A Tale of Three Cities

The Right to Bear Arms in State Supreme Courts

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Introduction

Among legal scholars, the Second Amendment to the United States Constitution[1] has received ever-increasing attention over the last decade. [2] (p.1178) (p.1179) From being ignored as "the Embarrassing Second Amendment,"[3] the Constitution's right to keep and bear arms is now discussed by the most prestigious law journals[4] and by the most important constitutional law professors.[5] Yet the increased scholarly attention paid to the Second Amendment has not been matched by commensurately increased judicial attention.

The Supreme Court in the last five years has offered dicta twice which suggest that the Court shares the academy's view of the Second Amendment as an individual right.[6] Yet the number of cases (two) which have relied on the Second Amendment to declare a law unconstitutional is no higher today than it was twenty years ago.[7] During this period, the only law which was (p.1180) even (slightly) judicially jeopardized by the Second Amendment was the federal Gun-Free School Zones Act of 1990.[8] In declaring the law outside the scope of the Congressional power over interstate commerce,[9] the Fifth Circuit suggested in passing that the law might also be problematic on Second Amendment grounds.[10] The Supreme Court, affirming the Commerce Clause holding, did not mention the Second Amendment.[11]

The story of the right to keep and bear arms under state constitutions is just the opposite. From the 1820s until the present, courts have used state constitutional rights to arms to strike down various gun control laws. Altogether, twenty weapons laws have been declared void as a result of a state right to keep and bear arms.[12] Forty-three state constitutions contain some kind of right to bear arms provision, making the right to arms among the more ubiquitous civil liberties guaranteed by state constitutions. [13] (p.1181) (p.1182) (p.1183)

Yet popular debate over gun control, which focuses intensely on the federal Second Amendment, largely neglects state constitutional provisions, provisions which are usually far more relevant to proposed state and local gun controls than the Second Amendment. Compared to the Second Amendment, legal scholarship has paid relatively little attention to state constitutional arms provisions.[14](p.1184)

This article attempts to redress the imbalance, at least a little. It examines three recent major state constitutional decisions dealing with the right to arms, in particular municipal bans or controls on so-called "assault weapons." In *Oregon State Shooting Ass'n v. Multnomah County*,[15] an Oregon county had enacted a relatively mild restriction on "assault weapons"; although the law did not place extra restrictions on possession or acquisition, it did ban the sale of "assault weapons" at a government facility which hosted gun shows, and also required "assault weapons" to be unloaded when transported in public.[16] When challenged in Oregon district court, the law was upheld. [17] The Oregon Court of Appeals voted to affirm the lower court, but was divided as to the rationale. The dissent would have upheld the law on the grounds that relatively minor restrictions on a small class of unusually dangerous firearms did not amount to an infringement of the right to arms. [18] The majority, however, went much further, holding that, under a historical test developed by the Oregon Supreme Court,[19] the Oregon constitutional right to arms did not even extend to the firearms in question. [20] The Oregon Supreme Court denied review.

In *Robertson v. City of Denver*,[21] the Colorado Supreme Court considered the constitutionality of a 1989 Denver City Council ordinance that was much more restrictive and covered a wider variety of firearms than did the ordinance at issue in Oregon.[22] Upon cross motions for summary judgment, the district court had declared the ordinance invalid under the Colorado Constitution, although the court opined that a much more narrowly drafted law would have been constitutional.[23] A 6-1 majority of the Colorado Supreme Court reversed and upheld the law.[24] The case has been remanded for trial on issues unrelated to this article.[25](p.1185)

Also in 1989, Cleveland enacted an ordinance[26] that covered even more firearms than the Denver ban.[27] Like the Denver law, the Cleveland law was a total ban on possession and sale, with an exception made for current owners who registered with the city. The majority of the Ohio Supreme Court held that the right to arms in Ohio was a fundamental individual right, [28]but the court affirmed the district court's grant of Cleveland's motion to dismiss, reasoning that no set of facts could prove the ordinance, or any part of it, unconstitutional.[29] The dissenters would have remanded the case for trial, to test the truth of the Cleveland ordinance's assertions that the banned guns were unusually dangerous and frequently used for criminal purposes. [30](p.1186)

In each of the cases the state Attorney General became involved, although in different ways. In Oregon, the Attorney General wrote an opinion stating that the restrictions violated the Oregon Constitution, but he did not participate further in the case.[31] In Ohio, Attorney General Lee Fisher, a member of the Board of Directors of Handgun Control, Inc., wrote amicus briefs in support of the Cleveland gun ban.[32] In Colorado, the Attorney

General has the statutory right to intervene in all cases challenging the constitutionality of an ordinance.[33] After Denver was sued by private plaintiffs who thought the Denver gun ban unconstitutional, Attorney General Duane Woodard exercised his right to intervene, and joined the case on the side of the plaintiffs.[34]

In the three cases we will examine,[35] the majority opinions did not take the right to arms seriously, at least not in the sense of viewing the right as one entitled to judicial protection. Rather, the majority opinions not only upheld the laws in question, but also disabled the constitutional right itself. With the exception of a concurring opinion in the Colorado case,[36] none of these rights-disabling opinions had the intellectual honesty to acknowledge that the opinion's authors strongly disfavored the right to arms and wanted to relegate it to a second-class constitutional status. Rather, the opinions claimed to be nothing more than narrow technical legal analyses, although the analyses were often conducted in an intellectually dishonest manner.

Part I of this article sets forth the intellectual and historical background of state constitutional litigation involving the right to arms, paying special attention to different theoretical bases for determining which kinds of arms should receive constitutional protection. The remainder of the article examines issues which the different courts considered in interpreting their state constitutions' right to arms. Part II looks at history and original intent, with special reference to Oregon, where the Oregon Supreme Court has created a historical intent test for interpreting the Oregon Constitution's right to (p.1187) arms.[37] Part III examines the issue of whether the right to arms is a fundamental right, a question that was central to the Colorado decision.[38] Part IV analyzes the standard of review for arms right cases, a central issue in the Ohio decision.[39] Part V examines the fact-finding engaged in by all three state courts, and part VIdiscusses the constitutional legitimacy of armed self-defense. The conclusion places the cases in their broader social context and explains how, paradoxically, legal decisions which suggest that gun owners have no rights which a court is bound to respect result in the political strengthening of the gun rights movement.

I. Historical Interpretations of State Constitutional Rights to Arms

A. The Underlying Theories

American courts have generally interpreted the state constitutional arms guarantees according to two theories, which we call "civic republicanism" and "classical liberalism." Both theories recognize an individual's right to possess arms, but the right serves a different purpose under each theory.[40] Under the civic republicanism theory, guarantees of the right to keep and bear arms protect individual ownership of arms that would be appropriate to

restraining tyrannical government, but do not necessarily protect a right to carry arms:(p.1188)

The section under consideration, in our bill of rights, was adopted in reference to these historical facts, and in this point of view its language is most appropriate and expressive. Its words are, "the free white men of this state have a right to keep and bear arms for their common defence." It, to be sure, asserts the right much more broadly than the statute of 1 William & Mary.[41] ... But, with us, every free white man is of suitable condition, and, therefore, every free white man may keep and bear arms. But to keep and bear arms for what? If the history of the subject had left in doubt the object for which the rights is secured, the words that are employed must completely remove that doubt. It is declared that they may keep and bear arms for their common defence .... The object, then, for which the right of keeping and bearing arms is secured is the defence of the public. *The free white men may keep arms to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution*.[42]

Under this theory, reflected in early court interpretations of the Second Amendment, the right to keep and bear arms only protects arms appropriate to military purposes:

What then, is he protected in the right to keep and thus to use? Not every thing that may be useful for offense or defense, *but what may properly be included or understood under the title of "arms," taken in connection with the fact that the citizen is to keep them, as a citizen*. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State. *Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we hold that the rifle, of all descriptions, the shot gun, the musket and repeater, are such arms, and that, under the Constitution, the right to keep such arms cannot be infringed or forbidden by the legislature*.[43]

Similarly, the West Virginia Supreme Court limited protection to only certain types of arms:

In regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets--arms to be used in defending the State and civil liberty--and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street-fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the State.[44] (p.1189)

Much of the case-law development of the civic republicanism theory took place in the South after the Civil War. The former slave states needed new

mechanisms for keeping the newly freed slaves in their "proper" place in the economic and social structure.[45] At the same time, the state legislatures recognized that overtly racially discriminatory laws would run afoul of the Civil Rights Act of 1866 or the Fourteenth Amendment's guarantee of equal protection.[46] While historians must infer the legislature's intent in enacting these laws (as historians have done with respect to the contemporaneous vagrancy laws),[47] there are occasional direct statements of purpose for these new, more restrictive, gun control laws. For example:

The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. ... The statute was never intended to be applied to the white population and in practice has never been so applied.[48]

The civic republicanism theory provided a way to justify bans or restrictive regulation of concealable handguns, Bowie knives, and a variety of other defensive weapons that were not military arms.

The classical liberalism theory of the right to keep and bear arms protected any arms that could be used for self-defense. The theory has protected not only the right to possess arms at home, but has also struck down many statutes prohibiting the carrying of arms--as we will see when we examine the Oregon decisions of the 1980s.[49] The earliest of these decisions comes from the Kentucky Supreme Court, striking down a prohibition on the carrying of concealed weapons:

And can there be entertained a reasonable doubt but the provisions of the act import a restraint on the right of the citizens to bear arms? The court apprehends not. The right existed at the adoption of the constitution; it had then no limits short of the moral power of (p.1190) the citizens to exercise it, and it in fact consisted in nothing else but in the liberty of the citizens to bear arms .... For, in principle, there is no difference between a law prohibiting the wearing [of] concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise.[50]

In a more recent decision, the Idaho Supreme Court followed in the classical liberal tradition with respect to the Second Amendment when it interpreted the Idaho Constitution's similar provision:[51]

The second amendment to the federal constitution is in the following language: "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Section 11, article 1, of the Idaho Constitution reads: "The people have the right to bear arms for their security and defense, but the legislature shall regulate the exercise of this right by law." Under these constitutional provisions, the legislature has no power to prohibit a citizen from bearing arms in any portion of the state of Idaho, whether within or without the

corporate limits of cities, towns, and villages. The legislature may, as expressly provided in our state constitution, regulate the exercise of this right, but may not prohibit it. A statute prohibiting the carrying of concealed deadly weapons would be a proper exercise of the police power of the state. But the statute in question does not prohibit the carrying of weapons concealed, which is of itself a pernicious practice, but prohibits the carrying of them in any manner in cities, towns, and villages. We are compelled to hold this statute void.[52]

The two theories, civic republicanism and classical liberalism, are not necessarily two discrete boxes, with state cases falling neatly into one or the other. One reason for the doctrinal overlap is that the federal Second Amendment implicitly contains both theories, with civic republicanism in the subordinate clause ("a well-regulated militia"), and classical liberalism in the main clause ("the right of the people").[53] Thus, it should not be surprising that decisions would often use both theories. In *Cockrum v. State*,[54] the Texas Supreme Court explained why both the Second Amendment and the similar guarantee of the Texas Constitution[55] limited the authority of the state government to regulate the carrying of arms:

The object of the first clause [of the Second Amendment] cited, has reference to the perpetuation of free government, and is based on (p.1191) the idea, that the people cannot be effectually oppressed and enslaved, who are not first disarmed. The clause cited in [the Texas] bill of rights, has the same broad object in relation to the government, and in addition thereto, secures a personal right to the citizen. The right of a citizen to bear arms, in the lawful defence of himself or the State, is absolute. He does not derive it from the state government, but directly from the sovereign convention of the people that framed the state government. It is one of the "high powers" delegated directly to the citizen, and "is excepted out of the general powers of government." A law cannot be passed to infringe upon or impair it, because it is above the law, and independent of the law-making power.[56]

Likewise, a 1900 Ohio Supreme Court decision explained the Ohio right in terms of both political liberty and personal defense.[57]

B. What Arms Are Protected?

As Part II will discuss, the Oregon courts are the only state courts in recent decades to have developed a substantial body of case law regarding what types of weapons are the "arms" which the state constitution guarantees the right to possess and carry. The few other state court decisions on the subject suggest that a ban on semi-automatic firearms might be constitutionally problematic.[58] In some cases, courts offered the conclusion that a particular firearm was protected without great theoretical elaboration. For example, in a 1984 case,[59] the Washington Supreme court determined that a murderer's ownership of a Colt CAR-15 semiautomatic rifle (an "assault

weapon" under current formulations) could not be used as a death penalty enhancement because to do so would unnecessarily "chill" or penalize the assertion of the constitutional right to bear arms.[60] The court found that the defendant's right to bear arms was directly implicated, and to hold otherwise would violate the Washington Constitution's mandate that "the right of the (p.1192) individual citizen to bear arms in defense of himself, or the state, shall not be impaired ...."[61] With similarly spare analysis, the Missouri Court of Appeals found "pistols and ammunition clips" to be protected because "every citizen has the right to keep and bear arms in defense of his home, person and property."[62]

A historical decision in a West Virginia case explained that a previous version of the state constitution had protected militia-type weapons, because "arms" included "the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets--arms to be used in defending the State and civil liberty ...."[63] This militia-weapons test, commonly known as the "civilized warfare" test,[64] appears to have been adopted by the United States Supreme Court in the 1939 decision *United States v. Miller*.[65] *Miller* allowed an individual who was not a National Guard member to raise a right to bear arms claim, but held that only arms which were suitable for use in a militia were protected by the Second Amendment.[66]

In contrast, a Florida case found semiautomatic firearms to be protected, but not by inquiring into their suitability for militia use.[67] Instead, the court based its holding on a determination that such firearms were commonly used for protection by law-abiding people (a classical liberal formulation).

We, therefore, hold that the statute does not prohibit the ownership, custody and possession of weapons not concealed upon the person, which, although designed to shoot more than one shot semi-automatically, are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semiautomatic pistols and rifles.[68]

A North Carolina decision[69] pointedly rejected the "civilized warfare" test (an implementation of the civic republicanism theory), even while affirming civic republicanism as the theoretical foundation of the right to arms: (p.1193)

To him [the ordinary private citizen] the rifle, the musket, the shotgun, and the pistol are about the only arms which he could be expected to "bear," and his right to do this is that which is guaranteed by the Constitution. To deprive him of bearing any of these arms is to infringe upon the right guaranteed to him by the Constitution.

It would be mockery to say that the Constitution intended to guarantee him the right to practice dropping bombs from a flying machine, to operate a cannon throwing missiles perhaps for a hundred miles or more, or to practice

in the use of deadly gases .... The intention was to embrace the "arms," an acquaintance with whose use was necessary for their protection against the usurpation of illegal power--such as rifles, muskets, shotguns, swords, and pistols.[70]

With this historical case law background in mind, let us now turn to Oregon, where the courts have gone far beyond their twentieth-century peers in developing and applying historical tests which use both the civic republican and the classical liberal theories.

II. Historical Tests and the Right to Arms

A. Oregon Case Law in the 1980s

In the 1980s, the Oregon courts repeatedly struck down laws regulating the possession and carrying of a variety of weapons based on Article I, Section 27 of the Oregon Constitution, which provides that "the people shall have the right to bear arms for the defence of themselves, and the State."[71] The courts did so by developing a jurisprudence which looked at the historical evolution of weapons technology.

The first case was the 1980 decision *State v. Kessler*,[72] in which the Oregon Supreme Court declared void an Oregon statute[73] that prohibited "possession of a slugging weapon"--in this case, a billy club--in the defendant's home.[74] The court traced the ancestry of article I, section 27 back to the Indiana Constitution of 1816,[75] and from there to the state constitutions of Kentucky (1799)[76] and Ohio (1802),[77] thence backward through the Second Amendment and ultimately to the 1689 English Bill of Rights.[78] The court (p.1194)also cited the Michigan case of *People v. Brown*[79] for the proposition that concern about the dangers of standing armies was a major motivation behind the right to keep and bear arms, but that the right also reflected a personal self-defense requirement.[80]

The dispute about *which* arms are protected represents one of the significant differences between the classical liberalism and civic republicanism theories. For this reason, the court discussed which arms the Oregon Constitution protects, and concluded that

The term "arms" as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense. The term "arms" was not limited to firearms, but included several handcarried weapons commonly used for defense. The term "arms" would not have included cannon or other heavy ordnance not kept by militiamen or private citizens.[81]

Up to this point, the Oregon Supreme Court fell squarely in the classical liberal and civic republicanism traditions of judicial interpretation of the right to keep and bear arms. The court then drew a line between constitutionally protected arms and unprotected weapons:

The development of powerful explosives in the mid-nineteenth century, combined with the development of mass-produced metal parts, made possible the automatic weapons, explosives, and chemicals of modern warfare .... These advanced weapons of modern warfare have never been intended for personal possession and protection. When the constitutional drafters referred to an individual's "right to bear arms," the arms used by the militia and for personal protection were basically the same weapons. Modern weapons used exclusively by the military are not "arms" which are commonly possessed by individuals for defense, therefore, the term "arms" in the constitution does not include such weapons.[82]

Because the Oregon Constitution's provision included "defense of themselves,"[83] the court concluded that defensive arms, even though "unlikely to be used as a militia weapon," would include any weapon commonly used for personal defense.[84] However, the court also clearly stated that "automatic weapons" and "modern weapons used exclusively by the military are not 'arms'" protected by the Oregon Constitution.
[85] (p.1195)

We do not wish to criticize the *Kessler* decision for not taking the right to arms seriously. *Kessler* is a careful decision that works hard to protect the rights of people who wish to own firearms, while drawing a workable test that clearly excludes modern military weapons from ordinary civilian possession. However, as a historical matter, the court may have been wrong to imply that the drafters of the 1859 Constitution could not imagine the automatic weapons developed as a result of the mid-nineteenth century's industrial advances.[86] In fact, the mid-century technological advances did not lead to unanticipated developments in small arms. Instead, this era perfected concepts that were already well-known or under development. As early as 1663, Palmer presented a paper to the Royal Society describing the operating principle of the modern gas-operated semiautomatic firearm. Similarly, James Puckle's "A Portable Gun or Machine called a Defence," patented in May 1718, bears many similarities to the Gatling gun, the first of the practical machine guns.[87] The Puckle gun was ridiculed at the time as an impractical design, and called a scheme for separating investors from their money. But it demonstrates that the *concept* of machine guns existed, even if the metal working technology of the day was not capable of making the weapon.[88]

The court also erred in asserting that "advanced weapons of modern warfare" such as "automatic weapons," "have never been intended for personal possession and protection."[89] Machine guns *were* originally designed for military purposes. Nevertheless, from the beginning they had a civilian market: "As early as 1863 H. J. Raymond, the owner of the *New York Times*, had bought three Gatling guns to protect his offices against feared attacks by

mobs of people protesting against the Conscription Act of March of that year, of which the *Times* had come out in support."[90]

Company goon squads used machine guns in suppressing strikes throughout the period between the Civil War and the 1930s--a disreputable use, but lawful under the laws of the day. The Thompson submachine gun provides the best example of the complex relationship between private and public ownership. Since the anticipated government contracts did not materialize, the "Tommy" guns were successfully marketed to private citizens for self-defense--especially in New York City, where the Sullivan Law had made it difficult to legally buy handguns.[91] Even today, private ownership of automatic (p.1196) weapons in the United States, while heavily regulated and highly taxed,[92] remains legal in most states.

