curious addition to state constitutions: rights to hunt and fish. As of the time of writing, twenty-seven state constitutions contain rights to hunt or fish.[149] While these amendments have had a largely negligible effect since their ratification,[150] they have an obvious, if merely conceptual, relationship with gun rights. The National Rifle Association has published and advocates for a "model [Right to Hunt and Fish] amendment," citing concerns that hunting will be severely restricted or banned by environmentalists and animal-rights activists.[151] A possibly related "right to food," added to the Maine Constitution in 2021,[152] was viewed by some observers as "a stealth vehicle for frustrating reasonable restrictions on guns and gun use in the context of hunting."[153] While no such amendment has yet been interpreted to confer a right to bear arms where it

149. ALA. CONST. art. I, § 36.02 (amended 2014); ARK. CONST. amend. 88, § 1 (amended 2010); CAL. CONST. art. I, § 25 (amended 1910); GA. CONST. art. I, § 1, para. 28 (amended 2006); IDAHO CONST. art. I, § 23 (amended 2012); FLA. CONST. art. I, § 28 (amended 2024); IND. CONST. art. I, § 39 (amended 2016); KAN. CONST. Bill of Rts., § 21 (amended 2016); KY. CONST. § 255A (amended 2012); LA. CONST. art. I, § 27 (amended 2004); MINN. CONST. art. I, § 12 (amended 1998); MISS. CONST. art. III, § 12A (amended 2014); MONT. CONST. art. IX, § 7 (amended 2004); NEB. CONST. art. XV, § 25 (amended 2012); N.C. CONST. art. I, § 38 (amended 2018); N.D. CONST. art. XI, § 27 (amended 2000); OKLA. CONST. art. II, § 36 (amended 2008); R.I. CONST. art. I, § 17; S.C. CONST. art. I, § 25 (amended 2010); TENN. CONST. art. XI, § 13 (amended 2010); TEX. CONST. art. I, § 34 (amended 2015); UTAH CONST. art. I, § 30 (amended 2020); VT. CONST. ch. 1, art. 67; WIS. CONST. art. I, § 26 (amended 2003); WYO. CONST. art. I, § 39 (amended 2012); FLA. CONST art. I, § 28 (amended 2024)

150. Jeffrey Omar Usman, *The Game Is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 85–90 (2009); Stacey Gordon, *A Solution in Search of a Problem: The Difficulty with State Constitutional "Right to Hunt" Amendments*, 35 PUB. LAND & RES. L. REV. 3, 29–46 (2015).

151. *Why Does NRA Support Right to Hunt and Fish (RTHF) State Constitutional Amendments?*, NAT'L RIFLE ASS'N, https://www.nraila.org/get-the-facts/hunting-and-conservation/why-does-nra-support-right-to-hunt-and-fish-rthf-state-constitutional-amendments [https://perma.cc/277P-ESED].

152. ME. CONST. art. I, § 25 (amended 2021); *see also* Sarah M. Everhart, *Green Amendments and Ham: How Green Amendment Jurisprudence Can Inform Maine's Right to Food*, 76 ME. L. REV. 204, 217–19 (2024) (discussing interpretation of the right to food).

153. Martha F. Davis, *In Maine, a 'Second Amendment for Food'?*, STATE CT. REP. (Mar. 29, 2024), https://statecourtreport.org/our-work/analysis-opinion/maine-second-amendment-food [https://perma.cc/ETL5-S6SX].

does not exist—or to guide the interpretation of an existing right[154]—such a result is certainly possible.[155]

3. New Coverage

The text of the Second Amendment only refers to "arms," a word choice that most, though not all, state constitutional analogs echo.[156] In *Heller*, the U.S. Supreme Court interpreted "arms" to refer to "all instruments that constitute bearable arms."[157] Accordingly, despite the exclusion of other words—like "ammunition"—it seems clear that the Second Amendment would not be interpreted to allow a state or municipality to totally ban ammunition as back-door gun control.[158]

But two states have amended their state constitutional rights to bear arms to *expressly* guarantee a level of protection for firearm accessories and supplies, including ammunition. In 1978, Idaho voters ratified an amendment that not only prohibited the imposition of "licensure, registration or special taxation on the ownership or possession of firearms" but also extended that prohibition to "ammunition."[159] In 2014, Missourians ratified an amendment that went even further, extending an individual *right* to "keep and bear" not just "arms," but also "ammunition[] and accessories typical to the normal function of such arms."[160]

4. Scrutiny and Protection

Prior to *Heller* and *McDonald*, most state courts reviewing challenges to firearm regulations frequently employed a test that questioned whether the

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154. In 2024, for example, the Maine Supreme Judicial Court rejected arguments from hunters that the state's Sunday hunting ban violated the "right to food" in the state constitution. Parker v. Dep't of Inland Fisheries & Wildlife, 314 A.3d 208, 216–18 (Me. 2024).

155. *Cf.* Robert A. Creamer, *History Is Not Enough: Using Contemporary Justifications for the Right to Keep and Bear Arms in Interpreting the Second Amendment*, 45 B.C. L. REV. 905, 925 (2004) (suggesting that Minnesota's constitutional right to hunt could be interpreted as conferring a right to bear arms).

156. *See* U.S. CONST. amend. II; Volokh, *supra* note 16.

157. District of Columbia v. Heller, 554 U.S. 570, 582 (2008).

158. *See* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS UNIV. L.J. 193, 237 (2017) (noting that most "courts to consider the issue of ammunition have concluded that the Second Amendment includes ammunition"); Jacob D. Charles, *Ancillary Rights*, 173 U. PA. L. REV. 1269, 1283–87 (2025).

159. IDAHO CONST. art. I, § 11 (amended 1978).

160. MO. CONST. art. I, § 23 (amended 2014).

challenged law was "reasonable."[161] While the *Heller–McDonald* duo did not clearly specify what standard of review applied in their wake, most federal courts opted for a two-part test that incorporated a heightened standard of review,[162] and state supreme courts generally applied intermediate scrutiny.[163]

However, voters in Alabama, Iowa, Louisiana, and Missouri went even further. Each described the right using more evocative language—"fundamental" in Alabama, Iowa, and Louisiana, and "unalienable" in Missouri.[164] They also required that regulations on keeping and bearing arms be evaluated under "strict scrutiny."[165] To my knowledge, the passage of Louisiana's 2012 amendment is likely the first time that a state constitution has been amended to *expressly* require the use of strict scrutiny and one of the only times that a standard of review has been added to a state constitution in any context.[166]

In other states, the standard of review for gun regulations might be altered by the location in the constitution into which the right was placed. Every right is located in the state constitution's bill of rights, which can lend credence to the conclusion that the right is operational without first requiring any

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161. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 715–19 (2007); David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1116 (2010) ("[S]ome courts have analyzed gun laws in vague terms such as 'reasonable' or 'balancing test,' without providing any standards for what makes something reasonable, or how to balance.").

162. Charles, *supra* note 45, at 83–87.

163. Monea, *supra* note 42, at 423–27.

164. ALA. CONST. art. I, § 26(a) (amended 2014); IOWA CONST. art. I, § 1A (amended 2022); LA. CONST. art. I, § 11 (amended 2012); MO. CONST. art. I, § 23 (amended 2014).

165. Pettys, *supra* note 19, at 1456–57.

166. In arriving at this conclusion, I reviewed the text and recent histories of all fifty state constitutions. While the word "scrutiny" appears in several other state constitutions, it does so in exclusively unrelated contexts. *E.g.*, CAL. CONST. art. I, § 3(b)(1) (providing that public documents "shall be open to public scrutiny"). Outside of these four states in this specific context, no state constitution includes the phrase "strict scrutiny." A handful of state constitutions have adopted some sort of standard for reviewing claims in different contexts. For example, the Alabama Religious Freedom Amendment in the state constitution expressly rejects the U.S. Supreme Court's test in *Employment Division v. Smith*, 494 U.S. 872 (1990), for government burdens on religious freedom, and instead adopts "[t]he compelling interest test as set forth in prior court rulings." ALA. CONST. art. I, § 3.01(2)(5). In the redistricting context, some state constitutions narrow their supreme courts' review of congressional and state legislative maps to abuse of discretion. *E.g.*, COLO. CONST. art. V, § 48.3(2) ("The supreme court shall approve the plans unless it finds that the commission . . . abused its discretion in applying or failing to apply the criteria.").

execution by the state legislature.[167] In Kentucky, Nebraska, and North Dakota, the right is located in the *first section* of the state constitution's bill of rights, where the state's "inherent and inalienable rights" are identified.[168] The decision to do so in Kentucky is well-established, dating back to the state's 1890 Constitution, but the Nebraska and North Dakota amendments were added in the 1980s.[169] Placing the right to bear arms on equal footing with life, liberty, and the pursuit of happiness is striking—while it may possibly confer either protection of the right or favor it when it conflicts with another right, whether it *would* do so is unclear.

5. State Legislative Power

Finally, several of the gun-rights amendments ratified in the last fifty years have modified state legislatures' powers to regulate the ownership and use of firearms. At the aggregate level, there has been seemingly little movement. Only Louisiana eliminated its legislature's power to do so outright. Beginning in 1879, the state constitution consistently allowed the passage of laws "to punish those who carry weapons concealed,"[170] but the 2012 rewrite omitted that provision altogether.[171] Only North Carolina has *added* such a power, which its 1971 Constitution did.[172] Of the states that have added a right to bear arms to their constitution, none has granted their legislature the power to ban concealed weapons or to regulate the exercise of the right to bear arms. *Some* legislative power surely exists to define "lawful" hunting or recreation, as well as other "lawful" uses,[173] but it is difficult to tell how significant that power is.

More significant movement has taken place in Idaho, Missouri, and Utah, where each state legislature still has the power to regulate firearms

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167. *See* José L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENV'T L. REV. 333, 353–54 (1993) ("[I]f a provision creates a right that can be enforced through traditional judicial means, it may be found self-executing despite the lack of a stated remedy or enforcing procedure.").

168. KY. CONST. § 1 (1890); NEB. CONST. art. I, § 1 (amended 1988); N.D. CONST. art. I, § 1 (amended 1984).

169. *See* KY. CONST. § 1 (1890); NEB. CONST. art. I, § 1 (amended 1988); N.D. CONST. art. 1, § 1 (amended 1984).

170. LA. CONST. of 1879, art. 3; LA. CONST. of 1898, art. 8; LA. CONST. of 1913, art. 8; LA. CONST. of 1921, art. I, § 8; LA. CONST. art. I, § 11 (amended 1974).

171. LA. CONST. art. I, § 11 (amended 2012).

172. N.C. CONST. art. I, § 30 (amended 1971) ("Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.").

173. *See supra* Section I.A.

possession—but in far more limited cases than older provisions allowed. Prior to the more recent amendments, the legislatures in Idaho and Utah were empowered to "regulate the exercise of th[e] right [to bear arms] by law,"[174] and the Missouri state legislature could ban concealed weapons.[175] These general powers were watered down significantly, but in materially different ways.

In Idaho, the general power to "regulate the exercise" of keeping and bearing arms was replaced by the power to prohibit the concealed carrying of weapons, impose greater sentences for crimes committed with firearms, ban those convicted of felonies from owning firearms, and specify unlawful uses of firearms.[176] The legislature still enjoys broad power under the 1978 amendment, but the specified list of powers presumably excludes anything beyond that.[177] The specific power in Missouri to bar the carrying of concealed weapons was eliminated altogether, and replaced with a different power to bar those convicted of felonies or who are mentally unwell from owning or possessing firearms.[178] And in Utah, the broad power to "regulate the exercise" of keeping and bearing arms was replaced by a narrower power to "defin[e] the lawful use of arms."[179]

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174. IDAHO CONST. art. I, § 11 (adopted 1889); UTAH CONST. art. I, § 6 (adopted 1895). There was no recorded discussion of the right to bear arms at the 1892 Utah constitutional convention. UTAH CONST. CONVENTION, OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MARCH, 1895, TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH 257 (Salt Lake City, Star Printing Co. 1898) ("The secretary then read section 6 [the right to bear arms], which was adopted without amendment."). The delegates' discussion of their proposed bill of rights frequently revolved around what the Idaho Constitution said. *See id.* at 252–53 (discussing Idaho Constitution in debate over suspension of habeas corpus).

175. MO. CONST. art. I, § 23 (adopted 1945) ("[T]his shall not justify the wearing of concealed weapons.").

176. IDAHO CONST. art. I, § 11 (amended 1978).

177. Idaho Press Club, Inc. v. State Legislature, 132 P.3d 397, 400 (Idaho 2006) ("[T]he rule of construction *expressio unius est exclusio alterius* applies to provisions of the Idaho Constitution that expressly limit power, but it does not apply to provisions that merely enumerate powers."(citations omitted)).

178. MO. CONST. art. I, § 23 (amended 2014).

179. UTAH CONST. art. I, § 6 (amended 1984). Jefferson Fordham, the late former dean of the University of Utah S.J. Quinney College of Law, authored the rebuttal statement against the 1984 amendment and specifically criticized the removal of the legislature's regulatory power, noting, "It would be no less than foolhardy to deny the representatives of the people adequate authority to protect the citizenry generally against the misuse of deadly weapons." Jefferson B. Fordham, *Arguments Against*, *in* DAVID S. MONSON, UTAH INFORMATION VOTER PAMPHLET: GENERAL ELECTION, NOVEMBER 6, 1984 29, 29 (1984).

B. The Intent

The amendments discussed in this Part are best understood as accomplishing two distinct goals (and sometimes both at the same time): (1) responding to real or imagined regulations on gun ownership and (2) nullifying unfavorable judicial decisions and entrenching favorable ones. I discuss each in turn.

1. Responses to Local Gun Regulations

Many state constitutional amendments that created or strengthened the right to bear arms were placed on the ballot during the aftermath of a national campaign to ban handguns[180]—during which time, localities around the country undertook high-profile, frequently successful efforts to prohibit or severely limit the ownership of handguns.[181] One of the earliest such examples was a city ordinance in Las Vegas, New Mexico, which prohibited anyone from "carry[ing] deadly weapons, concealed or otherwise, on or about their persons" within city limits.[182] In 1971, the New Mexico Court of Appeals struck down the restriction under the state constitution, concluding that the ordinance "den[ied] the people the constitutionally guaranteed right to bear arms."[183] As the case was being decided by the court, the state legislature also moved to replace the right to bear arms in the state constitution. The legislature overwhelmingly voted to replace the existing language—which merely granted the people "the right to bear arms"—with a stronger statement providing that "[n]o law shall abridge the right of the citizen to keep and bear arms."[184] The sponsor of the amendment noted that his goal was to "protect the right to bear arms" because of "several recent attempts to restrain that right."[185]

The most prominent example of a local ordinance motivating subsequent state constitutional change—and *nationwide*, at that—took place in Morton Grove, Illinois. In 1981, the Morton Grove Village Council voted to ban

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180. Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 FORDHAM L. REV. 681, 690–93 (2004).

181. *Id.* at 703–05; Rachel Simon, *The Firearm Preemption Phenomenon*, 43 CARDOZO L. REV. 1441, 1464–65 (2022).

182. City of Las Vegas v. Moberg, 485 P.2d 737, 738 (N.M. Ct. App. 1971) (quoting ordinance).

183. *Id.*

184. *Compare* N.M. CONST. art. II, § 6 (1910), *with* N.M. CONST. art. II, § 6 (amended 1971).

185. *House Passes Proposal on Right to Bear Arms*, ALBUQUERQUE J., Feb. 12, 1971, at B-12.

handguns.[186] Nearby communities in suburban Chicago followed suit, but Morton Grove, in particular, became a rallying cry for gun rights advocates.[187] After challenges to Morton Grove's handgun ban were rejected on Second Amendment grounds by federal courts[188] and on state constitutional grounds by the Illinois Supreme Court,[189] public debate over gun control restrictions involved references to "Morton Grove" even more frequently.

During the 1980s, voters in eight states ratified constitutional amendments that added or strengthened their right to bear arms.[190] In most of these states, the messaging in support of the amendment expressly revolved around fears of Morton Grove-type handgun bans coming to their states.[191] The New Mexico legislature proposed another modification to its state constitution's right to bear arms in 1985 that expressly prohibited any "municipality or county" from "regulat[ing], in any form, an incident of the right to keep and bear arms."[192] Though the amendment was derided by one newspaper editorial as "a popularity poll for the National Rifle Association,"[193] the legislative sponsor focused his attention on the prospect of onerous local

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186. Goss, *supra* note 180, at 703–04. For a contemporaneous discussion of gun control in local governments authored by the Morton Grove village attorney, see generally Martin C. Ashman, *Handgun Control by Local Government*, 10 N. KY. L. REV. 97 (1982).

187. Nathaniel Sheppard Jr., *Illinois Town Faces Lawsuit After Limiting Pistol Use*, N.Y. TIMES (July 4, 1981), https://www.nytimes.com/1981/07/04/us/illinois-town-faces-lawsuit-after-limiting-pistol-use.html ("'We are focusing our attention on Morton Grove,' [NRA spokesman John] Adkins said, 'because their actions exemplify what we believe is the first step toward banning all gun possession.'"); *see also* Goss, *supra* note 180, at 704–06 (summarizing advocacy campaign by the National Rifle Association and related groups).

188. Quilici v. Village of Morton Grove, 695 F.2d 261, 271 (7th Cir. 1982) ("Because the second amendment is not applicable to Morton Grove and because possession of handguns by individuals is not part of the right to keep and bear arms, Ordinance No. 81-11 does not violate the second amendment.").

189. Kalodimos v. Village of Morton Grove, 470 N.E.2d 266, 272–73 (Ill. 1984) ("[I]t is apparent to us that section 22, as submitted to the voters, meant that a ban on all firearms that an individual citizen might use would not be permissible, but a ban on discrete categories of firearms, such as handguns, would be. . . . [W]e conclude . . . that a reasonable prohibition of handguns is constitutional in this State.").

190. *See supra* note 143 and accompanying text.

191. Henry J. Cordes, *Petition Organizers Says Owning Guns Basic Right*, OMAHA WORLD-HERALD, July 3, 1988, at B-1; Dan Vukelich, *Gunfight: Legislators Divided over Ban on Local Gun Laws*, ALBUQUERQUE TRIB., Mar. 6, 1985, at A-1; Kevin Whalen, *Measure 3 Proponents Don't Expect Any Problems*, BISMARCK TRIB., Nov. 4, 1984, at B1; James W. McNeely, *The Right of Who to Bear What, When, and Where—West Virginia's Firearms Law v. The Right-to-Bear-Arms Amendment*, 89 W. VA. L. REV. 1125, 1179 (1987) (quoting advertisement by United Sportsmen of West Virginia).

192. N.M. CONST. art. II, § 6 (amended 1986).

193. Editorial, *Amendments*, TAOS NEWS, Oct. 30, 1986, at A4.

restrictions. "I don't want any Morton Groves in New Mexico," he said.[194] Similarly, in 1988, an NRA-backed campaign successfully placed a voter-initiated constitutional amendment on the ballot in Nebraska,[195] which up to that point had no express protection of the right to bear arms in its constitution.[196] In arguing for the amendment, the NRA's state field representative argued that "[a]ny city, county or subdivision in Nebraska could pass a Morton Grove,"[197] a sentiment similar to one from several years earlier, when legislators attempted to place a gun-rights measure on the ballot.[198]

Finally, in Wisconsin, voters approved a 1998 constitutional amendment that added a right to bear arms to the state constitution for the first time—motivated in large part by handgun bans or restrictions in cities across the state, the most prominent of which was an outright ban adopted in Madison.[199] When control of the state legislature flipped to Republicans in 1994,[200] they quickly enacted legislation that preempted most of the power of counties and municipalities to adopt gun control measures.[201] In the same session, the majority also advanced a constitutional amendment to expressly recognize

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194. Vukelich, *supra* note 191, at A-1.

195. Kathleen Rutledge, *Voters Warned to Read Fine Print of Arms Initiative*, LINCOLN J. STAR, Nov. 3, 1988, at 1 ("The proposed constitutional amendment, Initiative 403, was placed on the ballot by petition drive. It is supported by the National Rifle Association, the sole reported contributor to the campaign for the amendment.").

196. NEB. CONST. of 1866, art. I (no such right in the bill of rights); NEB. CONST. of 1875, art. I (same); NEB. CONST. art. I (adopted 1920) (same).

197. Cordes, *supra* note 191, at B-10.

198. SUSAN GILLEN, NEB. LEGIS. COUNCIL, RIGHT TO BEAR ARMS 7 (1988) ("From the legislative record of LR311CA and from statements elicited from the pro-gun lobby, it appears that Initiative No. 403 was drafted broadly to ensure maximum defense to anti-gun legislation of the type enacted in Morton Grove.").