The year after the *Kessler* decision, the Oregon Supreme Court decided in *State v. Blocker* that while the state legislature could prohibit the carrying of a concealed billy club, the statute in question[93] had prohibited possession of a billy club anywhere--and had made no distinction between concealed carry and open carry.[94] The court did acknowledge that some types of regulation of the bearing of arms were constitutional, but:

On the other hand, ORS 166.510, with which we are here concerned, is not, nor is it apparently intended to be, a restriction on the manner of possession or use of certain weapons. The statute is written as a total proscription of the mere possession of certain weapons, and that mere possession, insofar as a billy is concerned, is constitutionally protected.[95]

The legislature could prohibit carrying arms with criminal intent; it could prohibit carrying concealed arms; but unless some form of carry was protected, the statute would violate the constitutional protection of the right to bear arms for self-defense.[96]

In *State v. Delgado*, the Oregon Supreme Court faced a precursor to the "assault weapon" issue, a case involving switchblade knives.
[97] The *Kessler* decision had recognized that "hand-carried weapons commonly used by individuals for personal defense" were constitutionally protected.[98] In *Delgado*, the state argued that switchblades were not commonly used for defense, and therefore fell outside the protection of the Oregon Constitution.[99]

The Oregon Supreme Court rejected the prosecution's evidence that switchblade knives are "almost exclusively the weapon of the thug and delinquent,"[100] calling the material "no more than impressionistic observations on (p.1197) the criminal use of switch-blades."[101] The court also dismissed the distinction between "offensive" and "defensive" arms:

More importantly, however, we are unpersuaded by the distinction which the state urges of "offensive" and "defensive" weapons. All hand-held weapons necessarily share both characteristics. A kitchen knife can as easily be raised

in attack as in defense. The spring mechanism does not, instantly and irrevocably, convert the jackknife into an "offensive" weapon. Similarly, the clasp feature of the common jackknife does not mean that it is incapable of aggressive and violent purposes. It is not the design of the knife but the use to which it is put that determines its "offensive" or "defensive" character.[102]

The court then elaborated on the historical test that had first been announced in *Kessler*:

The appropriate inquiry in this case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era, or in 1859 when Oregon's constitution was adopted. In particular, it must be determined whether the drafters would have intended the word "arms" to include the switch-blade knife as a weapon commonly used by individuals for self defense.[103]

After a setting forth a history of pocket knives, fighting knives, sword-canes, and Bowie knives, the court found that the switch-blade knife was of the same "sort" as the knives in common use in 1859:

We are unconvinced by the state's argument that the switch-blade is so "substantially different from its historical antecedent" (the jackknife) that it could not have been within the contemplation of the constitutional drafters. They must have been aware that technological changes were occurring in weaponry as in tools generally. The format and efficiency of weaponry was proceeding apace. This was the period of development of the Gatling gun, breach loading rifles, metallic cartridges and repeating rifles. The addition of a spring to open the blade of a jackknife is hardly a more astonishing innovation than those just mentioned ....[104]

By acknowledging that "repeating rifles" were under development when Oregon adopted its 1859 Constitution, the court strongly implied that repeating rifles were constitutionally protected, a point which will be important when we examine the "assault weapon" decision. (p.1198)

While the Oregon Court of Appeals had been reversed in *Kessler*[105] and *Delgado*,[106] subsequent decisions of the intermediate court appeared to fall in line with the state supreme court's approach. In *Barnett v. State*, the court of appeals recognized the blackjack as an "arm" protected under the Oregon Constitution.[107] In *State v. Smoot*, the court of appeals upheld a conviction for concealed carry of a switchblade knife, since the statute in question restricted only the manner of carrying this constitutionally protected arm.[108] The court observed that "[a] person may possess and carry a switchblade as long as it is not concealed."[109]

Each of the Oregon decisions involved a weapon that has an unsavory image: a billy club, a switch-blade knife, and a blackjack. Yet the Oregon courts recognized that while these weapons were sometimes used by criminals, they

could also be used for lawful defense. The next decision, however, showed that the Oregon Court of Appeals found certain weapons more unsavory than a switch-blade knife.

B. Oregon's Historical Test Applied to Semiautomatics

In 1990, Multnomah County (where Portland is located) passed Ordinance 646, a mild "assault weapon" regulatory law.[110] It prohibited possession for sale at the Exposition Center, a public facility where gun shows were often held. It also required "assault weapons" in a public place "to be unloaded, locked in a gun case and, if in a vehicle, placed in an inaccessible portion of the vehicle when being transported."[111] *Oregon State Shooting Ass'n v. Multnomah County* was filed seeking declaratory judgment against the county ordinance, as well as against a city ordinance charging a fee for background checks on gun purchasers.[112] Much of the decision relates to the question of whether state firearms laws preempted local regulation, and is uninteresting from the standpoint of what arms are constitutionally protected.[113]

The Oregon Supreme Court's *Kessler* decision acknowledged both the classical liberalism theory ("weapons used by settlers for ... personal ... (p.1199) defense") and civic republicanism theory ("military defense")[114] of the right to keep and bear arms. *Kessler* protects both militia weapons and personal defense weapons. The later decisions (*Blocker*, *Delgado*, *Barnett*, and *Smoot*) involved weapons that were not military weapons, and consequently those cases did not discuss the civic republicanism theory. Yet the Oregon Court of Appeals, in deciding *Oregon State Shooting Ass'n*, ignored the civic republicanism theory of the right to keep and bear arms. *Kessler* does not protect modern weapons of warfare, defined as "automatic weapons" and those "used exclusively by the military;" however, it does protect the sort of weapons used for militia purposes in 1859.[115] Ignoring the *Kessler* decision's test for which kinds of military arms were protected, the *Oregon State Shooting Ass'n* court looked exclusively to *Delgado*'s test.[116] But of course *Delgado* had involved only the "personal protection" prong of *Kessler*, since *Kessler*'s militia prong plainly did not protect switchblade knives, the weapon at issue. The court of appeals might as well have cited a decision stating that both commercial speech and political speech were protected, and then applied only a test for commercial speech from a later case.

In *Oregon State Shooting Ass'n*, the court found that, under the *Delgado* personal defense test, a weapon must satisfy three criteria: (1) although the weapon may subsequently have been modified, it must be "of the sort" in existence in the mid-nineteenth century; (2) the weapon must have been in common use; and (3) it must have been used for personal defense.[117] Let us now examine each of those criteria, as applied to semiautomatic firearms by the court of appeals.

1. "Of the sort"

The first of these criteria is nebulous, as the majority on the court of appeals observed.[118] The court of appeals held that the banned semiautomatic weapons were not of the same "form" as mid-nineteenth century weapons.[119] The court based its holding on an incorrect statement of fact, and a statement of "fact" that was merely an opinion. The incorrect statement of fact was that "the technology for automatic weapons did not exist until the twentieth century ...."[120] The opinion masquerading as fact was "the technology by which automatic weapons operate precludes a finding that a semiautomatic weapon is a 'counterpart' of a mid-nineteenth century repeating rifle."[121]

The court of appeals was simply wrong concerning the twentieth-century birth of automatic weapons. If we define "automatic firearm" in its narrowest (p.1200) sense, an "automatic" is a firearm in which, as long as the trigger is depressed, will reload and fire more rounds until the magazine (which contains the ammunition) is exhausted. The shooter does not need to press the trigger over and over. Rather, he need squeeze it only once, and until he releases, bullets will be loaded and fired automatically. Hiram Maxim demonstrated the first successful automatic weapon in 1884.[122]

More importantly, weapons of the same "sort"--as measured by their ability to fire bullets rapidly--were in use or under development at the time Oregon adopted its 1859 Constitution. While functional automatic weapons were not invented until 1884, functional machine guns had come decades earlier. Although the terms "machine gun" and "automatic" are sometimes used interchangeably, they are not identical. An automatic gun is a subset of machine guns. A "machine gun" is a firearm in which rounds are loaded and fired by the operation of machinery--even if human action is required to operate the machine.

As noted above, prototypes of machine guns were centuries old, although mass production of such weapons had proved to be beyond the skills of the time.[123] The practical machine gun era began in France in 1851, with the production of the Montigny Mitrailleuse, a multibarreled battery gun that fired several hundred rounds a minute. Its commercial production demonstrates that machine guns were not only a recognized concept, but operable devices when the Oregon Constitution was adopted. A major advance in machine gun technology came in 1861, when the Union Army bought small quantities of the Ager Gun, a crank-operated machine gun. Unlike most previous machine-gun models, which had needed as many barrels as there were rounds to fire, the Ager fired all of its rounds through a single barrel. The gun, also known as the Ager Coffee Mill, enjoyed only limited success, because the barrel would overheat.[124] But in 1862, Richard Gatling received patents for his "Gatling gun." The Gatling gun used six rotating barrels, thereby allowing very rapid fire while keeping the barrels

from overheating. In contrast to the automatic weapons developed two decades later, the Gatling gun did not use the energy from the gun-powder explosion to perform the work of reloading and firing the gun. Instead, the Gatling gun was powered by a hand crank. Thus, the Gatling gun was not an automatic firearm, but it was a machine gun.[125] Gatling guns were used in small quantities during the Civil War, and sold heavily overseas in the 1860s and 1870s.

The court of appeals was therefore plainly wrong in its factual assertion about the development of firearms. If the case before the court of appeals had involved automatic weapons, the error would have been harmless, since *Kessler* had already stated that automatic weapons did not fall within the (p.1201) scope of the right to arms. If the question before the court of appeals was whether to regulate automatic weapons, based on the *Kessler* decision, the error about when automatic weapons were developed would be relatively minor, since *Kessler* stated that automatic weapons were not protected. The problem came when the court of appeals attempted to reason backward from the fact that automatics are not protected to prove that semiautomatics are not protected.

First, the court of appeals reiterated the trial court's claims that the named "assault weapons" "can be readily converted back into the fully automatic military configuration."[126] This factual finding was plainly incorrect, since federal law already regulates as an automatic any firearm which can be "readily converted" to automatic. As the United States Code states:

The term "machine-gun" means any weapon which shoots, is designed to shoot, *or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger*. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts ... from which a machine-gun can be assembled if such parts are in the possession or under the control of a person.[127]

In other words, by long-standing federal law, if a gun can be readily converted into an automatic, it *is* an automatic. In 1982, the Bureau of Alcohol, Tobacco and Firearms ("BATF") used the above-quoted statute to classify as an automatic a readily-convertible semi-automatic.[128] The gun in question was the open-bolt MAC-10, which could be converted to automatic by simply inserting a paper clip in a particular place. The BATF ruled that any subsequently-manufactured MAC-10 would be classified as a machine gun. Out of deference to the reliance interests of consumers, the BATF did not retroactively classify already-sold open-bolt MAC-10s as machine guns. After the BATF ruling, the MAC-10 manufacturer abandoned the open-bolt design, and began producing other guns which were, according to the BATF's analysis, not readily convertible to automatic.

The BATF decision would have been a solid basis for the court of appeals to find that the Oregon right to arms does not protect pre-1982 MAC-10s. But instead, the court of appeals used the BATF ruling about the MAC-10 to assert that *all* guns affected by the ordinance were readily convertible. [129] This reasoning is implausible. If an agency has the job of separating the sheep from the goats, examines an entire herd of animals, and removes only a single sheep, the agency's action is evidence that the other animals are not sheep.(p.1202)

In *State v. Delgado*, the Oregon Supreme Court implied, in passing, that the Oregon Constitution protected nineteenth-century repeating rifles and their twentieth-century counterparts.[130] Thus, if semiautomatic firearms were counterparts of nineteenth-century repeating rifles, they would be protected by the right to arms. The court of appeals held that a semiautomatic weapon could not be "a 'counterpart' of a mid-nineteenth century repeating rifle"[131] because the operating mechanism for automatic and semiautomatic weapons did not exist in 1859.

To determine the meaning of "counterpart," the court of appeals stated that "counterpart" meant "to seem like a duplicate."[132] For something to *be* a duplicate would mean that the Constitution protected only exact replicas of 1859 firearms. "To seem like a duplicate" implies only firearms which could fool consumers into believing that the guns were 1859 replicas would be protected. If that is what the court of appeals meant, the court was rejecting the controlling rule of the state supreme court, which has already found that weapons (like switchblade knives) which are neither duplicates nor seem like duplicates of 1859 weapons are constitutionally protected.

Reading the court of appeal's "seems like a duplicate" language more generously, the court might be saying, "if it quacks like a duck and tastes like a duck, it should be treated as a duck. Even if it is a goose." If so, the court of appeals would have been stating some kind of functionality test: if a gun functions the same as an 1859 gun, then it would be protected.

Functionally, a semiautomatic rifle is not so different from the Volcanic (later Henry) rifle that was under development just before and after adoption of the 1859 Oregon Constitution. Patents were issued in 1849 for the predecessor to the Volcanic rifle, which in turn, achieved massive commercial success as the Henry, introduced in 1861.[133] Like a semiautomatic rifle, the Henry could be loaded and fired repeatedly, without reloading. Like a semiautomatic and every other common gun (and unlike an automatic or a machine gun), the Henry fired only one round per trigger press. To fire another round, the shooter would have to press the trigger again. One of the most comprehensive histories of repeating firearms clearly recognized the lineal relationship between the guns like the Henry and modern rifles: "These were the beginning of the long line of military repeating shoulder arms that has stretched toward us through the box magazine, bolt action, clip loading, and

finally the automatic types of the present day ...."[134] Around 1860, the centuries-long prototype period of rapid-fire weapons was giving way to a period of mass production and refinement.[135]

The court of appeals opined that the 1859 Constitutional Convention would have found it "astonishing" that some of the "assault weapons" were (p.1203)capable of firing "20 rounds of ammunition [with] an effective range of 440 to 600 yards."[136] If so, the Convention's members had that opportunity for astonishment within two years after Oregon adopted the 1859 Constitution. Henry rifle advertising claimed that the rifle could fire sixty shots a minute.[137] The company boasted not only of the rifle's firepower, but of its ability to penetrate wood, and to kill at long ranges: "The penetration at 100 yards is 8 inches; at 400 yards 5 inches; and it carries with force sufficient to kill at 1,000 yards. A resolute man, armed with one of these Rifles, particularly if on horseback, CANNOT BE CAPTURED."[138] Even accounting for the exaggerations of advertising, the capabilities of the Henry rifle are similar to those of modern "assault weapons," and thus an accurate analysis of history suggests that modern semiautomatics may be a counterpart of the Henry rifle.

One ostensible difference between the banned "assault weapons" and weapons under development in the 1850s is the detachable magazine. Many of the weapons covered by the Multnomah County ordinance use detachable magazines, allowing rapid reloading. Although there were no detachable magazine firearms in the 1850s, the Colt revolver's cylinder was removable, allowing for relatively rapid reloading.[139] While not as fast as a modern detachable magazine weapon, the Colt revolver demonstrates that the functionality of repeating, rapidly reloadable firearms was known in 1859. Thus, one may argue that modern magazines are merely a refinement of the rapid reloading technology of the revolver. In any case, neither the Portland law nor the court of appeals referred to the detachable magazine as the distinction dividing "assault weapons" from those not regulated.[140]

2. Common Use

The second test listed by the court of appeals concerns "common use."[141] The Colt revolver was in common use throughout the West by the time Oregon adopted its 1859 Constitution. The Colt revolver combined two of the functions, repeating and rapid reloading, that are common to the weapons regulated by the Multnomah ordinance. The technological advantage of the Colt revolver over existing weapons was dramatic; one might even argue that they were the "assault weapons" of their time: (p.1204)

Unheard-of fire power was delivered by the new arms .... In fact, it is probable that since the late 1850's there has never been ... such a disparity in fire power between any two armed forces as there was between the groups

armed with the Colt revolver and their opponents armed in the prevailing way of the time.[142]

No serious person could argue that the Colt revolvers were not commonly used. Instead, the court of appeals ignored the Colt's place in history, and focused on the Volcanic rifle.[143] The Volcanic was the direct predecessor of the Henry, which became a major commercial success in 1861. The court of appeals insisted that because the Volcanic itself was not commercially successful, there were no counterparts to "assault weapons" in "common use" in Oregon in 1859.[144]

3. Personal Defense

Finally, the third criterion used by the court of appeals in applying *Delgado*'s three-part test was whether the weapon was used for personal defense.[145]

The *Kessler* decision made this distinction between "advanced weapons of modern warfare" and the weapons of personal self-defense.[146] In *Kessler*, the Oregon Supreme Court made it clear that weapons "used exclusively by the military" are not "arms" protected by the Oregon Constitution.[147] But what weapons are "used exclusively by the military"? The fact that Multnomah County found it necessary to regulate "assault weapons" suggests that there were a significant number of non-military owners of such weapons. Indeed, none of the semiautomatic firearms regulated by Multnomah County is used by any military force anywhere in the world, because the firearms are semiautomatic, and modern militaries use automatics. Semiautomatic firearms, which constitute about half of the current supply of handguns and a large fraction of the supply of rifles and shotguns, are frequently used for self-defense.[148]

C. Colorado History

In contrast to the Oregon cases, right to arms jurisprudence in Colorado has never looked to conditions surrounding the creation of the state constitution. Nor have the courts stated that evidence of original intent is irrelevant. The Colorado Statehood Constitution of 1876 included the arms guarantee as it still exists today.[149] The record of the constitutional convention includes (p.1205) votes on motions and amendments, but little reporting of debates (other than a debate over government assistance to parochial schools).[150] The only change made by the state convention to the original proposal was that the original proposal would have restricted the guarantee to "citizens," but the constitution broadened it to include every "person."[151] As in other Rocky Mountain states, the right to arms was considered fundamental and non-controversial:

The agreed-upon axioms of fundamental rights as guaranteed in the Constitution and the territorial organic acts stimulated little debate. The conventions accepted the free exercise of religion, speech, assembly, press, and petition. Delegates generally included the right to keep and bear arms

although the militia often received a separate article .... A liberal construction and a complete enumeration of rights were prevalent features of the Rocky Mountain bills of rights.[152]

The Colorado arms guarantee was taken from the Missouri Constitution of 1875.[153] The chairman of the Bill of Rights committee explained in the Missouri constitutional convention:

This provision goes on and declares, that the right of every citizen to bear arms in support of his house, his person, and his property, when these are unlawfully threatened, shall never be questioned, and that he shall also have the right to bear arms when he is summoned legally or under authority of law to aid the civil processes or to defend the State.[154]

Moreover, the framers of the Missouri Constitution felt that the state legislature would need authorization to regulate the carrying of concealed weapons, since a Kentucky state court had held that "a provision in the Constitution declaring that the right of any citizen to bear arms shall not be questioned, prohibited the Legislature from preventing the wearing of concealed weapons."[155] Since explicit authorization was necessary to regulate the bearing of concealed weapons, obviously no legislative power existed to prohibit the *keeping* of arms. As to the scope of protected arms, a Missouri delegate explained the federal Second Amendment in part as a right to own and carry militia arms: (p.1206)

How is this to be construed? Simply a right of the citizen of a state to carry a pistol, sabre or musket? ... The right belongs to every state, not only that its citizens shall always be free to own arms & to carry arms, but also to put those citizens thus armed & equipped in an organization called militia.[156]

As the Colorado Supreme Court had noted in 1989, "The framers looked to other states as models for almost all of our constitutional provisions."[157] By 1876, the courts of several states had held that the right to keep arms protected possession of militia-type firearms.[158] Hornbook law in 1876 was set forth by Pomeroy's *An Introduction to the Constitutional Law of the United States*:

It may be remarked that whatever construction is given to these clauses, [the federal Bill of Rights] will also apply to the same or similar provisions in the state constitutions.

1. The right of the people to keep and bear arms. The object of this clause is to secure a well-armed militia .... But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons. To preserve this privilege, and to secure to the people the ability to oppose themselves in military force against the usurpations of government, as well as against enemies from without, that government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms.[159]

The Colorado framers and the people in 1876 were familiar with the latest repeating firearms and the continuing technological revolution in arms. For instance, the book *Draft of a Constitution Published under the Direction of a Committee of Citizens of Colorado* included an advertisement on its last page for the sale of "all kinds of latest improved breech loading guns, rifles, pistols, Colts and Smith & Wesson's revolvers, Sharp's, Wesson's, Winchester and Remington rifles ...."[160] The Volcanic Rifle, marketed as early as 1856, held twenty-five to thirty rounds. The Winchester Model 1866 (a successor to the Henry) was advertised in 1867 as firing "at a rate of one hundred and (p.1207) twenty shots per minute," and was recommended both for Army use and "for a home or sporting arm."[161]

Thus, the issue that was at least arguably a close call with regard to the Oregon Constitution of 1859 was well-settled by the time of the Colorado Constitution of 1876. Rapid fire, powerful firearms, suitable for both military and civilian use, were ubiquitous, and were commonly sold to civilians. Since the framers of the Colorado Constitution thought it necessary to grant specific authorization for regulation of concealed carry, it is implausible that the framers contemplated a legislative body having the authority to ban the type of rapid-fire military/civilian rifles which were common at the time the constitution was written.

Further evidence about original intent is supplied by the most important jurist in early Colorado law--E.T. Wells--a highly respected justice of the territorial and the state supreme court, a delegate to the constitutional convention, author of the leading nineteenth-century treatise on Colorado law, and a president of the Colorado Bar Association. In the Colorado State Supreme Court Library is a book owned by Wells titled *The Constitution of the State of Colorado Adopted in Convention, March 14, 1876; Also the Address of the Convention to the People of Colorado.*[162] Handwritten notes on the constitution appear on bluelined note paper before the text begins. Item 68 is: "The provision that the right to bear arms shall be [not called?] in question refers only to military arms: not dirks, bowie knives, etc." Along with this, Justice Wells cited a case from Texas, *English v. State*. [163] *English v. State* held that the Texas Constitution "protects only the right to 'keep' such 'arms' as are used for purposes of war."[164] In addition to this civic republicanism standard, the *English* court stated:

The word "arms" in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the (p.1208) infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols and carbine ....[165]

All of this history makes it hard to believe that, under the original intent of the Colorado Constitution, semiautomatic firearms can be outlawed simply by dubbing them "military" and "rapid-fire." Obviously a demonstration could

have been proffered (which may or may not have been factually persuasive) that modern semiautomatics are actually so much more powerful than the Henry's and Winchester-type rifles of the 1870s that the modern guns could not be within the contemplation of the framers. No such demonstration was attempted. While the U.S. Supreme Court has stated that proof that the framers of the Constitution would have found a particular law offensive will suffice to declare the law unconstitutional,[166] other courts have not been so deferential to original intent. For example, a court may view original intent as only one factor among several to be considered. Or a court may simply declare that it does not care what the original intent of the Constitution was. The Colorado Supreme Court, when faced with overwhelming, uncontested evidence of original intent, could have done the same thing. But the court did not do so. Instead, it simply ignored the entire issue of original intent as if it had never been raised.[167]

D. Evolving Technology

The Oregon Court of Appeals, in suggesting that the state constitution protects only guns which "seem like duplicates" of 1859 guns, seemed to reject the idea that constitutional rights evolve along with the technology to exercise them.

It is true that the authors of the Second Amendment and of the Colorado, Ohio, and Oregon constitutions never specifically intended to protect the right to own semi-automatics (since such guns did not exist), just as they never intended to protect the right to talk privately on a telephone or to broadcast news on a television (since telephones and televisions did not exist either). To assert that constitutional protections only extend to the technology in existence in 1791 (or 1859) would be to claim that the First Amendment only protects the right to write with quill pens and not with computers, and that the Fourth Amendment only protects the right to freedom from unreasonable searches in log cabins and not in homes made from high-tech synthetics. Does "freedom of the press" in the Constitution's First Amendment, and its state counterparts, apply only to printing presses "of the sort" in use in 1789? Are printing technologies that rely on lead type protected, while xerographic processes are not? Is a pamphlet distributed on floppy diskette or through electronic mail unprotected? Should the Supreme Court (p.1209) hold that presses capable of printing thousands of pages of libels per hour are not protected?

The Constitution does not protect particular physical objects, such as quill pens, muskets, or log cabins. Instead, the Constitution defines a relationship between individuals and the government that applies to every new technology. For example, in *United States v. Katz*,[168] the Court applied the privacy principle underlying the Fourth Amendment to prohibit warrantless eavesdropping on telephone calls made from a public phone booth--even though telephones had not been invented at the time of the Fourth

Amendment.[169] Likewise, the principle underlying freedom of the press--that an unfettered press is an important check on secretive and abusive governments--remains the same whether a publisher uses a Franklin press to produce a hundred copies of a pamphlet, or laser printers to produce a hundred thousand.

In 1791, it was easy to start a newspaper. But today, starting a major paper requires large financial resources. The changed conditions provided a reason to uphold a law guaranteeing a right of reply to persons who were attacked in a newspaper. But the Supreme Court had no trouble rejecting changed conditions as a reason for retreating from the historical understanding of the First Amendment.[170]

It is true that an individual who misuses a semiautomatic today can shoot more people than could an individual misusing a musket 200 years ago.[171] Yet if greater harm were sufficient cause to invalidate a right, there would be little left to the Bill of Rights. Since the Constitution was adopted, virtually all of the harms that flow from constitutional rights have grown more severe. Today, if an irresponsible reporter betrays vital national secrets, the information may be in the enemy's headquarters in a few minutes, and may be used to kill American soldiers and allies a few minutes later. Such harm was not possible in an age when information traveled from America to Europe by sailing ship. Correspondingly, a libelous television program can ruin a person's reputation throughout the nation, a feat no single (p.1210) newspaper could have accomplished. Likewise, criminal enterprises have always existed, but the proliferation of communications and transportation technologies such as telephones and automobiles makes possible the existence of criminal organizations of vastly greater scale--and harm--than before.

In short, the proposition that the (arguably) greater dangers of semiautomatics justify a ban on modern firearms technology proves too much, since it allows a ban on many other modern objects used to exercise constitutional rights in harmful ways.

Virtually every freedom guaranteed in the Bill of Rights causes some damage to society. The authors of the Constitution knew that legislatures were inclined to focus too narrowly on short term harms: to think only about society's loss of security from criminals not caught because of search restrictions, and to forget the security gained by privacy and freedom from arbitrary searches. That is why the framers created a Bill of Rights--to put a check on the tendency of legislatures to erode essential rights for short-term gains.

Persons who find the above argument unpersuasive are not without a remedy. If the constitutional right to bear arms has become inappropriate for modern society because the people are so dangerous and the government is so trustworthy, then a constitutional amendment to abolish or limit the right

may be proposed. But, it is not appropriate for courts to flout an existing constitutional guarantee, even if they personally think it is unimportant. [172] As Justice Frankfurter answered when the Supreme Court's self-incrimination decisions were assailed as medieval technicalism inconsistent with modern government's need to detect criminals and subversives: "If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion."[173]

Recognizing that the right to arms is not limited to technology in existence when the particular arms guarantee was written does not mean that appropriate laws may not deal with new technologies. For example, although sound trucks did not exist when the First Amendment was written, they have been held to be within the scope of the First Amendment, while subject to reasonable time, place, and manner regulation.[174] (p.1211)

Accepting the evolution of firearms technology does not necessarily mean accepting the parade of horribles which typically ends with the question "what if everyone owned a nuclear weapon?" The right to arms is typically phrased in terms that refer to carrying the weapon (i.e. "keep and bear"). This suggests that the guarantee protects only arms which one can carry in the hands, and not tanks or jet fighters.

If we want to examine historical conditions in more detail, we can see that the personal arms which existed at the time of the Second Amendment (and the Colorado, Ohio, and Oregon constitutions) were all hand-carried weapons which could be precisely aimed at a particular target. Such weapons included firearms, edged weapons, and bows. In contrast to weapons which can be skillfully directed to single targets, weapons such as grenades or other explosives cannot be directed at a single target, but can kill everyone in the area. The historical reasoning would support constitutional protection for firearms accessories which make firearms even more accurate, such as scopes and laser sights, even though scope technology was not commercially applied to early firearms, and laser technology was not even contemplated. Likewise, should the weapon itself fire a precisely-directed laser, the laser gun itself would be protected. In contrast, a new weapon which fired projectiles indiscriminately (such as a device which fired dozens of arrows at once, at random angles) would not be protected, even though the projectile itself (an arrow) clearly is within the historical intent of the right to arms. In sum, as Indiana Supreme Court Chief Justice Emmert wrote:

Nor can it be maintained that the right to bear arms only protects the use of muskets, muzzle-loading rifles, shotguns and pistols, because they were the only ones used by the Colonists at the time. It might as well be argued that only a house of the architectural vintage of the Revolution would be protected against a present unreasonable search and seizure. Modern guns suitable for hunting and defense are within the protection of our Bill of Rights just the

same as the owner of a modern ranch house type home is protected against unlawful searches.[175]

Finally, we should point out that the Oregon Court of Appeals could have upheld the Portland law with a much narrower, simpler rationale. In doing so, the court could have avoided making the radical, rights-eviscerating assertion that the Oregon Constitution protects only duplicates of the exact arms technology that existed in 1859.[176] Indeed, this is the approach of the Oregon dissent.[177] (p.1212)

The *Oregon State Shooting Ass'n* concurring and dissenting opinion stated that the majority opinion "is an example of judicial manipulation of the constitution to meet a perceived localized social need."[178] "The listed weapons are the 'sort of' weapons commonly used for personal defense in 1859. They are rifles, pistols and shotguns."[179] The majority opinion "will come as a great shock to the many gun owners in Oregon who have possessed semi-automatic rifles and pistols for decades."[180] However, the ordinance did not unreasonably interfere with the right to bear arms because it is not "a complete ban on the possession of the listed firearms in public places"[181] and "does not interfere with a citizen's defense capacity in their homes or other private places."[182]

The authors of this article would not have upheld the Multnomah County law under any rationale, because we believe that the law did not have a close enough connection to public safety (in terms of the guns at issue being commonly used in crime, and the gun restrictions having any real effect on crime), and because we believe that the Portland restrictions were more onerous than the Oregon dissenters did. Nevertheless, the Oregon dissent represents a judicial approach which respects the right to keep and bear arms.

III. A Fundamental Right?

The "assault weapon" cases also implicated the issue of whether the right to arms is fundamental. This issue never really arose in Oregon, since the focus was on the supreme court's historical tests.[183] In Ohio, the court disposed of the issue quickly, noting that the right to arms was listed in the Ohio Bill of Rights along with other rights, all of them fundamental, and hence the right to arms was fundamental.[184] In the Colorado decision *Robertson v. City of Denver*,[185] the issue proved to be more complex. The complexity arose from a difference among the members of the *Robertson* court concerning the need to decide whether the right to keep and bear arms in Colorado was fundamental in order to resolve the case.[186]

The argument in favor of the right being considered fundamental ran as follows: all specific rights in the Colorado Bill of Rights are fundamental, (p.1213) since the article containing the Bill of Rights contains a prefatory

clause declaring that these rights are "the principles upon which our government is founded . ..."[187]

The Colorado Constitution states the right to arms in forceful terms which are stronger than words used to delineate some other rights in Colorado Constitution:[188] "the right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."[189]

Prior to the "assault weapon" case, the Colorado Supreme Court had reviewed two cases involving restrictions on the right to arms by law-abiding persons. The first case, *People v. Nakamura*,[190] invalidated a state law prohibiting aliens from possessing a shotgun, rifle, or pistol:

[The state] cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article 2 of the Constitution, to bear arms in defense of home, person, and property. The guaranty thus extended is meaningless if any person is denied the right to possess arms for such protection ....

[I]n so far as it denies the right of the unnaturalized foreign-born resident to keep and bear arms that may be used in defense of person or property, [the law] contravenes the constitutional guaranty and therefore is void. "The police power of a state cannot transcend *the fundamental law*, and cannot be exercised in such manner as to work a practical abrogation of its provisions."[191]

The *Nakamura* majority rejected the dissenting opinion's argument that a trial court may determine whether a specific firearm is possessed for the purpose of defense of home, person, or property.
[192] When *Nakamura* was (p.1214)decided in 1936, the court was aware of the wide availability of semiautomatic firearms,[193] a fact which made the court's refusal to inquire as to whether a particular type of firearm was being possessed for defense of "home, person, and property" all the more significant for whether a legislative body could make a blanket declaration that certain types of semiautomatic firearms could not be possessed for defense. The Colorado Supreme Court never discussed this implication of *Nakamura* in *Robertson*.[194]

The major gun law case in Colorado was *City of Lakewood v. Pillow*,[195] a unanimous 1972 decision which invalidated a local ordinance which prohibited the possession of a revolver, pistol, shotgun or rifle, except within one's domicile, one's business, or at a target range, unless licensed by the city. Finding the ordinance to be "unconstitutionally overbroad," the court explained:

An analysis of the foregoing ordinance reveals that it is so general in its scope that it includes within its prohibitions the right to carry on certain

businesses and to engage in certain activities which cannot under the police powers be reasonably classified as unlawful and thus, subject to criminal sanctions. As an example, we note that this ordinance would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on a substantial part of their business. Also, the ordinance appears to prohibit individuals from transporting guns to and from such places of business.... Several of these activities are constitutionally protected. Colo. Const. art. II, § 13. Depending upon the circumstances, all of these activities and others may be entirely free of any criminal culpability yet the ordinance in question effectively includes them within its prohibitions and is therefore invalid.

A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle *fundamental personal liberties* when the end can be more narrowly achieved.[196](p.1215)

From the plaintiffs' viewpoint, *Lakewood*'s observation that the restrictive gun law impermissibly served to "broadly stifle fundamental personal liberties" removed any doubt about whether the right to arms was fundamental.[197] In cases decided in later years, the Colorado Supreme Court continued to cite *Lakewood* and its "fundamental personal liberties" language.[198]

As a final argument, the plaintiffs pointed to U.S. Supreme Court language emphasizing that the courts have no authority to declare that some Bill of Rights freedoms "are in some way less 'fundamental' than" others: "Each establishes a norm of conduct which the Federal Government is bound to honor--to no greater or lesser extent than any other inscribed in the Constitution.... Moreover, we know of no principled basis on which to create a hierarchy of constitutional values ...."[199]

The City of Denver responded to the plaintiffs' and the Attorney General's fundamental rights argument. First, Denver asserted that not all Constitutional rights are fundamental.[200]Plaintiffs responded that the only rights ever declared non-fundamental were those not contained in the Bill of Rights.[201] Defendants suggested that the right to bear arms "is not essential to individual liberty."[202]

Defendants also argued that the supreme court in *Lakewood* had misapplied U.S. Supreme Court precedent on the First Amendment by using First Amendment overbreadth doctrine to analyze a gun restriction.[203] In an amicus brief, the Denver District Attorney stated that "it is important for this (p.1216)Court to limit [*Lakewood v.*] *Pillow*" and to provide "a contemporary construction" of that case.[204]

Defendants also pointed to several post-*Lakewood* cases in the 1970s where the supreme court had used the word "reasonable" in upholding restrictions on the possession of arms by convicted felons and drunks.[205] Plaintiffs argued that while restrictions on felons and drunks might be evaluated on a "reasonableness" standard, the lower standard had not been applied to law-abiding, responsible gun owners.[206](p.1217)

Denver also pointed to decisions stating the right to arms is not "absolute."[207] The plaintiffs conceded this but pointed out that being non-absolute is not the same as being non-fundamental.[208]

Although courts of sister states are not definitive interpreters of Colorado law, *Lakewood* had been prominently quoted by the courts of other states to invalidate firearms prohibitions, most notably for its statement that the right to arms is "fundamental."[209]

What did the Colorado Supreme Court do with the fundamental rights issue? The court could have followed *Lakewood* and its progeny and again stated that the right to arms was fundamental. Or the court could have followed the Denver District Attorney's suggestion and revisited the *Lakewood* decision. Or the court could have followed Denver's advice and ruled that, regardless of *Lakewood*'s holding, subsequent decisions have construed the right to arms as non-fundamental. The court did none of these things.