199. *See* WIS. LEGIS. REFERENCE BUREAU, INFO. BULL. 96-6, WISCONSIN FIREARMS LAWS AND THE GUN CONTROL DEBATE 24 (1996) (noting the adoption of "ordinances in Eau Claire, Green Bay, La Crosse, Madison, Milwaukee, Racine, Sheboygan, Stevens Point, Superior, and Wausau"); Jeffrey Monks, *The End of Gun Control or Protection Against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms on State Gun Control Laws*, 2001 WIS. L. REV. 249, 288 (noting that then-Assembly Speaker David Prosser supported the amendment because "a constitutional amendment could prevent places like the city of Madison from passing the types of ordinances it has enacted in the past"); Johnson, *supra* note 67, at 726–28 (noting that "[t]he Madison-style restrictions touched off a firestorm of opposition" and featured prominently in Wisconsin's 1994 state legislative elections).

200. Richard Eggleston, *GOP Controls Legislature*, GREEN BAY PRESS-GAZETTE, Nov. 9, 1994, at B-1.

201. Act of Nov. 16, 1995, 1995 Wis. Legis. Serv. Act 72 (codified as amended at WIS. STAT. § 66.0409) (barring municipalities from enacting ordinances regarding the purchase, use, registration, or transfer of firearms "unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute").

"the right to keep and bear arms," which voters overwhelmingly approved in 1998.[202]

2. Nullifying and Entrenching Judicial Decisions

While most state supreme courts recognized some form of an individual right to keep and bear arms and more than occasionally struck down gun regulations that infringed on that right, not all did—and certainly not all did to the satisfaction of gun rights advocates. Prior to *Heller* and *McDonald*, two state supreme court decisions generated enough dissatisfaction to motivate constitutional change. In 1974, the Utah Supreme Court upheld the constitutionality of a statute that prohibited gun ownership on the basis of citizenship, narcotics addiction, a conviction for a "crime of violence," or declaration of mental incompetence,[203] which prompted a successful constitutional amendment ten years later.[204] And in Maine, after the Supreme Judicial Court held in 1986 that the state constitutional right to bear arms was functionally a collective right,[205] the legislature immediately moved to strike the specified purpose—"for the common defense"[206]—from the state constitution. Voters ratified the amendment the next year.[207]

States began making similar moves almost immediately after the U.S. Supreme Court decided *Heller*. But at that point, the goal was to ensure that any change in the composition of the Court would not erode the individual rights established in *Heller*.[208] In 2009, the Kansas Legislature placed a constitutional amendment on the 2010 ballot that established, for the first

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202. WIS. CONST. art. I, § 25 (amended 1998). Wisconsin requires that constitutional amendments be approved at two successive legislative sessions by a majority vote of both houses. *Id.* art. XII, § 1. Accordingly, after the original passage of the proposed amendment in 1995, the legislature passed the measure again in 1997. *Right to Bear Arms Wins Backing*, OSHKOSH NW., Jan. 29, 1997, at A5.

203. State v. Beorchia, 530 P.2d 813, 814–15 (Utah 1974) ("It is quite evident from the language [in Article I, Section 6, of the Utah Constitution] that the Legislature had sufficient power to enact the statute in question.").

204. UTAH CONST. art. 1, § 6 (amended 1984).

205. State v. Friel, 508 A.2d 123, 125 (Me. 1986) ("The right declared by section 16 is limited by its purpose: the arms made be kept and borne 'for the common defense.'" (quoting ME. CONST. art. I, § 16).

206. ME. CONST. art. I, § 16 (1819).

207. *Amendments to the Maine Constitution, 1820–Present*, ME. ST. LEGIS., https://www.maine.gov/legis/lawlib/lldl/constitutionalamendments [https://perma.cc/53TW-6L56].

208. *See* Lockette, *supra* note 24, at 8A.

time, an express recognition of an individual right to bear arms.[209] In doing so, the legislature essentially proposed overruling the state supreme court's decision in *City of Salina v. Blaksley*, decided over a century earlier, which interpreted the existing constitutional text as conferring a collective right.[210] The debate over the constitutional amendment, as recorded in the state legislative journals, was remarkably specific in showing the majority's desire to overturn the ruling in *Blaksley*, even as several state senators confessed their previous ignorance of the century-old decision.[211] Similarly, as noted earlier, the Iowa Legislature added a right to bear arms in a similar context. After Republicans won total control of the state government in 2016,[212] they quickly moved to add an individual right to bear arms to the state constitution for the first time in state history.[213]

Legislators in the three other states that adopted more protective versions of their rights to bear arms after *Heller* and *McDonald*—Alabama, Louisiana, and Missouri—cited, as Kansas and Iowa lawmakers did, a fear of jurisprudential change at the U.S. Supreme Court as their primary motivation.[214] However, they also went *further* than the Court did. As discussed in Section II.A, the legislatures in Alabama, Iowa, Louisiana, and Missouri proposed amendments that recognized the right to bear arms as "fundamental" and required that all restrictions on the right be evaluated under strict scrutiny.[215] All of these amendments were backed by the NRA, which argued that "state and federal judges have relegated gun rights to 'second class' status, and so the time has come for state legislators and voters

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209. S. Con. Res. 1611, ch. 152, 83d Leg., 1st Reg. Sess., 2009 Kan. Sess. Laws 1640.

210. 83 P. 619, 619–21 (Kan. 1905).

211. *See* S. JOURNAL, 83d Leg., 1st Reg. Sess. 481 (Kan. 2009) (statement of Sen. Tim Huelskamp, concurred with by Sens. Abrams, Lynn, Ostmeyer, and Petersen) ("[N]ow we learn that the Kansas Supreme Court, in a unanimous decision more than 100 years ago, ruled there are no individual rights to gun ownership in the Kansas Constitution.").

212. *See* James Q. Lynch, *Senate Democratic Leader Rob Hogg Hopes to Prevent GOP Dismantling of State Government*, GAZETTE (Nov. 21, 2016), https://www.thegazette.com/news/senate-democratic-leader-rob-hogg-hopes-to-prevent-gop-dismantling-of-state-government [https://perma.cc/SG7M-FS6R] (noting that Republicans won control of the Iowa Senate in 2016, giving them control over the state legislature and governorship).

213. *See supra* notes 27–31 and accompanying text.

214. Lockette, *supra* note 24, at 1A ("'If a new interpretation of the Second Amendment is released by the Supreme Court, those residing in Alabama would be subject to the protections in Alabama law,' said Michael Sullivan, the Alabama lobbyist for the National Rifle Association."); Alex Stuckey, *Law Enforcement Concerned About Effect of Gun Plan*, ST. LOUIS POST-DISPATCH, July 28, 2014, at A1 ("[State Senator Kurt] Schaefer said the state's constitution needed to be updated in light of" *Heller* and *McDonald*").

215. *See supra* Section II.A.4.

to take decisive action."[216] The legislators themselves largely avoided any suggestion that they were changing the law, however, and instead claimed that they were merely adopting the U.S. Supreme Court's standard.[217] Regardless of what the true intent was, however, the amendments adopted could bring substantial changes to how state-level rights to bear arms are treated.

III. THE FUTURE OF STATE RIGHTS TO BEAR ARMS

In the last half-century, state electorates have ratified significant expansions or modifications of the right to bear arms.[218] Yet so far, these new rights have accomplished almost nothing. There has been no discernible increase in the number of lawsuits that rely on state constitutional rights and most state restrictions on firearms have been upheld under the new state standards.[219] The formal shift to strict scrutiny—perhaps the most significant change effected by these amendments—certainly does not automatically require that *any* infringement on the right be struck down.[220] (And the states that have shifted to strict scrutiny have little in the way of restrictive guns laws as it is.).[221]

Moreover, after *Heller* and *McDonald*, litigants have had good reason to push the Court to apply the tests it has laid out and establish nationwide rules recognizing a broad right to bear arms. Success at the national level obviously applies *everywhere*, while success in a single state may have limited spillover.[222] Given the success that litigants have had in these efforts,

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216. Pettys, *supra* note 19, at 1465–66 (summarizing NRA arguments).

217. *See, e.g.*, Stuckey, *supra* note 214, at A1 (noting that State Senator Kurt Schaefer, the sponsor of Missouri's 2014 constitutional amendment, "said the amendment . . . merely would align Missouri's constitution with the U.S. Constitution").

218. *See supra* Section II.A.

219. Monea, *supra* note 42, at 386–87 ("The National Rifle Association—not renowned for passing up pro-gun arguments—has dozens of cases currently in litigation. Virtually none mention a state constitutional argument in their official summaries."). In the most recent example, a challenge to New Mexico Governor Michelle Lujan Grisham's 2023 executive order declaring a public health emergency "due to gun violence" primarily relied on a separation-of-powers argument, not the Second Amendment or the New Mexico Constitution's right to bear arms. Amdor v. Grisham, No. S-1-SC-40105, 2025 N.M. LEXIS 26, at *11–12 (N.M. Mar. 6, 2025).

220. Pettys, *supra* note 19, at 1470–75.

221. *See id.* at 1456–57.

222. Federal law takes precedence over state law, *see generally* U.S. CONST. art. VI, cl. 2, meaning that federal constitutional litigation has national effects, but state constitutional litigation provides persuasive authority at best.

especially after *Bruen*,[223] why change the strategy and turn to the states[224]—especially when state courts haven't jumped at the chance to broadly interpret these new rights to bear arms?[225]

However, it seems unlikely that the federal judiciary will remain the near-exclusive home of gun control litigation for much longer. Whatever the long-term effects of *Bruen* end up being, the Court's subsequent clarification of the test in *Rahimi* reduces the odds that the judiciary will totally decimate noncontroversial and politically popular regulations of the right to bear arms. As such, as the federal courts adjudicate challenges to these laws, and swat away the more frivolous ones, it seems that attention will focus on the states.

Simultaneously, as state legislators recognize the potential of state-level rights to bear arms, both as tools of policymaking *and* as means of potentially juicing turnout among conservative voters[226] and placating their base,[227] more amendments will likely appear on ballots across the country. Moreover, the increased politicization of state judicial selection processes, the concordant rise of movement jurists, and the adoption of far-right legal theories by state court judges means that, as these amendments are ratified, they will be interpreted and applied by an increasingly sympathetic bench.[228]

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223. Charles, *supra* note 26, at 122–45 (surveying post-*Bruen* litigation from 2022 to 2023).

224. *Cf.* Yeargain, *supra* note 4 (arguing for parallel state constitutional litigation alongside federal constitutional litigation in the context of trans rights).

225. Monea, *supra* note 42, at 423–33 (surveying post-*Heller*/*McDonald* litigation in state courts); *see also* Gardner, *supra* note 44, at 764–66 (summarizing practical difficulties of developing state constitutional arguments given the "poverty of state constitutional discourse").