In a concurring opinion in *Robertson v. City of Denver*, Justice Vollack (subsequently promoted to Chief Justice) stated that he considered the right to arms non-fundamental because it was, in his view, not an important part of (p.1218)liberty in contemporary society.[210] At least Justice Vollack announced what he was doing: lowering the right to arms to a level of rational basis review because he did not like it.[211]

In contrast, the majority opinion asserted that the Colorado Supreme Court had never decided whether the right to arms was fundamental--as if the court's repeated reference to "fundamental personal liberties" in *Lakewood* and its progeny had never been written. Indeed the court carefully avoided quoting the "fundamental personal liberties" language. Having sidestepped the very issue that all litigants treated as the heart of the case, the court then went on to apply rational basis review to the ordinance in question--effectively treating the right to arms as non-fundamental, but without having the honesty to say so.

IV. Standard of Review

In *Arnold v. City of Cleveland*,[212] history was no issue. The parties framed the issue in terms of fundamental rights and the Ohio Supreme Court settled that question at the outset, by declaring that the right to arms under the Ohio Constitution was fundamental.[213] In almost every other state, an infringement on a fundamental right is subjected to the strict scrutiny test. The Ohio Court, however, held that restrictions on fundamental rights are

subject only to a reasonableness test.[214] Notably, the Ohio holding was not limited to arms rights cases, so any right under the Ohio Constitution will henceforth be protected only by reasonableness review. Section A of this part examines how the Ohio court chose a reasonableness test. Section B of this part discusses the standard of review in Colorado, while sections C and D argue that the Ohio, Oregon, and Colorado courts could (and should) have declared the ordinances unconstitutional, without even needing to consider a standard of review.

A. Ohio's Standard of Review

The result in *Arnold* was almost foreordained by the first paragraph:

In determining the constitutionality of an ordinance, we are mindful of the fundamental principle requiring courts to presume the constitutionality of lawfully enacted legislation. Univ. Hts. v. O'Leary, 429 N.E.2d 148, 152 (1981); and Hilton v. Toledo, 405 N.E.2d 1047, 1049 (1980). Further, the legislation being challenged will not be invalidated unless the challenger establishes that it is (p.1219)unconstitutional beyond a reasonable doubt. *Id. See also* Hale v. Columbus, 578 N.E.2d 881, 883 (1990).[215]

We will now turn to each of the three cases that formed the foundation for the *Arnold* standard of review; the cases are important not just to *Arnold*, but to how the Ohio court erred on all constitutional issues.

1. City of University Heights v. O'Leary

O'Leary involved a challenge to municipal ordinances which prohibited individuals from purchasing, owning, possessing, or transporting handguns without an identification card.[217] The citizen charged with violating these ordinances was a private detective carrying several unloaded firearms in cases locked in the trunk of his automobile[218] in compliance with the state regulations for transporting firearms.[219] The portion of the decision cited in *Arnold* states:

A duly enacted municipal ordinance is presumed constitutional; the burden of establishing the unconstitutionality of an ordinance is upon the one challenging its validity. East Cleveland v. Palmer (1974), 40 Ohio App. 2d 10, 317 N.E.2d 246. Appellee has failed to sustain this burden. Sections 626.04(a) and 626.09(a) are not violative of due process. They are not vague. It is clear what is required: a firearm owner's identification card issued by either a non-resident's home municipality, or by the city of University Heights. The method for acquiring a card is clearly set forth in Chapter 626.[220]

In *O'Leary* the trial court and intermediate appellate court both ruled that the University Heights ordinances were unconstitutional because of overbreadth, vagueness, and unenforceability.[221] The appellate court additionally ruled the ordinances violative of due process because they penalized innocent conduct.[222] The Ohio Supreme Court reversed after

very little discussion of Ohio law or the case itself. Its decision centered on a discussion of three federal cases and one from the District of Columbia: *Lambert v. California*,[223] *United States v. Mancuso*, [224] *United States v. Freed*,[225] and *McIntosh v. Washington*.[226]

In *Lambert v. California* the Supreme Court ruled unconstitutional a Los Angeles municipal ordinance which required convicted felons to register (p.1220)with the Chief of Police shortly after their arrival in the city. [227] The Court was persuaded in part by the passive nature of the defendant's activity.[228] Lambert's activity, remaining in Los Angeles, otherwise would be considered harmless and an exercise of her freedom of association and travel, both protected by the First Amendment. Her conduct would not ordinarily lead one to inquire about the lawfulness of the conduct. Additionally, the court found that registration of convicted felons is done primarily for the convenience of law enforcement agencies.[229]

In *United States v. Mancuso*[230] the U.S. Court of Appeals for the Second Circuit reversed the conviction of a defendant for violating 18 U.S.C. Section 1407, requiring convicted drug offenders to register with customs officials before and after leaving the country.[231] The Second Circuit relied on *Lambert* because of the passive nature of the defendant's conduct, a crime of omission.[232] Like the defendant in *Lambert*, Mancuso was exercising his freedom of association and travel. Both the district court and the Second Circuit considered Mancuso's lack of knowledge about the registration requirement in making their decisions.[233] The Second Circuit determined that knowledge of the registration requirement was required:

Since the district court specifically found that there was 'no knowledge' of the statute, we hold that Mancuso did not violate 18 U.S.C. 1407 .... On practical, purposive grounds, it is difficult to understand how elimination of the requirement of knowledge would have furthered the Congressional aim to make detection of illegal narcotics importation easier.... When there is no knowledge of the law's provisions, and no reasonable probability that knowledge might be obtained, no useful end is served by prosecuting the "violators."[234]

By imposing a knowledge requirement before penalizing a felon for exercising the right to travel, *Mancuso* seems to militate in favor of a knowledge requirement before penalizing a non-felon exercising the right to transport a firearm.

United States v. Freed[235] limited *Lambert* and *Mancuso*'s passive activity defense. Defendant Freed was prosecuted for possession of unregistered (p.1221)hand grenades, in violation of the National Firearms Act. [236] Enacted in 1934, the Act restricts the possession or transfer of unregistered machine guns, short-barreled rifles or shotguns, and "destructive devices," including hand grenades.[237] Writing for the Court, Justice Douglas distinguished *Lambert*, using the rationale of *Mancuso*:

"This is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons ...."[238]

With the aforesaid cases forming the background, the Ohio Supreme Court in *O'Leary* mirrored the analysis of *McIntosh v. Washington*,[239] in which the District of Columbia Court of Appeals upheld the firearms registration requirement enacted by the District of Columbia in 1976. Both courts relied on *Freed*'s "dangerous or deleterious devices" rationale. The conclusion of both the Ohio Supreme Court in *O'Leary* and the District of Columbia Court of Appeals in *McIntosh* was based on the premise that firearms are dangerous or deleterious devices.[240] The problem with this line of reasoning is that ownership and use of firearms--unlike ownership of hand grenades or heroin--is a fundamental right, as confirmed by the Ohio Supreme Court in*Arnold*.[241]

Traditionally, the items held to be "dangerous or deleterious devices" have not been items for which Congress wants to promote the regulated use. [242] Rather, as the Third Circuit noted in a similar case, "[Congress's] purpose was to prohibit this conduct, not to encourage registration prior to engaging in it."[243] So how did *O'Leary* find the innocent possession of unloaded firearms to be "dangerous or deleterious"?

The core of the *O'Leary* decision rests on a three-part test derived from the *Lambert* factors:

First, mere passive conduct is not involved here. To violate the law, one must acquire possession of a firearm. *United States v. Crow* (C.A. 9, 1971), 439 F.2d 1193, 1196,*vacated on other grounds*, 404 U.S. 1009, 92 S. Ct. 687, 30 L.Ed.2d 657 (1972); *State v. Drummonds* (1975), 43 Ohio App. 2d 187, 188-189, 334 N.E.2d 538. Second, the(p.1222)regulated conduct here, possession of a firearm, is one which by its nature suggests the possibility of governmental regulation. United States v. Freed, *supra*; United States v. Weiler, *supra*. Third, the gun registration ordinance involved here is not designed solely for the convenience of law enforcement agencies. The purpose of the ordinance is to protect the citizens of University Heights from violence arising from handguns and other firearms by keeping firearms out of the hands of unfit persons, that is, those ineligible to receive a Restricted Weapons Owner's Identification Card. *See Mosher v. Dayton* (1976), 48 Ohio St. 2d 243, 358 N.E.2d 540; *State v. Drummonds*, *supra*; *Photos v. Toledo* (1969), 19 Ohio Misc. 147, 250 N.E.2d 916.[244]

The first proposition, that acquiring a gun is not passive, was clearly true. The third proposition, that the gun registration ordinance was not solely for the convenience of the government, was at least arguably true.[245] The second proposition, however, revealed the Ohio court's hostility to the right to keep and bear arms. As noted above, a case involving grenades and other

unusual destructive devices (not covered by the right to arms) is no precedent for ordinary firearms being considered "dangerous or deleterious."[246] The other cases relied on by the Ohio court, *United States v. Crow*,[247] *State v. Drummonds*,[248] and *United States v. Weiler*,[249] all involved convicted felons. Crow was convicted of murder ten years before his firearms offense.[250] Drummonds was convicted of stabbing with intent to kill or wound before he was charged with the later firearms offense.[251] A court citing these cases for the result that gun owners are presumed to know they may need to register their weapons with any locality they pass through is equating all gun owners with convicted murderers.

The *O'Leary* decision was written before *Arnold* announced that the right to arms was fundamental in Ohio. Given that announcement, it was incongruous for *Arnold* to rely on *O'Leary*, which is based on the proposition that the owning of firearms is "dangerous or deleterious."[252] In early 1994, the United States Supreme Court announced a decision which made (p.1223) *O'Leary* and *Arnold* all the more untenable.[253] A gun owner possessed a semiautomatic Colt rifle which sometimes malfunctioned by firing two shots at once.[254] The two-shot malfunction made the gun (by federal definition) a "machine gun," since one trigger press would sometimes fire two bullets.[255] The gun owner was prosecuted for possessing an unregistered machine gun.[256] The government conceded the defendant's lack of knowledge, but argued that as a possessor of a semiautomatic rifle, he should have been on notice that he owned an object which might be subject to regulation.[257] In *Staples v. United States*, the Court held that ownership of a semiautomatic firearm was not the type of activity that should put one on notice that one may be subject to regulation.[258]

Having equated gun owners with convicted murderers and guns with grenades, *O'Leary* relied upon *City of East Cleveland v. Palmer*[259] to establish its standard of review for municipal ordinances.[260] *Palmer* was a challenge to a $75 parking ticket for violation of a municipal ordinance prohibiting parking along the city streets for more than five hours at night.[261] Parking on the street at night is hardly a fundamental right, but the Ohio Supreme Court seems to equate gun control measures with parking violations in using *Palmer* as its standard of review.

2. Hilton v. City of Toledo[262]

In announcing its standard of review, the *Arnold* court also relied on *Hilton*, a case involving a challenge to a municipal ordinance prohibiting certain advertising signs.[263] The ordinance prohibited flashing portable advertising signs, and limited use of any portable sign to a total of 15 days in one location;[264] however, it allowed the use of permanent electric signs.[265] In approving this ordinance as a valid exercise of the municipal police power to (p.1224) regulate commercial activity,[266] the Ohio Supreme Court applied the following standard of review:

An enactment of the legislative body of a municipality is entitled to a presumption of constitutionality. The presumption may be rebutted by showing that the ordinance lacks a real or substantial relationship to the public health, safety, morals or general welfare, or that it is unreasonable or arbitrary .... Furthermore, it is incumbent upon the party alleging unconstitutionality to bear the burden of proof, and to establish his assertion beyond a reasonable doubt.[267]

This passage from *Hilton* is a source of the standard of review used in *Arnold*.[268] Conspicuously absent from the *Arnold* test is the second sentence from *Hilton*, which explains how the presumption of constitutionality may be rebutted.[269] The full test for a review of a municipal ordinance, as announced in *Hilton*, is substantially similar to the test employed by the court in *Cincinnati v. Correll*,[270] another case cited by the *Arnold* court.[271] More of this comparison will be made later, but it suffices to say that the *Arnold* court edited the *Correll* test to remove its full effect.[272] Both tests require that the challenged ordinance must have a "real or substantial relationship" to the public health and welfare.

Hilton's test for review is derived from several Ohio cases, which tested the constitutionality of municipal ordinances, dating back to 1918: *City of Dayton v. S.S. Kresge Co.*,[273] *Alsenas v. City of Brecksville*,[274] *State v. Renalist, (p.1225)Inc.*,[275] *State ex rel. Ohio Hair Products Co. v. Rendigs*,[276] *City of East Cleveland v. Palmer*,[277] and *City of Cincinnati v. Criterion Advertising Company*.[278] All cases cited, except *Renalist*, were constitutional challenges to municipal ordinances. The challenged ordinances limited commercial conduct or practices. In most cases, no freedom of speech issue was even raised. To the extent that the right to speech did appear, it was in the context of commercial speech which (whether rightly or wrongly) is entitled to significantly less judicial protection than "core" First Amendment speech.[279]

3. Hale v. City of Columbus[280]

Arnold cited *Hale v. City of Columbus*[281] for the proposition that a constitutional challenge to a municipal ordinance must meet a burden of proof "beyond a reasonable doubt" in order to prove unconstitutionality.[282] Once (p.1226)again, as shown by the edited test from *Hilton*, the court has engaged in selective quotation to achieve its desired end. When the full test is considered, the minimum rationality standard applied in *Arnold* appears incomplete. The full paragraph from *Hale* reads as follows:

Legislative acts enjoy a strong presumption of constitutionality and any challenge must establish beyond a reasonable doubt that the enactment is unconstitutional .... The person challenging the legislation must show evidence that the legislation lacks the requisite nexus to its stated purpose.... Thus, the issue in the facts before this court is, whether the ordinance bears *a*

real and substantial relation to a proper subject of municipal police power under Section 3, Article XVIII of the Ohio Constitution.[283]

None of the cases cited in *Hale* to develop the standard of review involved constitutionally protected activity. Instead, the cases involved a public interest group's complaint that the legislature had not controlled utility advertising strictly enough,[284] a complaint that the legislature should not have given money to a veterans' group,[285] a challenge to an ordinance requiring the use of rubber tires on city streets,[286] and a challenge to a law banning pinball machines.[287](p.1227)

4. *Arnold*'s Balancing Test

The *Arnold* court quoted a passage from *Cincinnati v. Correll*:[288]

Laws or ordinances passed by virtue of the police power which limit or abrogate constitutionally guaranteed rights must not be arbitrary, discriminatory, capricious or unreasonable and must bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public.[289]

In quoting this passage, the *Arnold* court left out the paragraph from *Correll* which states: "The Courts of this country have been extremely zealous in preventing the constitutional rights of citizens being frittered away by regulations passed by virtue of the police power."[290]

"Therefore," the unzealous Ohio Supreme Court announced, "the test is one of *reasonableness*."[291] But, of course, "reasonableness" was only one part of the test which the *Arnold* court itself quoted. What about whether there is "a real and substantial relation to the object sought to be obtained?"[292] It should not be asking too much for a court that announces a test on one page to actually use the test on the next page.

After examining the *Arnold* court's misapplication of municipal cases involving commercial law to a fundamental rights case, the reader may wonder why the Ohio court did not follow precedents which required a strict scrutiny standard of review for infringements of state constitutional rights. The answer is that in Ohio, there were no such cases. The Ohio dissent, which argued for a strict scrutiny standard, could cite not cite any Ohio precedents.[293] Instead, it cited cases from other states, including the *City of Lakewood v. Pillow* decision from Colorado, a case consistently interpreted, until the 1994 Colorado Supreme Court decision, to mean that infringements on the state right to arms of law-abiding citizens should be subjected to rigorous judicial scrutiny.[294](p.1228)

B. Narrow Tailoring and Overbreadth

As noted above, the *Arnold* court quoted a two-part test for its low-level review of the Cleveland ordinance, but applied only the first part of the test.[295] Similarly, in *Lakewood*, the Colorado Supreme Court, in announcing

that it could rely on tests from prior cases without needing to decide if the right to arms was fundamental, used only a single component of the tests in the prior cases: whether the ordinance was within "the police power."[296] The Colorado court carefully ignored language from its earlier cases which dictated that a law could not be within the police power if it was "overbroad" or not "narrowly tailored."[297] Relying on *Lakewood*, Colorado courts had repeatedly used the overbreadth doctrine to strike down laws, even when fundamental rights were not involved.[298] Additionally, courts from other states had cited *Lakewood* while applying the overbreadth analysis to gun restrictions.[299] Yet, in*Robertson*, the supreme court ruled the trial court was wrong, as a matter of law, to have applied overbreadth analysis to the Denver gun ban.[300] However, prohibiting lawful acquisition of a constitutionally-protected object simply because some criminals might misuse it had already been declared unconstitutional.[301]

A requirement for narrow tailoring had also been articulated in *Lakewood*. [302] Instead of implementing a blanket gun ban, Denver could have more vigorously enforced existing laws involving criminal misuse of firearms, or passed a licensing law designed to allow law-abiding citizens to obtain semi-automatic firearms, while preventing criminals from obtaining the weapons. Again, the district court's use of narrow tailoring analysis was (p.1229)ruled erroneous,[303] even though the district court had merely been following the Colorado Supreme Court's 1972 *Lakewood* decision.[304]

C. Bans as Illegitimate Per Se

Ohio Justice Hoffman argued in dissent that "a stricter standard must be utilized when the legislation places restrictions upon fundamental rights, particularly where the legislation prescribes an outright prohibition of possession as opposed to mere regulation of possession."[305] We would go further still than Justice Hoffman. We would argue that the entire debate over standard of review should have been superfluous, for a gun prohibition applied to law-abiding citizens could never be constitutional--even if it could pass strict scrutiny.

In cases implicating the First Amendment (entitled to no more, and no less protection than the Second Amendment), it is well-established that no amount of demonstrated harm may justify banning speech.[306] In a due process case involving vagrants, an earlier Colorado Supreme Court had affirmed that no law enforcement necessity could justify an infringement of rights.[307]

It is true that a gun prohibition ordinance may be an attempt to serve the compelling state interest in reducing violence. But also compelling is the interest in suppressing Nazi speech, for what Nazi speech led to in Germany, it might lead to in America. In addition, there is a well-developed compelling state interest in censorship of television based on numerous studies showing

that prolonged exposure of children to television leads to increased homicide and other violent crime.[308] Another compelling state interest could be asserted (p.1230)in altering the racial balance of a student body or increasing the number of lawyers of a particular racial or ethnic group.

Yet courts will invalidate such laws, "not as insubstantial but as facially invalid."[309] No compelling state interest can support the banning of writings or movies because they might legitimize rape or adultery, because "the First Amendment's basic guarantee is of freedom to advocate ideas."[310]

D. Explicitly Stated Anti-constitutional Legislative Purpose

Suppose that a restrictive municipal zoning ordinance declared that its purpose was: "1. To reduce traffic congestion; 2. To reduce fire hazards associated with excessive density; and 3. To prevent racial minorities from living in the city." While the first two purposes of the ordinance are generally considered legitimate zoning purposes, the third purpose (racial discrimination) is plainly illegitimate. The existence of the illegitimate motive would be sufficient (even if the ordinance were otherwise flawless) for the ordinance to be declared unconstitutional.[311]

While illegitimate motivations usually must be ferreted out through litigation, the Portland,[312] Cleveland,[313] and Denver[314] city council majorities (p.1231)believed so deeply in their illegitimate motives that they placed them in black and white at the beginning of the statutes. If the right to arms were being treated like the right to freedom of speech or the right to be free of state-sponsored racial discrimination, the Portland, Cleveland, and Denver ordinances would have been instantly struck down on the basis of illegitimate motivation, without need for further inquiry.

The Cleveland City Council asserted that the guns it was banning were made for "anti-personnel" purposes, while the guns which it was not banning "are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities."[315] Likewise, "assault weapons" were banned because the Denver City Council found they were "designed primarily for military or antipersonnel use,"[316] and were regulated in Portland because their anti-personnel purpose outweighed "any function as a legitimate sports or recreational firearm."[317] The Ohio, Oregon and Colorado constitutions explicitly guarantee the right to bear arms for personal protection, and for defense of the state--two firearms uses which are "non-sporting" (p.1232)and "anti-personnel."[318] Although the city councils had, in effect, openly declared their illegitimate purpose (restricting of guns used for constitutionally protected anti-personnel purposes), neither the Oregon, Ohio nor Colorado courts considered for a moment that an explicitly stated, anti-constitutional purpose might invalidate the ordinance.[319]

The Colorado Constitution, article II, section 3 states: "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of ... protecting property; and of seeking and obtaining their safety." The Denver Ordinance allows persons who owned "assault weapons" before the effective date of the Ordinance to retain their guns by registering them with the police.[320] But these "grandfathered" registrants were forbidden to use their registered guns for self-defense, even against a deadly attack in their own home. The lower court declared the self-defense prohibition unconstitutional; while requiring the registration of certain guns might be permissible, forbidding the use of a lawfully owned gun for protection was not.[321]

On appeal, even the Center to Prevent Handgun Violence (the legal arm of the lobby which helped create the whole "assault weapon" prohibition issue) in its amicus brief did not attempt to justify a ban on use of a registered firearm in lawful self-defense; the Center argued instead that the ordinance had been misinterpreted.[322]

Yet the Colorado Supreme Court, after ruling that "assault weapons" (as broadly defined by the City Council) could be banned, also concluded that the Council could ban the use of lawfully registered, grandfathered guns in lawful self-defense.[323] While Denver had offered various reasons for wanting (p.1233)to control the "proliferation" of "assault weapons," the city attorney during the course of the case offered no reason for, and did not attempt to defend, the ban on use of lawfully owned guns for protection. A court which upholds a gun law which not even the gun prohibition lobby and its allies will defend is, it might be suggested, not much concerned about protecting the right to arms.

V. Fact-Finding

In Ohio, the *Arnold* court found that a fundamental interest was at stake, and then applied a "reasonableness" test to the infringing ordinance.[324] In Colorado, the *Robertson* court acted as if the fundamental rights issue were undecided, and then proceeded to apply a reasonableness test.[325] Even if we assume that infringements on rights contained in the Bill of Rights should be subject only to a test of "reasonableness," the premise of any "test" is that some things will pass the test, and others will fail. But as interpreted by the Colorado and Ohio courts, the "reasonableness" test is foreordained never to find unreasonable any infringement or prohibition on the right to arms.

The Ohio case came before the supreme court following Cleveland's successful motion to dismiss, a motion which precluded any discovery.[326] The Colorado case had arisen out of cross motions for summary judgment, following discovery.[327] In either case, the trial court was required (and the appellate courts were required to make sure that the trial courts did so) to give every benefit of doubt to the non-moving party, as to which facts would

be proven at trial.[328] The *Arnold* appeal, besides involving constitutional issues, also raised the propriety of the trial court's *sua sponte* conversion of the motion to dismiss into a motion for summary judgment, and then granting the motion before any discovery could be had.[329] The Ohio Supreme Court found any procedural error to be irrelevant, since, "we believe that appellants can prove no set of facts entitling them to relief."[330]

The factual showing that the Cleveland plaintiffs wanted to make in the trial court was offered in part through extensive exhibits of legal and criminological scholarship, and governmental crime statistics, in appendices to the appellate motions.[331] The Denver plaintiffs and the Attorney General had the opportunity to make a much more extensive showing, with exhibits to the summary judgment motion. Thus, while the Cleveland litigants complained (p.1234)that the Cleveland government refused to obey public information laws requiring disclosure of the government's data about the (non-)use of "assault weapons" in Cleveland crime,[332] the Colorado litigants were able to discover Denver's data.

At a hearing before the Denver City Council, Police Chief Zavaras testified that "assault weapons are becoming the weapons of choice for drug traffickers and other criminals."[333] The City Council passed a gun ban which made the specific finding that "law enforcement agencies report increased use of assault weapons for criminal activities. This has resulted in a record number of related homicides and injuries to citizens and law enforcement officers."[334] During discovery, the Colorado Attorney General and the private plaintiffs inventoried every single firearm in Denver police custody. The ordinance covered none of the 232 shotguns, nine of the 282 rifles (3.2%), and eight of the 1,248 handguns (0.6%) in the police inventory.[335] Of the fourteen banned guns in Denver police custody, one had been used in a crime of violence. Half had been seized from persons who were never charged with any offense.[336]

Consistent with the Denver data, the plaintiffs in both the Denver and Cleveland cases presented police data from many other cities to support the proposition that "assault weapons" were almost never used in crime.[337] The Ohio and Colorado majorities specifically found this evidence irrelevant.[338] (p.1235)In other words, the city governments could outlaw firearms which had not been crime problems and which, it could be proven,[339] posed no danger of becoming a crime problem. The city governments could outlaw something that might become a problem, whether or not credible evidence suggested that it might. In a free press analogy, *Playboy* and other non-obscene erotic literature could be outlawed because they might at some future point cause rape, even if it could be proven that they have never caused rape, and there is no evidence that they will do so in the future.[340]

Even if we presume that a government may ban unusually dangerous firearms, it remains to be proven whether the particular firearms banned are in fact unusually dangerous. Yet in upholding the grant of the motion to dismiss the plaintiffs' case, the Ohio Supreme Court foreclosed the plaintiffs from introducing any evidence as to whether the (very large) number of firearms banned by Cleveland were in fact more powerful, more likely to be used in crime, or more dangerous in any way at all. The Cleveland City Council had avowed its intent *not* to ban "sporting" firearms, but only "antipersonnel" ones.[341] Yet the Ohio majority saw no need for a factual hearing as to whether any one of the numerous guns banned by Cleveland could be proven, perhaps beyond a reasonable doubt, to be in fact a "sporting" gun rather than an "antipersonnel" one.[342]

In the first paragraph of the *Arnold* opinion, the majority announced that challengers to a municipal ordinance must prove "beyond a reasonable (p.1236)doubt" that the ordinance is unconstitutional.[343] Articulating a "reasonable doubt" standard of proof implies that proof can be made. But what kind of proof can be made when the government's assertions when enacting the ordinance are taken as the irrefutable last word, against which no evidence can matter?[344]

Thus, as the Ohio dissent complained:

Whether the weapons banned by the Cleveland ordinance are primarily antipersonnel or whether they are equally suitable for defensive or sporting purposes has yet to be demonstrated .... The mere declaration by Cleveland Council that it finds the primary purpose of assault weapons to be antipersonnel and any civilian application or use of those weapons is merely incidental to such primary antipersonnel purpose ... is, standing alone, insufficient to satisfy the government's burden when such legislation infringes upon a fundamental right .... The challenger must be given an opportunity to demonstrate otherwise.[345](p.1237)

The Colorado majority took the same approach as the Ohio majority. The Denver City Council had proclaimed that its motive in enacting the ordinance was fighting crime.[346] That proclamation was sufficient to prove to the court that the gun prohibition was within "the police power."

In Oregon, the majority had, in its finding that "assault weapons" are not protected by the Oregon right to arms, relied heavily on the finding that some semi-automatic "assault weapons" have evolved from military firearms.[347] Yet, as the dissent pointed out, the majority refused to "separately analyze those listed firearms that did not originate as military weapons."[348]Likewise, the majority worked hard to prove that semiautomatic technology was unimaginable to the authors of the 1859 Oregon Constitution; yet one of the guns which the majority discussed in a footnote (a shotgun) uses a revolver mechanism (invented in the 1840s, and widespread immediately thereafter) and is not a semiautomatic.[349] Yet the

majority did not discuss how a theory about semi-automatic guns which are derivative of military guns could be applied to eliminate constitutional protection for a revolver-action gun which has no military design in its past.

"Facts are stubborn things," John Adams told the jury during the Boston Massacre trial.[350] "Facts are stupid things," President Reagan said in a malapropism.[351] "Facts are nothing at all," the Ohio and Colorado Supreme Court majorities have stated, when the rights of gun owners are involved.

Conclusion

Not every state court in recent years has treated gun owners as having no rights that local governments were bound to respect as long as guns were not completely prohibited. For example, the same year that Portland, Denver, and Cleveland passed "assault weapon" laws, Atlanta did as well. A lawsuit soon followed, and not long thereafter the court granted the plaintiffs' motion for a temporary restraining order.[352] In a brief ruling, the court held that the Atlanta prohibition conflicted with state law[353] (and in dicta said that the ban would also violate the state constitutional right to arms). The City of Atlanta did not appeal the decision.

"Nothing is unsayable" in constitutional language, suggested Sanford Levinson, as he compared the Death of Constitutionalism (the notion that the Constitution is a text with bounded meaning), which he called the most important development in modern legal theory, to the Death of God, the (p.1238)most important development in modern theological theory. [354] The three cases from Colorado, Ohio, and Oregon represent an apogee of the Death of Constitutionalism, for they are grounded in neither the text of the relevant state constitution, prior precedent in the relevant state court, the intent of the authors of the constitutions, nor on any factual or logical inquiry. To the contrary, the decisions are an application of Justice Powell's rueful observation that "Constitutional law is what the Court says it is."[355] Yet only Justice Vollack in Colorado was forthright enough to admit that the justices would, in effect, rip the right to bear arms out of the Constitution because they did not like it.

Yet even as professors of theology proclaimed "the death of God" and their views swept through the academy, most of the American populace appears to think reports of the death highly exaggerated.[356] Indeed the religions which most determinedly reject the academy's world view (such as Pentecostalism) are the ones that are experiencing the most rapid growth. [357]

Something similar is happening with regard to the death of Constitutionalism. The 1993-1994 Ohio, Oregon, and Colorado decisions occurred during the period when the right to bear arms was under the greatest attack in history. The national media confidently proclaimed that the once-mighty National Rifle Association was impotent. Congress enacted,

and President Clinton enthusiastically signed, the Brady Bill[358] and then a federal "assault weapon" ban as they read polls which suggested that the controls were overwhelmingly supported by the public.

But something happened on the way to the death of the right to bear arms. The Brady Bill's requirement for local law enforcement to perform a mandatory background check has been held unconstitutional by some courts as a violation of the Tenth Amendment.[359]

Many gun owners, regardless of the courts' interpretation of the laws, apparently believe that the "assault weapon" bans are unconstitutional, and are behaving accordingly. While Cleveland and Denver mandated that existing owners of "assault weapons" register themselves and their guns with the police, only about one percent complied, a rate similar to compliance(p.1239)with other gun registration laws.[360] After Congress passed a national "assault weapon" ban in the summer of 1994, the gun-owner backlash against it was credited by President Clinton, and other commentators, as responsible for delivering the House of Representatives to the Republicans.[361]

In Ohio, Attorney General Fisher was defeated for re-election.[362] Four years before he had won a close victory, in part because many gun rights activists had no idea what he stood for. Four years later, they knew, and they worked very hard to deny him re-election.[363]

In Colorado, Democratic challenger Dick Freese made the "assault weapon" issue the centerpiece of his campaign against Attorney General Gale Norton.[364] His major television commercial showed an "assault rifle" menacingly pointed at the viewer, while informing viewers of Attorney General Norton's support for "assault weapons." Gale Norton won over sixty percent of the vote, the largest percentage received by any candidate for statewide office in Colorado in 1994.[365] The Oregon state legislature recently enacted legislation that preempts all local gun controls.[366] Having been told (p.1240)by the courts that the state constitutional right to keep and bear arms is unimportant,[367] many people are taking it seriously anyway.

The great irony of some courts acting as if gun owners have no rights which the courts are bound to respect is that the gun owners end up recognizing, correctly, that there is no judicial branch that will protect them from the excesses of the legislature. Thus, gun owners become much more intensely involved in the political process, and often succeed in shutting down any legislative attempt at gun control. Rutgers law professor Robert Cottrol explained how judicial inaction makes moderate gun control less obtainable:

One motivation for vigorous opposition to such measures as waiting period and background checks on the part of the NRA and others is the fear, buttressed by frank admissions on the part of many gun control advocates, that such steps are simply a back door towards prohibition. That fear is

further fed by those, including many in the federal judiciary, who urge that the Second Amendment provides no protection against firearms prohibition. [368]

Imagine how different the political debate on gun control might be it we simply treated the Second Amendment the way we do other provisions of the Bill of Rights. There is no viable political movement lobbying against requirements for parade permits. Why? Because the courts have made it clear that First Amendment guarantees regarding free speech and freedom of assembly will be enforced. Another strong signal of the courts' intentions to enforce the guarantees of the Second Amendment could go a long way towards furthering the cause of reasonable regulation of firearms ownership. [369]

Perhaps one should not make too much of the three state court decisions shredding the state constitutional right to keep and bear arms. State courts have been striking down unconstitutional gun laws on state grounds from 1821 through the 1980s,[370] and the three cases discussed in article may simply represent a brief aberration in the early 1990s. But to the extent that state courts continue to disrespect the rights of the fifty percent of families who own firearms--to the extent that courts continue breaking the law in the name of the law--then courts will aggravate rather than relieve the current climate of polarization and mistrust of government.

Footnotes

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[1] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

[2] Virtually all of the scholarship of the last 20 years concurs that the Second Amendment was originally intended to guarantee an individual right. *See, e.g.*, Staff of Senate Subcomm. on the Constitution, 97th Cong., 2d Sess., The Right to Keep and Bear Arms 1, 23 (1982) (noting that enforcement of some federal firearms laws is consistent with interpretation of Second Amendment as an individual right); 2 Encyclopedia of the American Constitution 1639-40 (Leonard W. Levy et al. eds., 1986) (stating that framers intended Second Amendment as guarantee of individual's right to bear arms); Leonard W. Levy, Original Intent and the Framers' Constitution

341 (1988) (arguing that Second Amendment is most accurately seen as protection of individual right to bear arms); The Oxford Companion to the United States Supreme Court 763 (Kermit L. Hall et al. eds., 1992) (discussing current debate over whether Second Amendment intended to protect individual right to bear arms or to permit states to maintain militias); The Reader's Companion to American History 477 (Eric Foner & John A. Garrity eds., 1991) (stating that framers intended Second Amendment to protect individual citizens); Akhil Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1164 (1991) [hereinafter Amar, *The Bill of Rights*] (discussing Second Amendment as political right of citizenry to prevent government tyranny); Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1264 (1992) [hereinafter Amar, *Fourteenth Amendment*] (arguing that incorporation of Bill of Rights transformed Second Amendment into individual right); David I. Caplan, *The Right of the Individual To Bear Arms: A Recent Judicial Trend*, 4 Det. C.L. Rev. 789, 793 (1982) (arguing that right to bear arms is individual rather than collective right); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 314 (1991) (arguing that individual right interpretation of Second Amendment is more consistent with historical evidence than collective right theory); Robert Dowlut, *The Right to Arms: Does the Constitution or Predilection of Judges Reign?*, 36 Okla. L. Rev. 65, 67 (1983) (arguing that framers guaranteed right to bear arms to individuals); Richard E. Gardiner, *To Preserve Liberty--A Look at the Right To Keep and Bear Arms*, 10 N. Ky. L. Rev. 63, 95 (1982) (arguing that no amount of historical revisionism can deny that right to bear arms is fundamental individual right); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 Val. U. L. Rev. 131, 132 (1991) (arguing that language and historical intent of Second Amendment mandates individual right to bear arms); Stephen Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. Dayton L. Rev. 91, 94 (1989) (arguing that broad language of Second Amendment warrants inference of individual right); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 Harv. J.L. & Pub. Pol'y 559 (1986) (discussing interpretation of Second Amendment as an individual right and its effect on gun control); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Commentary 87, 89 (1992) (arguing that Second Amendment guarantees every adult right to possess most firearms); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143, 145 (1986) (arguing that Second Amendment guarantees individual right to keep arms for self-defense); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 244-52 (1983) (arguing that