226. There is some evidence to suggest that "[b]allot propositions may increase voter turnout by transforming low information midterm elections into high information elections, and adding additional information to already high information presidential elections." Caroline J. Tolbert et al., *The Effects of Ballot Initiatives on Voter Turnout in the American States*, 29 AM. POL. RSCH. 625, 644 (2001). However, one of the most prominent efforts to use a ballot measure to increase voter turnout—in 2004, with the use of marriage equality bans to motivate turnout among socially conservative voters for George W. Bush—yielded inconclusive results. Daniel A. Smith et al., *Same-Sex Marriage Ballot Measures and the 2004 Presidential Election*, 38 ST. & LOC. GOV'T REV. 78, 88 (2006); David E. Campbell & J. Quin Monson, *The Religion Card: Gay Marriage and the 2004 Presidential Election*, 72 PUB. OP. Q. 399, 413–14 (2008) (concluding that "Bush turned out more evangelicals" in states with marriage equality bans, but that conservative "secularists were more likely to abstain").

227. *See, e.g.*, Editorial, *The Legislature That Can't Shoot Straight: Court Should Save Missourians from Poorly Worded Gun Amendment*, ST. LOUIS POST-DISPATCH, June 29, 2014, at A16 (arguing that Missouri Republicans' proposed constitutional amendment was proposed "to win favor with a small sliver of their voting base").

228. *See* Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. 2149, 2184–88 (2024) (discussing "movement jurists" in the context of abortion litigation).

While these outcomes are possible, they are certainly not guaranteed. And in most states, such a sprawling interpretation would run counter to the expressed intent of the state legislators who proposed such measures and the apparent intent of the voters who ratified them. The available evidence of intent suggests that, while legislators intended to strengthen their states' rights to bear arms, the proposed changes were tethered to anxieties about jurisprudential changes at the U.S. Supreme Court and a desire to freeze the status quo.[229] Indeed, many legislators expressly disclaimed that they were proposing substantial changes. If voters ratified these amendments with that framing in mind, an inconsistent interpretation would stymy voter intent.[230]

In this Part, I develop each of these arguments. In Section III.A, I argue that, despite the negligible effect of these amendments so far, more are likely on the horizon—both as means of further entrenching the status quo of the Second Amendment in state courts and to motivate turnout among right-leaning voters. Then, in Section III.B, I suggest several reasons to expect that state courts might be more inclined to broadly interpret these rights than they have been yet. In the past decade, national attention has increasingly focused on state courts, and the legal right and left are both prioritizing state-level judicial selection more than they have in the past. The changes taking place here are currently asymmetric, however. A burgeoning far-right legal movement, facilitated by significant changes to how judges are appointed, is increasingly influencing state courts. Given the centrality of gun rights to right-wing extremism, both domestically and abroad, it seems likely that judges who are ideologically sympathetic to gun rights would take up the textual changes to state constitutions and interpret them expansively.

In Section III.C, however, I argue that an overly broad reading of state constitutional rights to bear arms would be counter to the legislative intent, and the apparent intent of voters, behind the amendments themselves. Given the extent to which legislators played down the purpose and effect of their proposed amendments, reading the new provisions too broadly would effectively pull a bait and switch on voters.[231]

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229. *See, e.g.*, Lockette, *supra* note 24.

230. *See* Quinn Yeargain, *The Right to "Health Care Freedom" in State Constitutions*, 93 UMKC L. REV. 749, 772–73 (2025) (quoting an advocate discussing the potential for stymying voter intent because when voters read their ballots, "they're reading the language, [and] they're deciding whether they agree with [that] language" based on what it means to them at that time).

231. Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 19–20 (describing "the bait-and-switch in direct democracy"); *see also* William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1806–07 (2021).

A. The Likelihood of More Amendments

The turn to state constitutions during the Burger Court focused new attention on how state-level rights could be applied differently than the federal Bill of Rights, but these new applications largely came from judicial interpretations, not formal constitutional amendments.[232] Instead, state constitutional amendments were frequently part of a back-and-forth dialogue between courts and electorates.[233] As state courts interpreted state constitutional protections more broadly than the U.S. Supreme Court, legislatures and voters sometimes reacted by changing the text of state constitutions themselves to preclude such interpretations.[234]

However, rights development in the late twentieth and early twenty-first century went far beyond mere reactions to disfavored judicial decisions. Rights have become a growing focus of state constitutional change.[235] Many of these changes have been rights-*restricting*, most notably in the contexts of criminal procedure[236] and sexual freedom,[237] but new rights (or new *conceptions* of rights) have also been established, too. Across the country, states have established robust protections of the rights to free exercise of

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232. Donald E. Wilkes Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223, 227–28 (1984).

233. *See id.* at 232–35.

234. James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43, 77–80 (1983); Wilkes, *supra* note 232, at 232–35.

235. Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 918–29 (2022).

236. For example, in the last half-century, the state constitutional right to bail has been significantly pared back. Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 956–67 (2013); Ariana Lindermayer, *What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail*, 78 FORDHAM L. REV. 267, 290 (2009).

237. Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1746–53 (2013); *see* Leonore F. Carpenter & Ellie Margolis, *One Sequin at a Time: Lessons on State Constitutions and Incremental Change from the Campaign for Marriage Equality*, 75 N.Y.U. ANN. SURV. AM. L. 255, 266 (2020).

religion,[238] property rights,[239] privacy,[240] and "healthcare freedom."[241] The right to vote has been expanded by some states (for example, to expand the franchise to those convicted of felonies[242]) and contracted by others (by limiting the right to vote to "only citizens"[243]). In some cases, the creation of a new right triggers, perhaps intentionally, a conflict with another existing right.[244]

Rights have also been increasingly used as tools of policymaking. The rights to hunt and fish, though discussed earlier as possibly affecting the right to bear arms,[245] might also alter state regulatory power.[246] So, too, might environmental rights or the Maine Constitution's "right to food."[247] Rights to information or access may end up forcing greater government transparency.[248] The ease of establishing a labor union has long been limited

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238. *See, e.g.*, ALA. CONST. art. I, § 3.01 (Alabama Religious Freedom Amendment); LA. CONST. art. XII, § 17(A) ("freedom to worship in a church or other place of worship"); TEX. CONST. art. I, § 6-a (barring state from "prohibit[ing] or limit[ing] religious services"); Thomas C. Berg & Frank Myers, *The Alabama Religious Freedom Amendment: An Interpretative Guide*, 31 CUMB. L. REV. 47, 55–62 (2000) (describing Alabama Religious Freedom Amendment). *See generally* Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353, 366–70 (2004) (discussing state constitutional protections of the freedom of religion).

239. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2105 (2009) (discussing post-*Kelo* state constitutional amendments); Anthony B. Sanders, *The "New Judicial Federalism" Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 AM. U. L. REV. 457, 487–96 (2005).

240. Dinan, *supra* note 3, at 34–35.

241. Yeargain, *supra* note 230, at 755–58.

242. Manoj Mate, *Felony Disenfranchisement and Voting Rights Restoration in the States*, 22 NEV. L.J. 967, 988–89 (2022).

243. *See, e.g.*, Joshua A. Douglas, *State Constitutions and Youth Voting Rights*, 74 RUTGERS U. L. REV. 1729, 1736–37 (2022).

244. CLIFFORD BOB, RIGHTS AS WEAPONS: INSTRUMENTS OF CONFLICT, TOOLS OF POWER 56–58 (2019) ("[O]pponents of the original rights movement find it beneficial to fight right with right—and often with might. In doing so, they do not portray their claims as fresh stratagems to defend against the new rights movement. Rather, they armor them in the mail of tradition, a defense of time-tested if newly burnished rights.").

245. *See supra* Section II.A.2.

246. *See* Usman, supra note 150, at 88–90.

247. Sam Bookman, *Defensive Environmental Constitutionalism: American Possibilities*, 26 U. PA. J. CONST. L. 1284, 1291–97 (2024); Rebecca Bratspies, *Administering Environmental Justice: How New York's Environmental Rights Amendment Could Transform Business as Usual*, 41 PACE ENV'T L. REV. 100, 110–11 (2024); John C. Dernbach & Robert B. McKinstry, Jr., *Agency Statutory Authority and the Pennsylvania Environmental Rights Amendment*, 37 GEO. ENV'T L. REV. 1, 23–45 (2024).

248. Constance Van Kley, *A Unique Check on Government Power: Reconceptualizing the Right to Know as a Democracy-Promoting Provision*, 84 MONT. L. REV. 95, 105–06 (2023).

by the "right to work"—certainly not a *new* right in state constitutional parlance, given that it has been around for decades[249]—and more recently by a right to vote in *all* elections, including labor elections, by "secret ballot."[250]

The centrality of new types and invocations of rights to state constitutional development might be a more recent development, but it does not look likely to disappear anytime soon. What's more, rights-based amendments are seen (correctly or incorrectly) as tools to drive voter turnout, in large part because of how they relate to broader political debates.[251] Given voter ignorance of their own state constitutions and systems of government,[252] the legal effects of a modification to the constitution may not always be clear. A proposed state constitutional amendment to restrict the right to vote to "only citizens," for example, raises the specter of non-citizen voting and voter fraud, perhaps motivating conservative voter turnout[253]—despite the fact that virtually all states restrict voting to citizens anyway.[254] Likewise, an amendment proposing a right to hunt, fish, or farm could raise a concern for voters that these activities are not *already* protected, and thus vulnerable to erosion by animal-rights activists or environmentalists.[255]

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249. *See, e.g.*, ALA. CONST. art. I, § 36.05; FLA. CONST. art. I, § 6; MISS. CONST. art. VII, § 198A.

250. *See, e.g.*, ALA. CONST. art. VIII, § 177(C) (establishing that "[t]he Legislature shall by law provide for . . . secrecy in voting"); ARIZ. CONST. art. II, § 37 ("The right to vote by secret ballot for employee representation is fundamental and shall be guaranteed where local, state or federal law permits or requires elections, designations or authorizations for employee representation.").

251. For example, some political analysts argued that ballot initiatives regarding same-sex marriage increased voter turnout during the 2004 presidential election. *See, e.g.*, James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES (Nov. 4, 2004), https://www.nytimes.com/2004/11/04/politics/campaign/samesex-marriage-issue-key-to-some-gop-races.html.

252. TARR, *supra* note 1, at 2 n.4 (discussing poll results of voter awareness of their state constitution's existence); Steven Rogers, *What Americans Know About Statehouse Democracy*, 23 STATE POL. & POL'Y Q. 420, 428–30, 439 (2023) (discussing poll results of voter knowledge of their state systems of government and concluding that Americans are "least knowledgeable about the rules of the game governing state officials, particularly relative to their understanding of whether the same rules govern federal officials").

253. *E.g.*, Anna Spoerre, *GOP Senator Urges Missouri House to Reinstate 'Ballot Candy' into Initiative Petition Bill*, MO. INDEP. (Mar. 13, 2024), https://missouriindependent.com/2024/03/13/missouri-initiative-petition-reform-elections [https://perma.cc/D5WZ-38LT].

254. Sean Morales-Doyle, *Noncitizen Voting Isn't Affecting State or Federal Elections—Here's Why*, BRENNAN CTR. (Apr. 12, 2024), https://www.brennancenter.org/our-work/analysis-opinion/noncitizens-are-not-voting-federal-or-state-elections-heres-why [https://perma.cc/3UMV-4598].

255. NAT'L RIFLE ASS'N, *supra* note 151; Angela Kennedy, *Sustainable Constitutional Growth? The "Right to Farm" and Missouri's Review of Constitutional Amendments*, 81 MO. L.

Many of these rights have not been meaningfully developed. As Jessica Bulman-Pozen and Miriam Seifter have documented, courts have interpreted and applied these rights in a manner that relies too heavily on "methodological lockstepping" with federal approaches to rights-based litigation and too little on state-level histories and unique constitutional contexts, producing "ludicrous rulings."[256] So, too, in the context of the right to bear arms, where the switch to an ostensibly more protective right has, thus far, produced conceptual lockstepping with federal jurisprudence and few concrete litigation outcomes.[257] Yet the negligible development of new state constitutional rights has not stopped legislatures and voters from proposing or ratifying them, respectively.[258]

Accordingly, the limited development of the right to bear arms in the states—at least, independently from the interpretation of the Second Amendment—does not suggest that more amendments are unlikely. The purpose of such an amendment is not just to secure a legal outcome, but also to provide conservative candidates with a wedge issue and a tool to motivate voters.[259] A proposed constitutional amendment would likely be seen favorably by voters, even if they do not fully understand the legal consequences, and could even persuade lower-propensity voters to turn out. Left-leaning candidates for office could face pressure to back such an amendment—thereby further ensuring its passage by creating a permission structure for likeminded voters to also support it—or oppose it and risk being caricatured as opposing the right to bear arms.[260]

A constitutional amendment that was proposed in Oklahoma in 2024 illustrates how far these measures could go. The Oklahoma House of Representatives voted to place a modification to the right to bear arms on the

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REV. 205, 213 (2016) (noting that supporters of the Missouri constitutional amendment to establish a right to farm "claimed . . . that it would protect family farms from out-of-state animal rights groups").

256. Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1881–91 (2023).

257. Monea, *supra* note 42, at 423–33.

258. Bulman-Pozen & Seifter, *supra* note 256, at 1866–69 (detailing new rights).

259. *See* Spoerre, *supra* note 253.

260. *See, e.g.*, Rachel Lippmann & Jo Mannies, *State Supreme Court Upholds Amendment That Broadened Gun Rights in Missouri*, ST. LOUIS PUB. RADIO (July 1, 2015), https://www.kcur.org/2015-07-01/state-supreme-court-upholds-amendment-that-broadened-gun-rights-in-missouri [https://perma.cc/7EHH-5U3H] (noting that Missouri Attorney General Chris Koster, a Democrat, "stuck by" the 2014 right to bear arms amendment, "despite heat he has taken from fellow Democrats," in the leadup to his 2016 gubernatorial campaign).

ballot, though the Senate did not take it up before the session ended.[261] The amendment, if ratified, would have easily been the strongest-worded provision in the country. It established the right to keep and bear arms as "fundamental"; extended the right to include "handguns, rifles, shotguns, knives, nonlethal defensive weapons, and other arms in common use, as well as ammunition and the components of arms and ammunition"; recognized the right as extending to "self-defense, lawful hunting and recreation, . . . [and] any other legitimate purpose"; limited legislative power to "adopting narrowly tailored time, place, and manner regulations . . . [that] serve a compelling state interest"; and barred any law that sought to "impose registration or special taxation upon the keeping of arms including the acquisition, ownership, possession, or transfer of arms, ammunition, or the components of arms or ammunition."[262]

The effect of such an amendment would be unclear—not least because it blends together several different constitutional and legal concepts. Specifically recognizing "other arms in common use" would guarantee that any law regulating any "arm" (a term that is neither defined nor clear in context) would face constant legal challenges. Incorporating "time, place, and manner regulations" borrows from First Amendment jurisprudence, but with uncertain meaning in this context.[263] Yet, as was the case with the strict-scrutiny amendments that ultimately passed, the sponsor of the Oklahoma amendment insisted that it would not imperil restrictions on firearm ownership by those convicted of felonies or that limited carrying firearms in sensitive areas.[264]

If the purpose of these amendments is to serve as a wedge issue, or if drafters hold particularly extreme views, there is less of an incentive to draft them carefully. In such a case, any concerns about how to best balance the contours of an individual right with the state's police powers would be less important than the symbolic value of adopting "tough" language. But

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261. Jennifer Mascia, *Only One State Will Have a Gun-Related Initiative on the Ballot This Fall*, TRACE (Sept. 18, 2024), https://www.thetrace.org/2024/09/gun-policy-ballot-initiative-state [https://perma.cc/GT49-FEW7].

262. H.R.J. Res. 1034, 59th Leg., 2d Sess. § 1 (Okla. 2024).

263. As Saul Cornell has argued, many of the earliest regulations of firearms, which were adopted in the early to mid-eighteenth century, functionally operated as time, place, and manner restrictions, which reflected an understanding that the government possessed regulatory power over firearms. Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL'Y REV. 571, 585–90 (2006).

264. Brodie Myers, *Oklahoma Lawmakers Attempt to Strengthen Gun Rights*, 2 NEWS OKLA. (Mar. 11, 2024), https://kjrh.com/news/local-news/oklahoma-lawmakers-attempt-to-strengthen-gun-rights [https://perma.cc/9VGC-NAU7].

regardless of whether drafters are unthoughtful—much less outright apathetic—about how their language would be interpreted by courts, the words they choose have meaning.

B. More Sympathetic State Judiciaries

Despite having newly framed rights to bear arms at their disposal, state courts have not yet weaponized these rights to strike down restrictions on gun ownership and use.[265] The limited role for state courts in developing state rights to bear arms can be explained, in part, by the comparatively few cases brought before them.[266] Litigants have largely preferred to challenge state laws as violations of the Second Amendment. It is not hard to see why. Despite having substantially clearer textual support for an individual right to bear arms in *state* constitutions, developing a state constitutional argument—especially one that seeks to persuade a court to adopt a different test—takes a substantial amount of work, and all for an uncertain result.[267]

Litigants might reasonably expect that state courts would be more skeptical of their claims when brought under state constitutions. Even judges who are otherwise ideologically sympathetic to a robust recognition of the right to bear arms might balk at some of the more extreme outcomes that challengers have demanded under *Bruen*. For one, originalism looks different in the states,[268] and judges with an originalist bent would, in considering the original public meaning of their state constitution's right to bear arms, be confronted with a lengthy, well-documented history of state-level restrictions on keeping and using firearms.[269]

Additionally, the process by which state court judges reach the bench may have limited, so far, the extent to which extremists could end up on a state supreme court. Though judges in some states are still elected in partisan elections,[270] and even formally nonpartisan elections have been highly

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265. Monea, *supra* note 42, at 427–30.

266. *Id.* at 386–87.

267. *See* Gardner, *supra* note 44, at 764–66.

268. *See, e.g.*, G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 8 n.4 (2011) ("Text and generating history are of course important even to state-constitution interpreters who do not subscribe to originalism.").

269. *See, e.g.*, Cornell & DeDinno, *supra* note 115, at 513–15.

270. Quinn Yeargain, *Your State-by-State Guide to Every State Supreme Court*, BOLTS (Aug. 22, 2023), https://boltsmag.org/whats-on-the-ballot/state-supreme-courts [https://perma.cc/K5KE-6TC7].

politicized for decades,[271] many state supreme court justices still run entirely unopposed or in low-key elections.[272] In states that have established merit-based appointment systems, governors are deprived of the ability to select *whomever* they want—subject to the frequently illusory advice and consent of state senates—and must instead stick to a slate of candidates selected by a politically balanced nominating commission.[273]

But if these processes have worked to keep extremists off the bench so far, they are degrading before our eyes. Much of the interest in state supreme court elections has been from advocacy groups concerned about discrete issues—in the 1980s and 1990s, the death penalty; in the 1990s and 2000s, tort reform[274]—but in the last decade, the national parties have seen control of state courts as part of the process of winning and holding onto power.[275] As such, they have paid greater attention to these elections.[276] State politicians, too, have campaigned to oust the judges who have ruled against

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271. Aaron Weinschenk et al., *Have State Supreme Court Elections Nationalized?*, 41 JUST. SYS. J. 313, 320 ("In both partisan and nonpartisan elections, there is a statistically significant relationship between Democratic presidential vote share and Democratic state supreme court vote share even after controlling for incumbency."); *see also* Jane S. Schacter, *Polarization, Nationalization, and the Constitutional Politics of Recent State Supreme Court Elections*, 2022 WIS. L. REV. 1310, 1320–30.

272. Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 464–66 (2010).

273. *See, e.g.*, ARIZ. CONST. art. VI, §§ 36–37 (creating "nonpartisan commission on appellate court appointments" and obligating the governor to select from a list of "not less than three persons nominated by [the commission] to fill such vacancy," with a partisan balance requirement in the slate of nominees).

274. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 49–50 (2003) (discussing public policy issues and individual judicial decisions that have precipitated "[c]oncerted campaigns to defeat judges up for reelection or retention election"); Barbara J. Pariente & F. James Robinson, Jr., *A New Era for Judicial Retention Elections: The Rise of and Defense Against Unfair Political Attacks*, 68 FLA. L. REV. 1529, 1545–60 (2016) (describing campaigns in Florida, Iowa, Kansas, and Tennessee).

275. DOUGLAS KEITH & ERIC VELASCO, BRENNAN CTR. FOR JUST., THE POLITICS OF JUDICIAL ELECTIONS, 2019–20, at 4–5 (2022), https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2019-20 [https://perma.cc/5QM5-RWAD] (noting that political parties and issue groups have been more invested in state supreme court elections because of a growing state court role in redistricting "and the newly strengthened conservative majority on the U.S. Supreme Court, which makes it more likely that progressive groups will try to avoid federal courts").