Second Amendment is the basis for an individual right to bear arms, rather than a collective right to bear arms); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103, 111(1987) (arguing that language of Second Amendment protects individual's right to keep and bear arms); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 642(1989) (observing that armed individuals are sometimes necessary to prevent governmental tyranny); Joyce Lee Malcolm, *The Right of the People To Keep and Bear Arms: The Common Law Tradition*, 10 Hastings Const. L.Q. 285, 314 (1983) (arguing that first clause of Second Amendment amplifies scope of right to individuals); William Marina, *Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective*, *in* Firearms and Violence: Issues of Public Policy 417, 418 (Don B. Kates, Jr. ed., 1984) (arguing that individual's Second Amendment right to bear arms not outmoded by developments in technology); James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. Pa. L. Rev. 287, 328 (1990) (arguing that participation by all individuals is necessary to justify resistance to government under Second Amendment); Glenn Harlan Reynolds, *The Right To Keep and Bear Arms Under the Tennessee Constitution*, 61 Tenn. L. Rev. 647, 650 (1994) (extensively discussing the Second Amendment in relation to the Tennessee Constitution); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right To Bear Arms*, 139 U. Pa. L. Rev. 1257, 1269 (1991) (arguing that Second Amendment provides dispersal of military power across the nation); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 Law & Contemp. Probs. 125, 141 (1986) (arguing that framers intended Second Amendment to foster communal responsibilities while guaranteeing citizens' individual rights); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. Hist. 599, 610 (1982) (arguing that history demonstrates that framers intended to guarantee individual right to arms and state right to militia); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236, 1242 (1994) (arguing that the phrase "well-regulated militia" necessarily contemplated individual right to bear arms); David E. Vandercoy, *The History of the Second Amendment*, 28 Val. U. L. Rev. 1007, 1008 (1994) (contending that framers intended to guarantee individual right to bear arms in order to throw off collectively the "yokes of any oppressive government which might arise"); *see also* Charles L. Cantrell, *The Right To Bear Arms: A Reply*, 53 Wis. Bar Bull. 21, 26 (1980) (arguing that framers intended Second Amendment to protect individual right to keep and bear arms); Robert J. Cottrol & Raymond T. Diamond, *"The Fifth Auxiliary Right,"* 104 Yale L.J. 995, 997-1006(1995) (reviewing Joyce L. Malcolm, To Keep and Bear Arms: The Origin of an American Right (1994)); F. Smith Fussner, Book Review, 3 Const. Commentary 582 (1986) (reviewing Stephen Halbrook, That Every Man Be Armed, The Evolution of a

Constitutional Right (1984)); Joyce L. Malcolm, Essay Review, 54 Geo. Wash. L. Rev. 582 (1986) (same); *Cf.* Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 Hamline L. Rev. 69, 103-04 (1986) (arguing that Second Amendment intended to guarantee individual's right to personal security, not to guarantee right to arms); Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right To Arms Viewed through the Ninth Amendment*, 24 Rutgers L.J. 1, 3 (1992) (arguing that Ninth Amendment protects individual's access to tools for self-defense); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551, 614-15 (1991) (conceding that individual right was intended, but since state governments have neglected their duties to promote responsible gun use through drill in a "well-regulated militia," right to arms is no longer valid); John Schoon Yoo, *"Our Declaratory Ninth Amendment"*, 42 Emory L.J. 967, 976 (1993) (discussing Ninth Amendment's role in implementing individual rights).

But see Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right To Bear Arms*, 71 J. Am. Hist. 22, 25 (1983) (arguing that Second Amendment intended to allow militias, not individual right); 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, 7 (1989) (same); Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. Ky. L. Rev. 140, 143 (1982) (arguing for gun control because of high contribution of negligent gun owners to gun violence); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 Val. U. L. Rev. 107, 110 (1991) (arguing that individual right to bear arms is contradicted by framers' intent and text of constitution); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 Hamline L. Rev. 383, 384-89 (1983) (arguing that neither Supreme Court nor circuit courts have upheld individual right to bear arms).

[3] Levinson, *supra* note 2, at 642 (observing that armed individuals are necessary to prevent governmental tyranny).

[4] *See, e.g.*, *id.* at 637. *See also* Amar, *Fourteenth Amendment*, *supra* note 2, at 1193; Amar, *The Bill of Rights*, *supra* note 2, at 1131; Kates, *supra* note 2, at 204; Scarry, *supra* note 2, at 1257.

[5] *See, e.g.*, Amar, *Fourteenth Amendment*, *supra* note 2, at 1193 (Professor, Yale Law School); Levinson, *supra* note 2, at 637 (Charles Tilford Professor of Law, University of Texas School of Law, University of Texas School of Law); Van Alstyne, *supra* note 2, at 1236 (William R. & Thomas L. Perkins Professor of Law, Duke University School of Law).

[6] In 1990, Justice Rehnquist wrote:

"The people" seems to have been a term of art employed in select parts of the Constitution .... The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1 (Congress shall make no law ... abridging ... *the right of the people peaceably to assemble*) .... While this textual exegesis is by no means conclusive, it suggests that "the people" protected ... by the First and Second Amendments ... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (Rehnquist, J.).

In Casey v. Planned Parenthood, 112 S. Ct. 2791 (1992), Justice O'Connor wrote for the majority that the scope of the due process clause is not limited to "the precise terms of *the specific guarantees elsewhere provided in the Constitution*... [such as] the freedom of speech, press, and religion; *the right to keep and bear arms*." *Id.* at 2805 (quoting Poe v. Ulman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (emphasis added)).

[7] *See In re* Brickey, 70 P. 609, 610 (Idaho 1902) (holding that legislature may regulate but not prohibit right to bear arms under Second Amendment); Nunn v. State, 1 Ga. (1 Kelly) 243(1846) (using Second Amendment to invalidate firearms regulation).

[8] Pub. L. No. 101-647, 104 Stat. 4844 (codified at 18 U.S.C. §§ 921-924 (Supp. V 1993)).

[9] United States v. Lopez, 2 F.3d 1342, 1367-68 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

[10] *Id.* at 1364 n.46.

[11] United States v. Lopez, 115 S. Ct. 1624 (1995).

[12] *See* Wilson v. State, 33 Ark. 557, 558 (1878) (pistol carrying statute); City of Lakewood v. Pillow, 501 P.2d 744, 745 (Colo. 1972) (restriction on sale, possession, and carrying); People v. Nakamura, 62 P.2d 246, 247 (Colo. 1936) (ordinance prohibiting possession by aliens of a firearm for hunting); *In re* Brickey, 70 P. 609, 609 (Idaho 1902) (gun carrying statute); Junction City v. Mevis, 601 P.2d 1145, 1152 (Kan. 1979) (gun carrying ordinance as too broad); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (Ct. App. 1822) (concealed carrying statute; state constitution was later amended to allow regulation of concealed carrying of arms); People v. Zerillo, 189 N.W. 927, 928 (Mich. 1922) (ordinance prohibiting alien's possession of firearm); City of Las Vegas v. Moberg, 485 P.2d 737, 738 (N.M. Ct. App. 1971) (gun carrying ordinance); State v. Kerner, 107 S.E. 222, 224 (N.C. 1921) (ordinance requiring license to carry pistol); *In re* Reilly, 31 Ohio Dec. 364, 365 (C.P. 1919) (ordinance forbidding hiring armed guard to protect property); State v. Delgado, 692 P.2d 610, 610 (Or. 1984) (ordinance prohibiting possession of switchblade

knife); State v. Blocker, 630 P.2d 824, 824 (Or. 1981) (prohibition of carrying a club); State v. Kessler, 614 P.2d 94, 95 (Or. 1980) (prohibition of possession of a club); Barnett v. State, 695 P.2d 991, 991 (Or. Ct. App. 1985) (ordinance prohibiting possession of black-jack); Glasscock v. City of Chattanooga, 11 S.W.2d 678, 678 (Tenn. 1928) (gun carrying ordinance); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 168 (1871) (pistol carrying statute); Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214, 215 (1866) (gun confiscation law); Jennings v. State, 5 Tex. Crim. App. 298 (Ct. App. 1878) (ordinance requiring forfeiture of pistol after misdemeanor conviction); State v. Rosenthal, 55 A. 610, 611 (Vt. 1903) (pistol carrying ordinance as too restrictive); State *ex rel.* City of Princeton v. Buckner, 377 S.E.2d 139, 149 (W. Va. 1988) (gun carrying law as too restrictive).

[13] Alabama: "That every citizen has a right to bear arms in defense of himself and the state." Ala. Const. art. I, § 26.

Alaska: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Alaska Const. art. 1, § 19.

Arizona: "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." Ariz. Const. art. II, § 26.

Arkansas: "The citizens of this State shall have the right to keep and bear arms for their common defense." Ark. Const. art. II, § 5.

Colorado: "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons." Colo. Const. art. II, § 13.

Connecticut: "Every citizen has a right to bear arms in defense of himself and the state." Conn. Const. art. I, § 15.

Delaware: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for hunting and recreational use." Del. Const. art. I, § 20.

Florida: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." Fla. Const. art. I, § 8(a).

Georgia: "The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne." Ga. Const. art. I, § 1, ¶ 8.

Hawaii: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Haw. Const. art. I, § 17.

Idaho: "The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent the passage of any legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony." Idaho Const. art. I, § 11.

Illinois: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." Ill. Const. art. I, § 22.

Indiana: "The people shall have a right to bear arms, for the defense of themselves and the State." Ind. Const. art. I, § 32.

Kansas: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." Kan. Const. Bill of Rights, § 4.

Kentucky: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: ... Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons." Ky. Const. Bill of Rights § 1, ¶ 7.

Louisiana: "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." La. Const. art. I, § 11.

Maine: "Every citizen has a right to keep and bear arms; and this right shall never be questioned." Me. Const. art. I, § 16.

Massachusetts: "The people have a right to keep and to bear arms for the common defense. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the Legislature; and the military power shall always be held in an exact subordination to the Civil authority, and be governed by it." Mass. Const. Part the First, art. xvii.

Michigan: "Every person has a right to keep and bear arms for the defense of himself and the state." Mich. Const. art. I, § 6.

Mississippi: "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons." Miss. Const. art. III, § 12.

Missouri: "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons." Mo. Const. art. I, § 23.

Montana: "The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons." Mont. Const. art. II, § 12.

Nebraska: "All persons are by nature free and independent, and have certain inherent and unalienable rights; among these are life, liberty, and the pursuit of happiness and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof." Neb. Const. art. I, § 1.

Nevada: "Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes." Nev. Const. art. I, § 11(1).

New Hampshire: "All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state." N.H. Const. Part First, art. 2-a.

New Mexico: "No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons." N.M. Const. art. II, § 6.

North Carolina: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice." N.C. Const. art. I, § 30.

North Dakota: "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed." N.D. Const. art. I, § 1.

Ohio: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power." Ohio Const. art. I, § 4.

Oklahoma: "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons." Okla. Const. art. II, § 26.

Oregon: "The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." Or. Const. art. I, § 27.

Pennsylvania: "The right of the citizens to bear arms in defense of themselves and the State shall not be questioned." Pa. Const. art. I, § 21.

Rhode Island: "The right of the people to keep and bear arms shall not be infringed." R.I. Const. art. I, § 22.

South Carolina: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in time of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it." S.C. Const. art. I, § 20.

South Dakota: "The right of the citizens to bear arms in defense of themselves and the state shall not be denied." S.D. Const. art. VI, § 24.

Tennessee: "That the citizens of this State have a right to keep and bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." Tenn. Const. art. I, § 26.

Texas: "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." Tex. Const. art. I, § 23.

Utah: "The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the Legislature from defining the lawful use of arms." Utah Const. art. I, § 6.

Vermont: "That the people have a right to bear arms for the defence of themselves and the State--and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power." Vt. Const. ch. I, art. § 16.

Virginia: "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power." Va. Const. art. I, § 13.

Washington: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men." Wash. Const. art. I, § 24.

West Virginia: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use." W. Va. Const. art. III, § 22.

Wyoming: "The right of citizens to bear arms in defense of themselves and of the state shall not be denied." Wyo. Const. art. I, § 24.

[14] The fact that only two books have been written on the subject of state constitutional rights to arms indicates the relative dearth of scholarship on the subject. Clayton E. Cramer, For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right To Keep and Bear Arms (1994) (discussing right to bear arms as construed by state and federal courts); Stephen Halbrook, A Right To Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees (1989) (tracing evolution of individual right to bear arms and loss of framers' original intent in judicial interpretation). For law review articles, see Caplan, *supra* note 2, at 789 (discussing 1981 decisions on carrying of arms in Indiana and Oregon); Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. Dayton L. Rev. 59 (1989) (analyzing development of right to bear arms at federal and state level); Dowlut, *supra* note 2, passim; Robert Dowlut & Janet Knoop, *State Constitutions and the Right To Bear Arms*, 7 Okla. City U. L. Rev. 177 (1982) (comparative analysis of state constitutional provisions concerning right to bear arms); Stephen Halbrook, *Second Class Citizenship and the Second Amendment in the District of Columbia*, 5 Geo. Mason U. Civ. Rts. L.J. (forthcoming 1995); Stephen Halbrook, *Rationing Firearms Purchases and the Right To Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W. Va. L. Rev. 1, 3 (1993) (comparative analysis of right to bear arms provisions from two state constitutions and state gun control legislation); Stephen Halbrook, *The Right To Bear Arms in Texas: the Intent of the Framers of the Bills of Rights*, 41 Baylor L. Rev. 629 (1989) (comparative analysis of Second Amendment with right to bear arms in Texas Constitution); Stephen Halbrook, *The Right To Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 Vt. L. Rev. 255 (1985) (comparing states'

Bills of Rights and rights to bear arms); Reynolds, *supra* note 2 (discussing Second Amendment in relation to Tennessee constitution).

[15] 858 P.2d 1315 (Or. Ct. App. 1993), *review denied*, 877 P.2d 1202 (Or. 1994). Multnomah County includes the city of Portland.

[16] Multnomah County, Or., Ordinance No. 646 (1990). The Oregon legislature effectively invalidated this ordinance by passing, over the governor's veto, 1995 Ore. HB 2784.

[17] Oregon State Shooting Ass'n v. Multnomah County, No A9008-04628 (Or. Cir. Ct., Aug. 22, 1991).

[18] *Oregon State Shooting Ass'n*, 858 P.2d at 1330 (Edmonds, J., concurring in part, dissenting in part).

[19] One prong of the Oregon Supreme Court's test requires that the weapon "as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary or post-revolutionary era or in 1859 when Oregon's constitution was adopted." State v. Delgado, 692 P.2d 610, 612 (1984) (footnote omitted).

[20] *Oregon State Shooting Ass'n*, 858 P.2d at 1320.

[21] 874 P.2d 325 (Colo. 1994).

[22] Denver, Colo. Municipal Code art. IV § 38-130 (1989) (placing restrictions on semiautomatic "assault weapons").

[23] Robertson v. City of Denver, No. 90CV603, slip. op. at 12 (Denver Dist. Ct., Feb. 28, 1993).

[24] *Robertson*, 874 P.2d at 336.

[25] The issue on remand is the claim of plaintiffs and the Attorney General that many of the semiautomatic firearms are named improperly, because the ordinance specifies the name of an automatic firearm, or a firearm that does not exist. For example, the ordinance attempts to outlaw "Norinco, Mitchell and Poly Technologies Avtomat Kalashnikovs (all models)." Den. Rev. Mun. Code, § 38-130(h)(1)a. "Avtomat" is Russian for "1. any automatic device ... 4. submachine gun." Kenneth Katzner, English-Russian/Russian-English Dictionary 418 (1984). The three companies listed (Norinco, Mitchell, and Poly Technologies) have never sold any automatic firearms or submachine guns in the United States. Yet the city attorney of Denver insists that the language bans semiautomatics made by those companies, as well as by numerous other companies.

[26] Cleveland, Ohio, Ordinance No. 415-89, § 628.02 (1989). The original version of the ordinance violated the Supremacy Clause as it conflicted with 18 U.S.C. § 926A (guaranteeing target shooters' right to transport unloaded guns in interstate commerce notwithstanding gun control laws in jurisdictions they passed through). The Cleveland City Council re-enacted

and amended the law to resolve the problem. *See* Arnold v. City of Cleveland, 616 N.E.2d 163, 165 n.2 (Ohio 1993) (noting that conflict corrected).

[27] Section 628.02 of Cleveland Ordinance No. 415-89 defines what was considered to be an "assault weapon" under the ordinance. The *Arnold* court quoted the relevant portion of this section:

(a) 'Assault weapon' means:

(1) any semiautomatic action, center fire rifle or carbine that accepts a detachable magazine with a capacity of 20 rounds or more;

(2) any semiautomatic shotgun with a magazine capacity of more than six rounds;

(3) any semiautomatic handgun that is:

A. a modification of a rifle described in division (a)(1), or a modification of an automatic firearm; or

B. originally designed to accept a detachable magazine with a capacity of more than 20 rounds.

(4) any firearm which may be restored to an operable assault weapon as defined in divisions (a)(1), (a)(2) or (a)(3).

(5) any part, or combination of parts, designed or intended to convert a firearm into an assault weapon as defined in divisions (a)(1), (a)(2) or (a)(3), or any combination of parts from which an assault weapon as defined in divisions (a)(1), (a)(2) or (a)(3), may be readily assembled if those parts are in the possession or under the control of the same person.

(b) Assault weapon does not include any of the following:

(1) any firearm that uses .22 caliber rimfire ammunition with a detachable magazine with a capacity of 30 rounds or less.

(2) any assault weapon which has been modified to either render it permanently inoperable or to permanently make it a device no longer defined as an assault weapon.

Arnold, 616 N.E.2d at 163 (quoting Cleveland, Ohio, Ordinance No. 415-89, § 628.02).

[28] *Id.* at 166 (citing Ohio Const. art. I, § 4).

[29] *Id.* at 173.

[30] *Id.* at 177 (Hoffman, J., dissenting).

[31] 1992 Ore. AG LEXIS 27 (1992).

[32] *Arnold*, 616 N.E.2d at 166.

[33] Colo. Rev. Stat. § 13-51-115 (1984).

[34] While the case was in progress, Gale Norton defeated Attorney General Woodard. Norton continued Colorado's participation in the case.