276. Nick Corasaniti, *The Quiet Way Democrats Hope to Expand Their Power at the State Level*, N.Y. TIMES (Feb. 20, 2024), https://www.nytimes.com/2024/02/20/us/politics/democrats-judges-states.html; Andrea Bernstein & Andy Kroll, *Trump's Court Whisperer Had a State Judicial Strategy. Its Full Extent Only Became Clear Years Later.*, PROPUBLICA (Oct. 23, 2023), https://www.propublica.org/article/leonard-leo-wisconsin-documents-state-courts-republicans-judges [https://perma.cc/S7CF-M93W].

them,[277] to restructure existing court systems,[278] or to pack state appellate courts.[279] One of the most recent successes in that respect took place in Texas in 2024, where embattled Attorney General Ken Paxton urged the defeat of three incumbent members of the Texas Court of Criminal Appeals in the Republican primary[280] after the court limited his office's power to prosecute election offenses.[281] All of the judges targeted by Paxton and his allies lost renomination.[282]

Nonpartisan, ostensibly merit-based, judicial selection has not been safe from political machinations, either. In several states, nominating commissions have been formally weakened to enhance executive power[283] or successfully gamed by governors to informally increase their autonomy.[284] In

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277. Jan Biles, *State Supreme Court Justices Stave Off Ousting Campaign*, TOPEKA CAP. J. (Nov. 4, 2014), https://www.cjonline.com/story/news/politics/elections/2014/11/05/state-supreme-court-justices-stave-ousting-campaign/16650103007 [https://perma.cc/6TQ3-DXHB] (describing support of Kansas Governor Sam Brownback for anti-retention campaign for state supreme court justices appointed by Democratic governor).

278. Jane Musgrave, *Split the Florida Supreme Court? Republican Lawmakers Say It Would Speed Up Justice*, PALM BEACH POST (Mar. 20, 2011), https://www.palmbeachpost.com/story/news/2011/03/20/split-florida-supreme-court-republican/7587617007 [https://perma.cc/PR46-EHYX] (describing Republican-backed effort to split the Florida Supreme Court into two separate courts of last resort).

279. Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121, 1135–45 (2020).

280. William Melhado, *Ken Paxton Successfully Ousts Three Republican Criminal Appeal Court Judges*, TEX. TRIB. (Mar. 6, 2024), https://www.texastribune.org/2024/03/05/texas-court-of-criminal-appeals-republican-primary [https://perma.cc/AAZ6-ACVZ]; HOBBY SCH. PUB. AFFS., UNIV. HOUS., TEXAS PRIMARY ELECTION 2024: INFLUENCES IN STATE HOUSE REPUBLICAN PRIMARY RACES 14 (Feb. 2024), https://uh.edu/hobby/txprimary2024/republican.pdf [https://perma.cc/5BAS-38D7] (reporting results of a poll showing that "60% of likely Republican primary voters would be less likely to vote for an incumbent Texas Court of Criminal Appeals (CCA) judge who voted in 2021 to strike down the Texas Attorney General's ability to unilaterally prosecute voter fraud").

281. State v. Stephens, 663 S.W.3d 45, 57–58 (Tex. Ct. Crim. App. 2021).

282. Melhado, *supra* note 280.

283. Act of July 1, 2023, ch. 210, 2023 Idaho Laws (codified at IDAHO CODE § 1-2101 (2023)); Act of May 8, 2019, ch. 89, Iowa Legis. Serv. (codified at IOWA CODE § 46.1 (2019)); S.B. 129, ch. 250, 65th Leg., 2023 Utah Laws 2197 (codified at UTAH CODE ANN. § 73A-10a-303 (West 2023)); Aaron Mendelson, *How Republicans Flipped America's State Supreme Courts*, CTR. FOR PUB. INTEGRITY (July 24, 2023), https://publicintegrity.org/politics/high-courts-high-stakes/how-republicans-flipped-americas-state-supreme-courts [https://perma.cc/4FBL-AXGF].

284. PEOPLE'S PARITY PROJ., THE PEOPLE V. CORPORATE AMERICA: HOW THE ARIZONA SUPREME COURT PUTS CORPORATIONS OVER INJURED WORKERS 3 (Apr. 11, 2024), https://peoplesparity.org/wp-content/uploads/2024/04/The-People-v.-Corporate-America_Arizona.pdf [https://perma.cc/8H59-BDQU] (noting that, despite a constitutional requirement that "no political party should have more than seven members, which is a majority," on the state

Montana, the nominating commission was altogether abolished,[285] a result that the state Supreme Court upheld against a state constitutional challenge.[286]

Though it is too early to tell whether these changes will produce substantially different state judiciaries, there are some signs that state courts are beginning to fracture along harsh ideological lines and embrace fringe arguments. One notable example is Justice Rebecca Bradley of the Wisconsin Supreme Court. On two separate occasions, Bradley has accused other judges—including her colleagues on the court—of "hoplophobia" (the fear of guns).[287] And, in a concurring opinion that agreed with the court's decision to not allow Wisconsin attorneys to claim a "Diversity, Equity, Inclusion, and Access" continuing legal education credit, Bradley argued that the United States had become a "'race-obsessed' society"; favorably cited far-right commentator Ben Shapiro's book "How to Debate Leftists and Destroy Them"; and denounced diversity training as "woke corporate nonsense."[288]

More consequentially, state appellate courts have started to embrace "fetal personhood" arguments. A since-withdrawn[289] opinion from the North Carolina Court of Appeals in 2023 held, in the context of a parental rights termination case, that a child not yet born "resid[ed] in the home" with the mother "because life begins at conception."[290] In 2024, the Alabama Supreme Court allowed an action to proceed under the state's Wrongful Death of a Minor Act for the destruction of frozen embryos by a fertility clinic,[291] which

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judicial nominating commission, former Arizona Governor Doug Ducey "appointed seven Republicans and five registered independents linked to the GOP, in addition to leaving several seats vacant after Democrats left"); Andrew Pantazi, *Rick Scott Has Already Influenced Who Will Be Selected for Florida Supreme Court*, FLA. TIMES-UNION (Oct. 16, 2018), https://www.jacksonville.com/story/news/politics/elections/local/2018/10/16/rick-scott-has-already-influenced-who-will-be-selected-for-florida-supreme-court/9538625007 [https://perma.cc/UT4K-ZXD6] ("In 2001, Gov. Jeb Bush signed into law changes that would ensure the governor gets to select all nine members [of the Florida Statewide Judicial Nominating Commission]. Four of those members, however, must come from lists of recommended names by the Florida Bar. Unlike Bush and Gov. Charlie Crist, Scott has repeatedly rejected the Bar's recommendations.").

285. S.B. 140, ch. 62, 2021 Mont. Laws 181.

286. Brown v. Gianforte, 488 P.3d 548, 561 (Mont. 2021).

287. State v. Dodson, 969 N.W.2d 225, 232 (Wis. 2022) (Bradley, J., dissenting); Wis. Jud. Comm'n v. Scott C., 961 N.W.2d 854, 887 (Wis. 2021) (Bradley, J., dissenting).

288. In re Diversity, Equity, Inclusion & Access Training for Continuing Legal Educ., No. 22-01, 2023 Wis. LEXIS 167, at *32, *33, *45 (Wis. July 13, 2023) (Bradley, J., concurring).

289. In re E.D.-A., No. 22-1002, 2023 N.C. App. LEXIS 862, at *1 (Nov. 9, 2023).

290. In re E.D.-A., No. COA22-1002, 2023 N.C. App. LEXIS 663, at *2, *25–26 (Oct. 17, 2023).

291. LePage v. Ctr. for Reprod. Med., P.C., Nos. SC-2022-0515, SC-2022-0579, 2024 Ala. LEXIS 60, at *9–13 (Feb. 16, 2024). The Alabama Constitution contains a statement that "it is

prompted many of the in vitro fertilization clinics in the state to at least temporarily suspend their activities.[292] And though the Florida Supreme Court allowed an abortion-rights constitutional amendment to be placed on the 2024 general election ballot,[293] it expressly cautioned that it was not resolving any fetal personhood arguments,[294] raising concerns that the court might have found a way to neutralize the measure if it passed.[295]

Judges' positions on issues like fetal personhood do not necessarily predict how they will rule on the reach of a state constitutional right to bear arms, but extreme positions on both issues are core parts of Christian nationalism, a growing far-right movement.[296] The central belief of Christian nationalism is that "the United States has always been, and should always remain, a Christian nation in both its culture and government," and that a "Christian government" is needed "to ensure that the United States abides by Christian

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the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life." ALA. CONST. art. I, § 36.06(a). Chief Justice Tom Parker's concurring opinion identified this statement as "the theologically based view of the sanctity of life adopted by the People of Alabama," and argued that it "encompasses the following: (1) God made every person in His image; (2) each person therefore has a value that far exceeds the ability of human beings to calculate; and (3) human life cannot be wrongfully destroyed without incurring the wrath of a holy God." *LePage*, 2024 Ala. LEXIS at *32.

292. *See* Alander Rocha, *Alabama Passed a New IVF Law. But Questions Remain.*, ALA. REFLECTOR (Mar. 11, 2024), https://alabamareflector.com/2024/03/11/alabama-passed-a-new-ivf-law-but-questions-remain [https://perma.cc/85LD-GXPS].

293. Advisory Op. to the Att'y Gen. RE: Limiting Gov't Interference with Abortion, No. SC2023-1392, 384 So. 3d 122, 139 (Fla. 2024).

294. *See id.* at 137 n.3 ("The constitutional status of a preborn child under existing article I, section 2 presents complex and unsettled questions. Until . . . today . . . this Court's jurisprudence for the past thirty-odd years had *assumed* that preborn human beings are *not* constitutional persons."); *id.* at 144 (Grosshans, J., dissenting) ("[T]he public should be made aware that the scope of the amendment could, and likely would, impact how personhood is defined for purposes of article I, section 2 of our constitution.").

295. *See* Jonathan L. Marshfield, *Will Voters Have the Final Say on Abortion Rights in Florida?*, STATE CT. REP. (Apr. 18, 2024), https://statecourtreport.org/our-work/analysis-opinion/will-voters-have-final-say-abortion-rights-florida [https://perma.cc/VYS2-XZ5H]; *see also* Patricia Mazzei, *Putting Abortion Question to Florida Voters Is Unlikely to End Court Fights*, N.Y. TIMES (Apr. 8, 2024), https://www.nytimes.com/2024/04/08/us/florida-abortion-amendment-fetal-personhood.html. These questions were ultimately rendered moot when, following an unprecedented and chilling propaganda campaign by the state government against the measure, it received only fifty-seven percent of the vote instead of the sixty percent it needed to pass. Shefali Luthra et al., *Florida Abortion Rights Measure Is the First to Fail Since the End of Roe*, 19TH NEWS (Nov. 5, 2024), https://www.nytimes.com/2024/04/08/us/florida-abortion-amendment-fetal-personhood.html.

296. *See, e.g.*, ANDREW L. WHITEHEAD & SAMUEL L. PERRY, TAKING AMERICA BACK FOR GOD: CHRISTIAN NATIONALISM IN THE UNITED STATES 75 (2022).

principles."[297] And though opposition to abortion may seem to fit more naturally into Christian nationalist legal thought than gun rights would, many adherents view the right to bear arms as "a sacred God-given right."[298] This is true on the international stage, too, with gun rights occupying a central role in similar global right-wing movements.[299] Many of the priorities of the National Association of Christian Lawmakers, one of the leading Christian nationalist advocacy organizations,[300] weave together abortion regulations and private enforcement mechanisms,[301] proposals that flirt with the use of violence, even if not expressly encouraging it.[302]

All of this is to say that past is not prologue. The mere fact that courts have not adopted freewheeling interpretations of the new rights to bear arms *yet* does not mean that they will not do so. As nominating processes for judges break down, and as state judicial candidates have electoral incentives to campaign as ideologues and partisans, it seems all too likely that state courts will be increasingly composed of judges outside of the mainstream. As these realities set in, the new rights to bear arms might well be given sprawling interpretations in the coming decades.

C. Avoiding Dishonest Interpretations

Even though much remains unknown about the future scope of state constitutional protections of the right to bear arms, a very real possibility is that these rights could be stretched well beyond the understandings of the voters who ratified them. Supporters of these amendments framed them as prophylactic measures that did not do much to *change* the current state of the

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297. Caroline Mala Corbin, *The Supreme Court's Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833, 841 (2020).

298. *See* Andrew L. Whitehead et al., *Gun Control in the Crosshairs: Christian Nationalism and Opposition to Stricter Gun Laws*, SOCIUS, Jan.–Dec. 2018, at 9.

299. *See* CLIFFORD BOB, THE GLOBAL RIGHT WING AND THE CLASH OF WORLD POLITICS 114–17 (2012).

300. *See* Tim Dickinson, *The Christian Nationalist Machine Turning Hate into Law*, ROLLING STONE (Feb. 23, 2023), https://www.rollingstone.com/politics/politics-features/christian-nationalists-national-association-christian-lawmakers-1234684542 [https://perma.cc/2S5K-YUAE].

301. Yvonne Lindgren & Nancy Levit, *Reclaiming Tort Law to Protect Reproductive Rights*, 75 ALA. L. REV. 355, 364–65 (2023) ("The National Association of Christian Lawmakers has drafted model legislation that incorporates [Texas] S.B. 8's private enforcement structure for other states to use.").

302. Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1242–43 (2023) ("[G]iving individuals the right to sue is more of a supplement than an alternative, reinforcing rather than redirecting more physically aggressive forms of political conflict.").

law—and instead merely locked it in. These measures were necessary, they argued, to guard against future jurisprudential change at the U.S. Supreme Court and to ensure that gun rights would remain protected. Opponents, in turn, argued that the new rights could lead to challenges of laws that ban people convicted of felonies, who are mentally ill, or who have perpetrated domestic violence from owning firearms,[303] and that prosecutions for using a firearm during the commission of a crime would be more difficult.[304] In other words, opponents warned of many of the outcomes that have followed the Court's decision in *Bruen*.[305] The supporters frequently conceded that future litigation was likely—but a necessary price to pay for protecting individual rights—and that the extreme outcomes suggested by opponents would not come to pass.[306]

Yet the verbiage in many of the new rights, coupled with the change to the existing rights, absolutely empower *Bruen*-type challenges against virtually any limitation on the right to bear arms. The growing requirement that laws be evaluated under strict scrutiny,[307] as well as their classification as inalienable rights,[308] admittedly articulates a *different* test than *Bruen*.[309] It is conceivable that *Bruen*'s historically focused test could be satisfied by a restriction on the right to bear arms that would not satisfy strict scrutiny, and vice versa. But in any event, the fact that state gun control regulations have not been struck down in significant numbers does not mean that they will not be in the future.

Nonetheless, any such outcome would clearly run counter to what voters could have reasonably expected when ratifying these measures. The public's views on gun control are complex and frequently contradictory. While Americans generally support the right to bear arms and disagree with more absolutist prohibitions, like handgun bans,[310] they also broadly favor stricter

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303. Alex Stuckey, *Law Enforcement Concerned About Effect of Gun Plan*, ST. LOUIS POST-DISPATCH, July 28, 2014, at A1; Kathleen Rutledge, *Voters Warned to Read Fine Print of Arms Initiative*, LINCOLN J. STAR, Nov. 3, 1988, at 1.

304. Jordan Shapiro, *Voters to Decide on Gun-Rights Measure*, SPRINGFIELD NEWS-LEADER, May 8, 2014, at A8.

305. *See, e.g.*, Charles, *supra* note 26, at 122–45.

306. Allie Hinga, *Missouri a Bastion of Gun Rights?*, KAN. CITY STAR, July 7, 2014, at A1.

307. *See* Pettys, *supra* note 19, at 1465–66.

308. *See* discussion *supra* Section II.A.4.

309. *See, e.g.*, Willinger, *supra* note 47, at 467 (arguing that, after *Rahimi*, *Bruen*'s history and tradition test "fall[s] roughly between intermediate and strict scrutiny rather than to the far-right end of the strictness spectrum").

310. *See* Charles Franklin, *New Marquette Law School National Survey Finds Approval of U.S. Supreme Court at 40%, Public Split on Removal of Trump from Ballot*, MARQ. UNIV. L. SCH.

gun control and think that it is too easy to acquire a firearm.[311] These views do not always clearly map onto support or opposition for gun control-related ballot measures, even with respect to proposals that win nearly unanimous support in public opinion polls,[312] like background checks.[313] In any event, it is unsurprising that every state constitutional amendment that has added or strengthened the right to bear arms has received majority support.[314] Voters likely do not possess a working understanding of what "strict scrutiny" means,[315] or what the consequences of labeling a right as "inalienable" are, and when the public campaign for these amendments emphasize that they merely safeguard *existing* rights, the measures hardly seem controversial.

POLL (Feb. 20, 2024), https://law.marquette.edu/poll/2024/02/20/new-marquette-law-school-national-survey-finds-approval-of-u-s-supreme-court-at-40-public-split-on-removal-of-trump-from-ballot [https://perma.cc/9S3H-MUQ8] ("64% [of Americans] favor *Bruen*'s affirmation of a right to possess a firearm outside the home."); Jeffrey M. Jones, *Majority in U.S. Continues to Favor Stricter Gun Laws*, GALLUP (Oct. 31, 2023), https://news.gallup.com/poll/513623/majority-continues-favor-stricter-gun-laws.aspx [https://perma.cc/V465-ZBPW] (noting that 27% of Americans favored handgun ban, down from 60% in 1959). *But see* Andrew Willinger, *Bruen, Public Opinion, and Survey Design*, DUKE CTR. FOR FIREARMS L. (Dec. 8, 2022), https://firearmslaw.duke.edu/2022/12/bruen-public-opinion-and-survey-design [https://perma.cc/8XFT-SMQ7] ("Popular support for the decision [*Bruen*] may in fact be that high—but Marquette's question does not shed any real light on the popularity of *Bruen* as a whole.").

311. *See* Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (July 24, 2024), https://www.pewresearch.org/short-reads/2023/09/13/key-facts-about-americans-and-guns [https://perma.cc/TT7R-6DN2] (61% say it is "too easy to legally obtain a gun"; 58% "favor stricter gun laws"; and over 60% favor limiting "people with mental illnesses from purchasing guns," raising the "minimum age for buying guns to 21 years old," and "[b]anning high-capacity ammunition magazines that hold more than 10 rounds" and "assault-style weapons"); *see also* Jones, *supra* note 310 ("[56%] say gun laws should be stricter.").

312. *See, e.g.*, *U.S. Support for Gun Control Tops 2-1, Highest Ever, Quinnipiac University National Poll Finds; Let Dreamers Stay, 80 Percent of Voters Say*, QUINNIPIAC UNIV. POLL (Feb. 20, 2018), https://poll.qu.edu/Poll-Release-Legacy?releaseid=2521 [https://perma.cc/Q4GZ-LF52] ("Support for universal background checks is itself almost universal, 97–2 percent, including 97–3 percent among gun owners.").

313. Kathleen Ferraiolo, *State Policy Activism Via Direct Democracy in Response to Federal Partisan Polarization*, 47 PUBLIUS 378, 383–86 (2017) ("In 2016, four separate gun control measures appeared on state ballots, in Washington [], Nevada, Maine, and California, three of which were successful. . . . The Maine initiative was narrowly rejected. Meanwhile, although voters approved the Nevada measure, the state attorney general indicated that it was unenforceable due to the FBI's refusal to participate in the expanded background checks.").

314. *See infra* Appendix, Table 1.

315. Tim Lockette, *Running Out of Time: State Commission Has a Week to Get Amendments on November Ballot*, ANNISTON STAR, Aug. 28, 2014, at 1A ("Sen. Bryan Taylor, R-Prattville, said the gun-rights amendment is an example of just how tough it will be to write fair, simple ballot wording. Taylor said this year's amendment, if passed, would require 'strict scrutiny' of any effort to restrict gun rights. . . . 'If you don't know the meaning, it could sound like you're limiting the right to bear arms,' he said.").

This context should matter in interpreting the scope of these new provisions. Voter intent, as well as a holistic consideration of the circumstances in which ratification took place, should certainly not override *clear* text. While states differ significantly on the weight that they afford to expressions of voter intent, even the states *most* willing to consider voter intent nonetheless make clear that evidence of intent can only be considered when the language at issue is at least plausibly ambiguous.[316] Yet rights-based language is almost always framed in comparatively general terms and requires at least some amount of interpretation. It cannot be the case that, when legislators won broad voter support by insisting that the amendments would bring about no real change, that generalities and ambiguities in the amendments could be interpreted inconsistently with those representations.[317]

IV. CONCLUSION

States have been described, *ad nauseam*, as "laborator[ies]" of democracy, free to "try novel social and economic experiments without risk to the rest of the country."[318] But today, decades after the beginning of New Judicial Federalism and in an era of increasing polarization, state constitutions have emerged as research laboratories in an arms race between different legal experiments with constitutional interpretation. Regardless of success or failure in federal courts, litigants are able to advance new arguments to recognize different rights under state constitutions—either to protect what the U.S. Supreme Court will not, or to develop a body of persuasive caselaw by testing out different arguments.

For example, state constitutional recognition of the right to bear arms allowed litigants to achieve some limited successes prior the Court's new Second Amendment jurisprudence. Where the U.S. Constitution did not, prior to *Heller* and *McDonald*, recognize an individual right to bear arms that applied to the states, state constitutions filled in the gaps. The historical survey in this piece demonstrates that, dating back to the earliest states, subnational constitutions have long recognized rights to bear arms dating.