[35] Before going further, we must point out that one of the authors of this article was involved in the Colorado litigation. David Kopel represented the State of Colorado in district court. After leaving the Attorney General's office, he was one of several attorneys who submitted an amicus brief to the Colorado Supreme Court on behalf of the Colorado Law Enforcement Firearms Instructors Association, the American Federation of Police, the Congress on Racial Equality, and other organizations. Readers should, of course, be skeptical about analyses written by attorneys who participated in a case discussed in an article. Accordingly, it will not be the objective of this article to prove that any of these three cases should have come to a different ultimate result. As we will detail, the laws in question (or at least the core of the laws) could have been upheld by courts which took the right to arms seriously, but which viewed the right somewhat more narrowly than we do. For those who take the right to arms very seriously, parts IV.C and IV.D, *infra*, suggest that the laws were void per se. *See infra* text accompanying notes 305-23.

[36] Robertson v. City of Denver, 874 P.2d 325, 339 (Colo. 1994) (Vollack, J., concurring).

[37] *See infra* text accompanying notes 71-180.

[38] *Robertson*, 874 P.2d at 339.

[39] Arnold v. City of Cleveland, 616 N.E.2d 163 (Ohio 1993).

[40] With respect to differing legal interpretations of the right to keep and bear arms, see, e.g., Cramer, *supra* note 14, at 33-35.

A third theory concerning the right to keep and bear arms is that the Second Amendment and its state constitutional analogs guaranteed a right of the states to organize their own militias. This rationale was almost unknown in American political discourse until the 1960s. It appeared because unlike prior gun control movements, whose goal was disarmament of particular segments of the population (e.g., convicted felons, blacks, and aliens) the modern gun control movement needed a theory that allowed disarming the entire civilian population.

Only one decision using this theory appears before 1900. *See* State v. Buzzard, 4 Ark. 18, 23-24, 28 (1842) (upholding statute creating criminal penalty for carrying concealed weapons). Many of the decisions supporting the state militia rationale are based on state constitutions that declare the right exists "for the common defense." *See, e.g.*, United States v. Johnson, 497 F.2d 548, 550 (4th Cir. 1974) (upholding federal statute prohibiting convicted felons from transporting firearms across state lines); United States v. Tot, 131 F.2d 261, 266-67 (3d Cir. 1942) (upholding federal statute prohibiting person convicted of violence to receive firearm transported across state

lines), *rev'd on other grounds*, 319 U.S. 463 (1943); City of Salina v. Blaksley, 83 P. 619, 620 (Kan. 1905) (applying protection only to arms appropriate for militia); Commonwealth v. Davis, 343 N.E.2d 847, 850 (Mass. 1976) (applying protection only to members of state militia); Harris v. State, 432 P.2d 929, 930 (Nev. 1967) (upholding statute making possession of tear gas pen unlawful).

Other decisions have found that "for the common defense" included a right of individual ownership of military weapons. *E.g.*, Dabbs v. State, 39 Ark. 353, 356-57 (1882); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 179 (1871); State v. Ishenhour, 43 Tenn. (3 Cold.) 214, 215-17 (1866); Aymette v. State, 21 Tenn. (2 Hump.) 154, 159-60 (1840); Simpson v. State, 13 Tenn. (5 Yerg.) 356, 359-60 (1833).

[41] English Bill of Rights (1689). The best analysis of the history of the right to arms in England is Joyce Malcolm, Arms for Their Defense (1994).

[42] Aymette v. State, 21 Tenn. (2 Hump.) 154, 157-58 (1840) (emphasis added) (upholding statute making carrying concealed Bowie knife a misdemeanor because such weapon not suitable for the common defense).

[43] Fife v. State, 31 Ark. 455, 460 (1876) (emphasis added) (holding that easily concealed pistol not protected by constitution because not useful in defense of country but only of self).

[44] State v. Workman, 35 W. Va. 367, 373 (1891).

[45] Cottrol & Diamond, *supra* note 2, at 344, 349.

[46] For a discussion of the relationship between racism and the development of American gun control jurisprudence, see Cramer, *supra* note 14, at 97-141; Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 Kan. J. L. & Pub. Pol. 17, 22-24 (1995) (calling for strict scrutiny of gun control legislation in light of its racial effect); Robert J. Cottrol & Raymond T. Diamond, *Never Intended To Be Applied to the White Population: Firearms Regulation and Racial Disparity*, Chi.-Kent L. Rev. (forthcoming 1995); Cottrol & Diamond, *supra* note 2, at 319, 359-61(arguing that African Americans need more protection from the State).

[47] *See* Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877 201 (1988) (discussing legislation of antebellum South). Foner notes that:

[U]nlike the Mississippi and South Carolina codes, many subsequent laws made no reference to race, to avoid the appearance of discrimination and comply with the federal Civil Rights Act of 1866. But it was well understood, as Alabama planter and Democratic politico John W. DuBois later remarked, that "the vagrant contemplated was the plantation negro."

Id.

[48] Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring specially).

[49] Decisions of the Oregon Supreme Court during the 1980s reflect the classic liberalism theory. See *infra* notes 73-111 and accompanying text for a full discussion of these issues.

[50] Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92 (1822) (emphasis added).

[51] Idaho Const. art. I, § 11. This provision was replaced with that quoted in note 13, *supra*.

[52] *In re* Brickey, 70 P. 609 (Idaho 1902).

[53] U.S. Const. amend. II. For the best explanation of how the Second Amendment combined two threads of arms-rights theory, see Hardy, *supra* note 2, at 560.

[54] 24 Tex. 394 (1859).

[55] Texas Const. art. I, § 13. The Texas Constitution in effect at the time provided that "every citizen shall have the right to keep and bear arms, in the lawful defense of himself and the state." *Id.*

[56] *Cockrum*, 24 Tex. at 401-02.

[57] State v. Hogan, 58 N.E. 572, 575 (Ohio 1900):

The constitutional right to bear arms is intended to guaranty to the people, in support of just government, such right, and to afford the citizen means for defense of self and property. While this secures to him a right of which he cannot be deprived, it enjoins a duty in execution of which, that right is to be exercised. If he employs those arms which he ought to wield for the safety and protection of his country, his person, and his property, to the annoyance and terror and danger of its citizens, his acts find no vindication in the bill of rights.... A man may carry a gun for any lawful purpose, for business or amusement, but he cannot go about with that or any other dangerous weapon to terrify and alarm a peaceful people.

Id. at 575.

[58] *See, e.g.*, Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972) (holding that semi-automatic weapons protected because commonly used by law-abiding people); State v. Kerner, 107 S.E. 222, 225 (N.C. 1921) (striking down local ordinance requiring permit to carry unconcealed pistol).

[59] State v. Rupe, 683 P.2d 571 (Wash. 1984).

[60] *Id.* at 594.

[61] *Id.* at 596 (quoting Wash. Const. art. I, § 27).

[62] Taylor v. McNeal, 523 S.W.2d 148, 150 (Mo. App. 1975) (right of people to bear arms limited by right of police to seize arms incident to lawful arrest).

[63] State *ex rel.* City of Princeton v. Buckner, 377 S.E.2d 139, 143 (W. Va. 1988).

[64] *See, e.g.*, State v. Swanton, 629 P.2d 98, 99 (Ariz. Ct. App. 1981) (defining "arms" in Arizona Constitution as arms used in civilized warfare).

[65] 307 U.S. 174 (1939).

[66] *Id.* at 178.

[67] Rinzler v. Carson, 262 So. 2d 661 (Fla. 1972). The statute in question in *Rinzler* made it unlawful for "any person to own or to have in his care, custody, possession or control any short-barreled rifle, short-barreled shotgun, or machine gun which is, or may be readily operable." *Rinzler*, 262 So. 2d at 664.

[68] *Id.* at 666. While the court held that machine-guns were not constitutionally protected, Florida allowed possession of machine-guns registered under federal law, and thus a local ordinance purporting to ban machine-guns was preempted and held invalid. *Id.* at 667-68. Constitutional protection for machine-guns would appear to be stronger under the civic republicanism theory (suitable for militia use) than the classical republican theory (commonly used for personal protection and sport).

[69] State v. Kerner, 107 S.E. 222, 224 (N.C. 1921).

[70] *Id.* (invalidating a prohibition on the unlicensed open carrying of pistols). Again, doctrinal lines are not always precise; while civic republicanism theory was often invoked to uphold restrictions on the carrying of firearms, in *Kerner* civic republicanism was affirmed along with the right to unlicensed carrying.

[71] *See, e.g.*, State v. Blocker, 630 P.2d 824, 825 (Or. 1981) (upholding constitutional right to possess billy club in public).

[72] 614 P.2d 94 (Or. 1981).

[73] Or. Rev. Stat. § 166.510 (1973) (repealed 1985).

[74] *Kessler*, 614 P.2d at 95-97.

[75] Ind. Const. art. I, §§ 32, 33 (1816).

[76] Ky. Const. of 1799, art. X, §§ 23, 24 (1799).

[77] Ohio Const. of 1802, art. VIII, § 20.

[78] *Kessler*, 614 P.2d at 97.

[79] 235 N.W. 245, 246-47 (Mich. 1931). The Michigan court upheld the conviction of a felon who possessed a blackjack, noting that legislation "cannot constitutionally result in the prohibition of the possession of those arms which, by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of person and property." *Id.* at 247. A later Michigan decision found that an

electrical shocking device (stun gun) was not a commonly possessed, constitutionally protected arm. People v. Smelter, 437 N.W.2d 341, 342 (Mich. Ct. App. 1989).

[80] *Kessler*, 614 P.2d at 97.

[81] *Id.* at 98.

[82] *Id.* at 99.

[83] Or. Const. art. I, § 27.

[84] *Kessler*, 614 P.2d at 99.

[85] *Id.*

[86] *Id.*

[87] Melvin M. Johnson Jr. & Charles F. Haven, Automatic Weapons of the World 71-72 (1945).

[88] *See* John Ellis, The Social History of the Machine Gun 13-15 (1975) (discussing Puckle's problems in developing gun).

[89] *Kessler*, 614 P.2d at 99.

[90] Ellis, *supra* note 88, at 42. For an argument using the Second Amendment to suggest that conscription is unconstitutional, see Amar, *The Bill of Rights*, *supra* note 2, at 1168-73.

[91] William J. Helmer, The Gun That Made The Twenties Roar 75-76, plate after 86 (1969).

The substitution of machine guns for handguns is but one example of the unintended consequences that flow from handgun-only controls. Such laws may increase firearms fatalities by encouraging criminals to switch to sawed-off shotguns, which are as concealable as a large handgun, and far deadlier. If only a third of handgun criminals switched to long guns, while the rest gave up crime entirely, firearms deaths would skyrocket. *See* Gary Kleck, Point Blank: Guns and Violence in America 91-94, 97 (1991); David T. Hardy & Don B. Kates, Jr., *Handgun Prohibition and Crime*, *in* Restricting Handguns 118, 129 (Don B. Kates ed., 1984) (citing increased danger from robbery by shotgun or rifle); Gary Kleck, *Handgun-Only Control*, *in* Firearms and Violence: Issues of Public Policy 195-99 (Don B. Kates ed., 1984) (same); David Kopel, *Peril or Protection? The Risks and Benefits of Handgun Prohibition*, 12 St. Louis U. Pub. L. Rev.285, 326-32 (1993).

[92] National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at I.R.C. §§ 5801-5872 (1988 & Supp. V. 1993)) (procedure for paying federal tax allowing possession of an automatic weapon).

[93] Or. Rev. Stat. § 166.150 (1993).

[94] 630 P.2d 824, 825-26 (Or. 1981).

[95] *Id.* at 826.

[96] *Id.* at 825-26.

[97] 692 P.2d 610 (Or. 1984).

[98] State v. Kessler, 614 P.2d 94, 100 (Or. 1980).

[99] *Delgado*, 692 P.2d at 612.

[100] *Id.* (quoting S. Rep. No. 1980, 85th Cong., 2d Sess. (1958)).

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 614.

[105] State v. Kessler, 602 P.2d 1096 (Or. Ct. App. 1979), *aff'd in part*, *rev'd in part*, 614 P.2d 94 (Or. 1980).

[106] State v. Delgado, 684 P.2d 630 (Or. Ct. App. 1984), *aff'd*, 692 P.2d 610 (Or. 1984).

[107] Barnett v. State, 695 P.2d 991 (Or. Ct. App. 1985).

[108] 775 P.2d 344, 345 (Or. Ct. App. 1989).

[109] *Id.*

[110] Media coverage of "assault weapon" regulations often shows automatic weapons blazing away. The Multnomah County ordinance, and its many counterparts around the United States, however, regulate not machine guns, but guns that fire one shot for every pull of the trigger.

[111] Multnomah County Ordinance No. 646 § IIIB.

[112] Oregon State Shooting Ass'n v. Multnomah County, 858 P.2d 1315, 1317 (Or. Ct. App. 1993), *review denied*, 877 P.2d 1202 (Or. 1994).

[113] The courts held that Oregon's preemption law did not cover the section of the ordinance relevant here. *Id.* at 1323.

[114] State v. Kessler, 614 P.2d 94, 98 (Or. 1980).

[115] *Id.*

[116] *Oregon State Shooting Ass'n*, 858 P.2d at 1318.

[117] *Id.*

[118] *Id.* at 1319.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] Johnson & Haven, *supra* note 87, at 85.

[123] *See supra* notes 87-90 and accompanying text.

[124] Ellis, *supra* note 88, at 25-26, 33; Johnson & Haven, *supra* note 87, at 82-84.

[125] "This was probably the first real 'machine gun' in that the charges were fed into the chambers, fired, and extracted by the actual operation of machinery." Johnson & Haven, *supra*note 87, at 85.

[126] Oregon State Shooting Ass'n v. Multnomah County, 858 P.2d 1315, 1321 (Or. Ct. App. 1993), *review denied*, 877 P.2d 1202 (Or. 1994).

[127] 26 U.S.C. § 5845(b) (1995) (emphasis added).

[128] 27 C.F.R. § 179.11 (1982).

[129] *Oregon State Shooting Ass'n*, 858 P.2d at 1320-21.

[130] 692 P.2d 610, 614 (Or. 1984).

[131] *Oregon State Shooting Ass'n*, 858 P.2d at 1319.

[132] *Id.*

[133] Pollard's History of Firearms 256-57 (Claude Blair ed., 1983).

[134] Johnson & Haven, *supra* note 87, at 77.

[135] *Id.* at 69-77.

[136] *Oregon State Shooting Ass'n*, 858 P.2d at 1319 n.5.

[137] Pollard's History of Firearms, *supra* note 133, at 256-57; *see also* Advertisement, *infra* note 138.

[138] Advertisement for Henry Rifles, reprinted in Harold F. Williamson, Winchester, the Gun that Won the West 36 (1952).

[139] C. Meade Patterson & Cuddy De Marco, Jr., *Civil War Revolvers*, *in* American Handguns & Their Makers 36-37 (Mike Day ed., 1981).

[140] At least four of the "assault weapons" in the ordinance do not use detachable magazines: the Striker-12, Street Sweeper, SPAS-12, and LAW-12 shotguns.

[141] Oregon State Shooting Ass'n v. Multnomah County, 858 P.2d 1315, 1318 (Or. App. 1993), *review denied*, 877 P.2d 1202 (Or. 1994).

[142] Johnson and Haven, *supra* note 87, at 74-75.

[143] *Oregon State Shooting Ass'n*, 858 P.2d at 1321.

[144] *Id.*

[145] *Id.* at 1318.

[146] State v. Kessler, 614 P.2d 94, 98-99 (Or. 1980).

[147] *Id.* at 99.

[148] Kleck, *supra* note 91, at 70-82.

[149] 2 W. Swindler, Sources and Documents of United States Constitutions 60, 66 (1973).

[150] Proceedings of the Constitutional Convention Held in Denver, Dec. 20, 1875 (1907).

[151] *Id.* at 90, 204-05. A "civic republicanism" theory would tend to limit the arms right to citizens, since militia service (like jury duty) was the exclusive province of citizens. The classical liberal theory, focusing on self-defense as a fundamental human right, would be more likely to embrace the broader vision of an arms right for all persons.

[152] Gordon M. Bakken, Rocky Mountain Constitution Making, 1850-1912 23-24 (1987).

[153] 2 W. Swindler, *supra* note 149, at 94 (noting that guarantee taken from Mo. Const., art. II, § 17 (1875)).

[154] 1 Debates of the Missouri Constitutional Convention of 1875 439 (1930).

[155] *Id.* (referring to Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822)).

[156] *Id.* at 119.

[157] People v. Ford, 773 P.2d 1059, 1066 (Colo. 1989).

[158] *See, e.g.*, Fife v. State, 31 Ark. 455, 458 (1876) (holding that constitution guarantees citizens right to keep and bear arms ordinarily used by a well regulated militia, and those necessary to resist oppression); Hill v. State, 53 Ga. 472, 474 (1874) (holding that 'arms' meant weapons ordinarily used in battle: guns of every kind, swords, bayonets, horseman's pistols, etc.); Andrews v. State, 50 Tenn. (3 Heisk) 165, 179 (1871) (holding that right covers arms in use of which a soldier should be trained including rifles of all descriptions: shot-guns, muskets, and repeaters; and that constitutional right to keep such arms cannot be infringed or forbidden by legislature); Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840) (holding that arms include those usually employed in civilized warfare and ordinary military equipment).

[159] John N. Pomeroy, An Introduction to the Constitutional Law of the United States 152 (3d ed. 1877).

[160] Draft of a Constitution Published Under the Direction of a Committee of Citizens of Colorado (Denver 1875).

[161] Williamson, *supra* note 138, at 13, 36, 49. Henry rifles were commonly sold in Denver as early as 1865, and were "a strong competitor in the civilian market in the late 1860s" in Colorado. Louis A. Garavaglia & Charles G. Worman, Firearms of the American West 106, 116 (1984). Civil War military rifles were sold at Denver Arsenal. *Id.* at 111. Also on the scene were Winchester lever action rifles which fired 18 rounds in 9 seconds. *Id.* at 128. In 1871, the Evans rifle appeared, "manufactured as a sporting rifle, military

rifle, and carbine," which held 34 cartridges and was sold by a Denver dealer. *Id.* at 189-91.

The Denver Armory advertised the latest firearms in the *Rocky Mountain News* in 1876. For example, the issues of April 28 and June 3, 1876 advertised "Sharp's Sporting and Military Creedmoor Rifles." The July 4 edition described "A New Weapon," namely, "a pistol that can kill at five hundred yards" for sporting and military use.

[162] The Constitution of the State of Colorado Adopted in Convention, March 14, 1876; Also the Address of the Convention to the People of Colorado (Denver, 1876).

[163] 35 Tex. 473, 475 (1871).