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316. *See, e.g.*, Knopp v. Griffin-Valade, 543 P.3d 1239, 1244 (Or. 2024) ("[W]hen interpreting a constitutional amendment adopted through an initiated ballot measure, we consider 'the voters' intent,' focusing on the text and context as well as 'the measure's history, should it appear useful to our analysis.'" (citing State v. Algeo, 311 P.3d 865, 870 (Or. 2013)). At the same time, "voters frequently lack an ascertainable intent on interpretative problems." Glen Staszewski, *Interpreting Initiatives Sociologically*, 2022 WIS. L. REV. 1275, 1288 (2022).

317. *See* Yeargain, *supra* note 230.

318. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., concurring).

But, as I have shown, this observation is incomplete by itself—many of these rights have been for more limited purposes, or cabined by state legislative power to regulate how firearms could be carried.

Beginning in the late twentieth century, a nationwide effort emerged to strengthen these state constitutional rights. As municipalities advanced gun-control measures that attracted national attention, state legislatures, in turn, advanced NRA-backed constitutional amendments that added or strengthened the right to bear arms in their state constitutions. And after *Heller* and *Bruen* in the early 2000s, state constitutional amendments adopted in the decade thereafter entrenched the newly minted rights and further added to them.

Yet the positioning of these rights after *Bruen* and *Rahimi* is unclear. As the Court (presumably) continues to refine *Bruen*'s historical test, and as lower courts continue to puzzle it out, will gun-rights advocates be incentivized to bring their claims in state court? While the test adopted in *Bruen* is amorphous, state constitutional litigation is uniquely challenging and unfamiliar to many litigants—yet in many states, the standard of review for infringements on the right to bear arms is strict scrutiny, a far more familiar test.

And if these claims are brought in state court, what result might occur? While state courts have been unwilling thus far to strike down widely accepted and politically popular forms of gun control,[319] like those that restrict the ability of "criminals" to possess firearms,[320] that might change. The growing extremism of state courts, as the far-right legal movement gains steam and as governors are increasingly able to capture ostensibly nonpartisan judicial nominating processes, means that state supreme courts could be fertile ground for these kinds of arguments. To that end, cases that challenge the constitutionality of limiting the ability of those convicted of felonies to purchase and own firearms, which may end up going nowhere in federal court, could be brought in state court with much more favorable outcomes for advocates.

As I argued in this article, however, embracing an expansive view of state constitutions' rights to bear arms would transmogrify the amendments that voters ratified into something that they likely would not recognize. The campaigns to ratify these amendments emphasized their negligible effects on existing gun control regulations, even as opponents warned that they would

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319. Monea, *supra* note 42, at 418–23.

320. Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203, 222 (2021) ("[T]he new Second Amendment law launched by *Heller* is motivated by a law-and-order vision that seeks the suppression of 'criminals.'").

wreak havoc on public safety measures. In light of those campaigns, it would be deeply antidemocratic, and entirely contrary to voter intent, for courts to strike down gun-control measures *en masse*. While the expansion of state constitutional rights to bear arms must have meaning, that meaning must be commensurate with how voters understood what they were doing.

APPENDIX

Table 1. Proposed State Constitutional Amendments to the Right to Bear Arms, 1971–present

State	Year Proposed	Amendment
Alabama	2014	Establishing a "fundamental right to bear arms;" subjecting restrictions to "strict scrutiny;" prohibiting any citizen from giving up their right under an "international treaty or international law"[321]
Alaska	1994	Establishing an "individual right to keep and bear arms"[322]
Delaware	1987	Establishing an individual "right to keep and bear arms"[323]
Florida	1990	Imposing a mandatory three-day waiting period to purchase a gun[324]
Idaho	1978	Removing the specified purposes for the "right to keep and bear arms;" allowing the legislature to prohibit the carrying of concealed weapons, impose mandatory minimums for crimes committed with firearms, prohibit convicted felons from owning firearms, and criminalizing specified uses of firearms; barring the legislature from "impos[ing] licensure, registration or special taxation" on "firearms or ammunition"; prohibiting "the confiscation of firearms" except for convicted felons[325]
Iowa	2022	Establishing a "fundamental individual right" to "keep and bear arms;" subjecting restrictions to "strict scrutiny"[326]

321. ALA. CONST. art. I, § 26.
322. ALASKA CONST. art. I, § 19.
323. DEL. CONST. art. I, § 20.
324. FLA. CONST. art. I, § 8.
325. IDAHO CONST. art. I, § 11.
326. IOWA CONST. art. I, § 1A.

Kansas	2010	Establishing an individual "right to keep and bear arms;" specifying purposes for "defense of self, family, home and state," "lawful hunting and recreational use," and "any other lawful purpose."[327]
Louisiana	2012	Establishing the "fundamental" right "to keep and bear arms;" subjecting restrictions to "strict scrutiny;"[328] removing legislative power to "prohibit the carrying of weapons concealed on the person."[329]
Maine	1987	Removing the specified purpose for the "right to keep and bear arms."[330]
Missouri	2014	Establishing an "unalienable" right "to keep and bear arms;" adding "ammunition" and "accessories typical to the normal function of . . . arms" to the right; adding defense of "family" to the specified purposes; subjecting any restrictions to "strict scrutiny;" obligating the state to "uphold these rights and . . . under no circumstances decline to protect against their infringement;" allowing the legislature to prohibit convicted felons and "those adjudicated by a court to be a danger to self or others as a result of a mental disorder or mental infirmity" from owning firearms.[331]
Nebraska	1988	Establishing individual "right to keep and bear arms;" specifying purposes as "security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes."[332]
Nevada	1982	Establishing individual "right to keep and bear arms;" specifying purposes as "for

327. KAN. CONST. Bill of Rts., § 4.
328. LA. CONST. art. I, § 11.
329. *Compare* LA. CONST. art. I, § 11 (1974), *with* LA. CONST. art. I, § 11 (amended 2012).
330. *Compare* ME. CONST. art. I, § 16 (1819), *with* ME. CONST. art. I, § 16 (amended 1987).
331. MO. CONST. art. I, § 23.
332. NEB. CONST. art. I, § 1.

		security and defense, for lawful hunting and recreational use and for other lawful purposes."[333]
New Hampshire	1978 (failed)	Establishing individual "right to keep and bear arms;" establishing purposes as "in defense of themselves, their families, their property and the state;" allowing the legislature to "prescribe the manner in which they may be borne and to prohibit convicted felons form carrying or possessing them."[334]
	1982	Establishing individual "right to keep and bear arms;" specifying purposes as "in defense of themselves, their families, their property and the state."[335]
New Mexico	1971	Specifying purposes as "for lawful hunting and recreational use and for other lawful purposes."[336]
	1986	Prohibiting counties and municipalities from "regulat[ing], in any way, an incident of the right to keep and bear arms."[337]
North Dakota	1984	Establishing individual right "to keep and bear arms;" specifying purposes as "for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes."[338]
Utah	1984	Specifying purposes as for "defense of self, family, others property, or the state, as well as for other lawful purposes;" removing legislature's ability to "regulate the exercise of this right by law;" allowing the legislature to "defin[e] the lawful use of arms."[339]
West Virginia	1986	Establishing individual "right to keep and bear arms;" specifying purposes as "for the

333. NEV. CONST. art. I, § 11.
334. N.H. DEP'T OF STATE, *supra* note 142, at 297.
335. N.H. CONST. pt. 1, § 2-a.
336. N.M. CONST. art. II, § 6 (1971).
337. N.M. CONST. art. II, § 6.
338. N.D. CONST. art. I, § 1.
339. *Compare* UTAH CONST. art. I, § 6 (1895), *with* UTAH CONST. art. I, § 6 (amended 1984).

		defense of self, family, home and state, and for lawful hunting and recreational use."[340]
Wisconsin	1998	Establishing individual "right to keep and bear arms;" specifying purposes as "for security, defense, hunting, recreation or any other lawful purpose."[341]

Table 2: Proposed Changes to Rights to Bear Arms in Rewritten State Constitutions, 1960–present

State	Year Proposed	Amendment
Arkansas	1970 (failed)	Barring the imposition of a "registration tax or fee"[342]
	1980 (failed)	Specifying purposes as "for hunting and recreational use" and "common defense"[343]
Idaho	1970 (failed)	Removing specified purposes of "for their security and defense"[344]
Kentucky	1966 (failed)	No textual change, but proposed moving the right to the list of "inherent and inalienable rights"[345]
New Mexico	1969 (failed)	Prohibiting any law from "abridg[ing]" the right to keep and bear arms; specifying purposes "for lawful hunting and recreational use, and for other lawful purposes not prohibited on December 9, 1969."[346]

340. W. VA. CONST. art. III, § 22.

341. WIS. CONST. art. I, § 25.

342. ARK CONST. of 1970 art. II, § 20 (constitution not ratified), *printed in* STATE OF ARK., PROPOSED ARKANSAS CONSTITUTION OF 1970 WITH COMMENTS: A REPORT TO THE PEOPLE OF THE STATE OF ARKANSAS BY THE SEVENTH ARKANSAS CONSTITUTIONAL CONVENTION 7 (1970).

343. ARK CONST. of 1980 art. II, § 19 (constitution not ratified), *printed in* STATE OF ARK., PROPOSED ARKANSAS CONSTITUTION OF 1980 WITH COMMENTS: A REPORT TO THE PEOPLE OF THE STATE OF ARKANSAS BY THE EIGHTH ARKANSAS CONSTITUTIONAL CONVENTION 4 (1980).

344. IDAHO CONST. of 1970 art. I, § 12 (constitution not ratified), *printed in* S.J. Res. 122, 40th Leg., 2d Sess., 1970 Idaho Sess. Laws 739, 742.

345. KY. CONST. of 1966 art. I, § 1 (constitution not ratified), *printed in* S.B. 161, 1966 Gen. Assemb., Reg. Sess. (Ky. 1966).

346. N.M. CONST. of 1969 art. II, § 19 (constitution not ratified), *printed in* STATE OF N.M., PROPOSED NEW MEXICO CONSTITUTION 7 (1969).

North Dakota	1972 (failed)	Establishing individual right to "keep arms for self defense, lawful hunting, recreational use and other lawful purposes"; permitting the regulation of the "unlawful carrying of concealed weapons"[347]
Oregon	1970 (failed)	Elimination of restriction that "the military shall be kept in strict subordination to the civil power"[348]

347. N.D. CONST. of 1972 art. I, § 9 (constitution not ratified), *printed in* STATE OF N.D., DEBATES OF THE NORTH DAKOTA CONSTITUTIONAL CONVENTION OF 1972 1791 (1972).

348. OR. CONST. of 1970 art. I, § 17 (constitution not ratified), *printed in* S.J. Res. 23, 1969 Or. Laws 1951, 1953.