[164] *Id.* The protection offered by the Texas Constitution was broadened by State v. Duke, 42 Tex. 455, 458-59 (1875) (expanding scope of protection offered to weapons "commonly kept" and those "appropriate for ... self-defense").

[165] *English*, 35 Tex. at 476-77.

[166] Minneapolis Star v. Minnesota Comm'r of Revenue, 460 U.S. 575, 583-84 n.6 (1983) (remarking that law may be invalidated when evidence shows that it would have offended Framers).

[167] Robertson v. City of Denver, 874 P.2d 325, 328 (Colo. 1994).

[168] 389 U.S. 347 (1967).

[169] *Id.* at 350-53.

[170] *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 248-54 (1974) (holding that despite recognition of modern media's increasing monopoly of dissemination of news state statute violates First Amendment by compelling newspaper to publish opposing voices).

[171] It should be noted that the 1989 Stockton schoolyard murders were not made worse because murderer Patrick Purdy owned a semiautomatic. He fired approximately 110 rounds in six minutes. Anyone who was willing--as Purdy apparently was--to spend some time practicing with guns, could have speedily reloaded even a simple bolt-action rifle, and fired as many shots in the same time period. For an account of the Stockton schoolyard massacre, see Mark A. Stein & Peter H. King, *Rifleman Kills 5 at Stockton School: 29 Other Pupils Hurt; Assailant Takes Own Life*, L.A. Times, Jan. 18, 1989, at A1.

Medical technology has greatly outstripped firearms technology in the past two centuries. Because gunshot wounds are much less likely to result in fatality today, a criminal firing a semiautomatic gun for a given period (such as six minutes) today would kill fewer people today than a criminal firing a more primitive gun two hundred years ago.

[172] One clearly obsolete provision of the Constitution is the guarantee of federal jury trials when the amount in controversy exceeds $ 20. U.S. Const. amend. VII. Due to inflation, a $ 20 case today is immensely less significant than a $ 20 case from 200 years ago. Today, the $ 20 rule impedes judicial efficiency by guaranteeing a jury trial for even the pettiest of cases. Yet no one suggests that a legislature could simply ignore the 7th Amendment because of obsolescence. The only remedy is to propose an amendment.

[173] Ullmann v. United States, 350 U.S. 422, 427-28 (1956) (quoting Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954)).

[174] *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 81-82 (1949) (explaining that municipalities may regulate soundtrucks with regard to place, time and volume but that absolute prohibition is unconstitutional).

[175] Matthews v. State, 148 N.E.2d 334, 341 (Ind. 1958) (Emmert, C.J., concurring in part and dissenting on other grounds) (footnote omitted).

[176] This interpretation places about half of all handguns and a huge fraction of commonly-used rifles and shotguns completely outside the scope of the Constitution.

[177] The Oregon dissent/concurrence wrote that "taken to its logical extension," the majority's reasoning means that "a wide swath" would be cut "out of a constitutional guarantee." Oregon State Shooting Ass'n v. Multnomah County, 858 P.2d 1315, 1327 (Or. App. 1993) (en banc) (Edmonds, J., concurring in part; dissenting in part), *review denied*, 877 P.2d 1202 (Or. 1994). The majority replied that other semiautomatics were not at present before the court. *Id.* at 1321.

[178] *Id.* at 1324.

[179] *Id.* at 1325.

[180] *Id.* at 1327.

[181] *Id.* at 1329-30.

[182] *Id.* at 1330.

[183] *See id.* at 1318-20 (using Oregon Supreme Court's historical test to determine whether weapon is within meaning of 'arms' in Or. Const. art. I, § 27).

[184] *See* Arnold v. Cleveland, 616 N.E.2d 163, 169 (Ohio 1993) (holding that state constitution "secures to every person a fundamental individual right to bear arms for 'their defense and security'").

[185] 874 P.2d 325 (Colo. 1994).

[186] See *id.* at 339. (Vollack, J., concurring) (expressing disagreement with majority over whether case required determination of whether right to bear arms is "fundamental").

[187] Colo. Const., art. II. *Cf.* Stilley v. Tinsley, 385 P.2d 677, 680 (Colo. 1963) (en banc) (referring to "all rights reserved to the people and guaranteed rights which go to the very foundation of our government, as set forth in Article II, Bill of Rights"); Rabinoff v. District Court, 360 P.2d 114, 128 (Colo. 1961) (en banc) (Frantz, J., dissenting on other grounds). In *Rabinoff*, Justice Frantz explained that

[p]lacing the Bill of Rights immediately after Article I, defining the boundaries of the state, establishes the pre-eminence of these rights in the order of constitutional commands.... Investiture of governmental power and of the rule of the majority shall be made only after certain natural, essential and inalienable rights of the individual are indelibly inscribed in the Constitution in such manner as will assure that their integrity remains intact.

Id.

[188] *See, e.g.*, Colo. Const. art. II, § 7 (prohibiting only "unreasonable" searches and seizures); *cf.* Alexander v. People, 2 P. 894, 897 (Colo. 1884) (remarking that framers of constitution must have used words 'in their natural sense' and must have intended what they said).

[189] Colo. Const. art. II, § 13.

[190] 62 P.2d 246 (Colo. 1936).

[191] *Id.* at 247 (emphasis added) (quoting Smith v. Farr, 104 P. 401, 406 (Colo. 1909)).

[192] *Id.* at 248. As the dissent noted, the majority "assumed that the defendant's shotgun is necessarily included among arms which, under section 13 of article 2, he has 'the right ... to keep and bear ... in defense of his home, person, and property.'" *Id.* at 247.

[193] *See, e.g.*, Carlson v. People, 15 P.2d 625, 627 (Colo. 1932) (explaining the semiautomatic mechanism).

[194] Robertson v. City of Denver, 874 P.2d 325, 328 (Colo. 1994) (discounting applicability of *Nakamura* because it lacked an explicit analysis of whether right was fundamental).

[195] 501 P.2d 744, 745 (Colo. 1972).

[196] *Id.* (citations omitted) (emphasis added). The defendants in *Robertson* argued that since the word "reasonable" appeared in various places in the Colorado gun cases, gun laws were to be tested only on a standard of reasonableness. Defendant's Brief at 14-15, Robertson v. City of Denver (No. 90CV603), *rev'd*, 874 P.2d 325 (Colo. 1994). The supreme court essentially adopted this viewpoint without quite saying so. *Robertson*, 874 P.2d at 329 (explaining that issue in each case was whether law constitutes reasonable exercise of state's power). Yet free speech jurisprudence also relies on the word "reasonable" (as in "reasonable time, place and manner

restrictions"), without requiring that infringements on speech be tested only under a reasonableness standard. *See, e.g.*, Bock v. Westminister Mall Co., 819 P.2d 55, 62-63 (Colo. 1991) (conceding that mall may set reasonable restrictions but holding that they must be subjected to stringent scrutiny as free speech occupies preferred position in constellation of freedoms guaranteed by state constitution).

[197] *Lakewood*, 501 P.2d at 745.

[198] *See, e.g.*, People v. Buckallew, 848 P.2d 904, 908 (Colo. 1993) (holding that a statute is overbroad if it infringes upon enjoyment of fundamental rights by encompassing those activities within its prohibition); People v. Gross, 830 P.2d 933, 939 (Colo. 1992) (holding that a penal statute is overbroad if it prohibits legitimate activity).

[199] Valley Forge Christian College v. Americans United for Separation of Church & State Inc., 454 U.S. 464, 484 (1982). *See also* Ullmann v. United States, 350 U.S. 422, 426-29 (1956). The *Ullmann* Court stated:

This constitutional protection must not be interpreted in a hostile or niggardly spirit .... As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion .... To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.

Id.

[200] Appellant's Brief at 6, Robertson v. City of Denver (No. 90CV603), *rev'd*, 874 P.2d 325 (Colo. 1994) (citing Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982) (referring to provisions concerning mining, irrigation, nuclear detonations, and education)).

[201] *See* Appellees' Brief at 8 n.9, *Robertson*, (No. 90CV603) (noting that Bowers v. Hardwick, 478 U.S. 186, 186, 191 (1986) stated that rights involved were "not readily identifiable" in Constitution's text").

[202] Appellant's Brief at 8, *Robertson* (No. 90CV603).

[203] *Id.* at 14.

[204] Brief of Denver District Attorney at 18, 20, *Robertson* (No. 90CV603).

[205] Appellant's Brief at 11-12, *Robertson* (No. 90CV603).

[206] Appellee's Brief, *Robertson* (No. 90CV603). *See, e.g.*, People v. Blue, 544 P.2d 385, 390 (Colo. 1975):

These defendants, however, cannot invoke the same constitutionally protected right to bear arms as could the defendant in *Lakewood*, *supra*, for ... the right of a convicted felon to bear arms is subject to reasonable legislative regulation and limitation ....

... To be sure, the state legislature cannot, in the name of the police power, enact laws which render nugatory our Bill of Rights and other constitutional

protection. But we do not read this statute as an attempt to subvert the intent of Article II, Section 13. The statute simply limits the possession of guns and other weapons by persons who are likely to abuse such possession. That case [*Lakewood*] involved a municipal ordinance which forbad the possession, use, or carrying of firearms outside of one's own home. Such a broad prohibition, we held, unduly infringed on the personal liberty of bearing arms. However, the defendant in *Lakewood v. Pillow*, *supra*, was not, as far as the record revealed, an ex-felon, and the issue of whether like restrictions could not constitutionally be imposed on persons who had been convicted of felonies involving the use of force or violence or certain dangerous weapons was not there considered.

Id. at 390-91. In People v. Ford, 568 P.2d 26, 28 (Colo. 1977) the court noted that:

[I]n [*Blue*] the defendants did not contend that they were armed in order to defend their persons, homes or property. Therefore the court in *Blue* left unanswered the question whether such a defense, if established, would render unconstitutional the statute's application in a particular case ....

The General Assembly's power to regulate in this area, however, is subject to the clear constitutional guarantee of the right to bear arms. A defendant charged under section 18-12-108 who presents competent evidence showing that his purpose in possessing weapons was the defense of his home, person, and property thereby raises an affirmative defense.

Id. (footnote omitted). Thus, *Ford* carved out a special test to allow felons to possess firearms if they prove that the possession is specifically for defense. This was the same test which the Colorado Supreme Court rejected as applied to law-abiding persons in People v. Nakamura, 62 P.2d 228, 247-48 (Colo. 1936).

In People v. Garcia, the Colorado Supreme Court upheld a restriction on actual, immediate possession of a firearm while intoxicated. 595 P.2d 228, 231 (Colo. 1979) (en banc). The court reaffirmed the idea that possession of firearms (absent intoxication) is a fundamental right by explaining that:

The overbreadth doctrine is applicable to legislative enactments which threaten the exercise of fundamental or express constitutional rights, such as ... the right to bear arms. *City of Lakewood v. Pillow* 180 Colo. 20, 501 P.2d 744 (1972) ....

In *City of Lakewood*, *supra*, we noted that the ordinance at issue there prohibited legitimate acts, such as business operations of gunsmiths, pawnbrokers and sporting goods stores, or keeping a gun for the purpose of defense of self or home and that such acts could not reasonably be considered unlawful under an exercise of police power. Subjecting legitimate behavior to criminal sanctions thus rendered the ordinance overbroad.

Such is not the instant case. It is clearly reasonable for the legislature to regulate the possession of firearms by those who are under the influence of alcohol or drugs. Unlike *City of Lakewood*, *supra*, the statute here proscribes only that behavior which can rationally be considered illegitimate, and thus properly prohibited by the state's exercise of its police power.

Id. at 230.

Although *Garcia* did use the word "rational," that word does not prove that the right to bear arms is non-fundamental and subject only to a rational basis test. After all, it is keeping and bearing arms, not carrying firearms while drunk or drugged, that is a fundamental right. By analogy, the right to assemble does not sanction being intoxicated in public, just because one is at an assembly. A restriction on drunken behavior, not being a constitutional right, would be judged by the rational relation test.

[207] Appellant's Brief at 27-28, *Robertson* (No. 90CV603), *rev'd*, 874 P.2d 325 (Colo. 1994) (citing Douglass v. Kelton, 610 P.2d 1067, 1069 (Colo. 1980) (sheriff had no statutory authority to issue permit to carry a concealed weapon; statement that "right to bear arms is not absolute" reflects explicit constitutional provision against "carrying concealed weapons")).

[208] *Cf.* People v. County Court, 551 P.2d 716, 718 (Colo. 1976) ("The right of free speech is not absolute at all times and under all circumstances.").

[209] *See, e.g.*, Junction City v. Mervis, 601 P.2d 1145, 1151 (Kan. 1979) (holding prohibition on firearms possession not on one's own property "constitutionally overbroad and an unlawful exercise of the city's police power"); Bowers v. Maryland, 389 A.2d 341, 347 (Md. 1978) (citing *Lakewood* for proposition that "fundamental freedoms protected under the Bill of Rights [include] right to bear arms"); State v. Buckner, 377 S.E.2d 139, 143-44 (W. Va. 1988) (declaring that statute which required license to carry a gun overbroad and violative of constitution). In *Buckner*, the West Virginia Supreme Court declared:

W.Va.Code, 61-7-1 [1975] thus prohibits the carrying of weapons for defense of self, family, home and state without a license or statutory authorization. Article III, section 22 of the West Virginia Constitution, however, guarantees that a person has the right to bear arms for those defensive purposes. Thus, the statute operates to impermissibly infringe upon this constitutionally protected right to bear arms for defensive purposes.

Id. at 144.

[210] Robertson v. City of Denver, 874 P.2d 325, 339-40 (Colo. 1994) (Vollack, J., concurring).

[211] *Id.* at 346 (explaining that since ordinance did not trammel an important constitutional right, rational basis should be applied).

[212] 616 N.E.2d 163 (Ohio 1993).

[213] *Id.* at 171.

[214] *Id.*

[215] *Id.* at 166.

[216] 429 N.E.2d 148 (Ohio 1981).

[217] *Id.* at 149-50.

[218] *Id.* at 149.

[219] *Id.* at 152 (Celebrezze, C.J., dissenting).

[220] *Id.* (Celebreeze, C.J., dissenting).

[221] *Id.* at 149.

[222] *Id.*

[223] 355 U.S. 225 (1957).

[224] 420 F.2d 556 (2d Cir. 1970).

[225] 401 U.S. 601 (1971).

[226] 395 A.2d 744 (D.C. 1978).

[227] *Lambert*, 355 U.S. at 229.

[228] *Id.*

[229] *Id.* The Third Circuit noted these factors in distinguishing *Lambert* when it faced the issue of whether a convicted felon charged with possession of a firearm in contravention of the Gun Control Act of 1968 could assert a *Lambert* defense. United States v. Weiler, 458 F.2d 474, 479 (3d Cir. 1972). Lambert had no knowledge that she would give up her right to travel.*Lambert*, 355 U.S. at 229. However, it is common knowledge that convicted felons give up other rights, including the right to possess or transport firearms. *Weiler*, 458 F.2d at 479.

[230] 420 F.2d 556 (2d Cir. 1970).

[231] *Id.*

[232] *Id.* at 557.

[233] *Id.* at 558-59.

[234] *Id.*

[235] 401 U.S. 601 (1971).

[236] *Id.* Freed was accused of violating 26 U.S.C. § 5812, which requires weapons covered by the Act to be registered prior to transfer, the transferor and transferee to make application to the Secretary of the Treasury, and the transfer be approved by the Secretary of the Treasury. *Id.* at 604.

[237] *Id.* at 616 (Brennan, J. concurring).

[238] *Id.* at 609.

[239] *See* McIntosh v. Washington, 395 A.2d 744, 756 (D.C. 1978) (finding that Supreme Court has indicated that dangerous or deleterious devices are proper subject of regulatory measures adopted in the exercise of state's police power); City of Univ. Heights v. O'Leary, 429 N.E.2d 148, 151 (1981) (finding that Supreme Court had indicated that dangerous or deleterious devices are proper subject of regulations adopted pursuant to state's police power).

[240] *Id.*

[241] Arnold v. City of Cleveland, 616 N.E.2d 163, 171 (1993).

[242] United States v. Weiler, 458 F.2d 474, 479 (3d Cir. 1972) (discussing interstate transportation of firearms by convicted felons).

[243] *Id.*

[244] City of Univ. Heights v. O'Leary, 429 N.E.2d 148, 151 (Ohio 1981).

[245] The public safety concerns that motivated the registration ordinance could, however, also have been said to be present in *Lambert*. The government wanted to know where felons were at all times not merely so that it could accumulate records, but so that the government could prevent felons from harming other persons. *Cf.* People v. Lambert, 355 U.S. 217, 229 (1957) (asserting that registration statutes exist for convenience of law enforcement).

[246] See *supra* note 238 and accompanying text for a discussion of the Supreme Court's view of what constitutes a "dangerous and deleterious devise."

[247] 439 F.2d 1193 (9th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972).

[248] 334 N.E.2d 538 (Ohio Ct. App. 1975).

[249] 458 F.2d 474 (3d Cir. 1972).

[250] *Crow*, 439 F.2d at 1194.

[251] *Drummonds*, 334 N.E.2d at 539.

[252] *See* Arnold v. City of Cleveland, 616 N.E.2d 163, 173 (1993) (finding ordinance attempting to limit accessibility of certain generally recognized dangerous firearms a reasonable exercise of police power when ultimate objective appears to be public safety).

[253] Staples v. United States, 114 S. Ct. 1793 (1994).

[254] *Id.* at 1795.

[255] *Id.* at 1796.

[256] *Id.* at 1793.

[257] *Id.* at 1800.

[258] *Id.* at 1794. *See also* United States v. Anderson, 853 F.2d 313, 317-19 (5th Cir. 1988) (discussing the M10 pistol--an "assault weapon"--and stating that possession of conventional semi-automatic pistol is generally an innocent act and that thousands of law-abiding Americans innocently purchase new semi-automatic guns), *modified*, 885 F.2d 1248 (5th Cir. 1989).

[259] 317 N.E.2d 246 (Ohio App. 1974).

[260] *See* City of Univ. Heights v. O'Leary, 429 N.E.2d 148, 152 (Ohio 1981) (citing City of East Cleveland v. Palmer, 317 N.E.2d 246, 248 (Ohio App. 1974) (finding that duly enacted municipal ordinance is presumed constitutional and burden of establishing unconstitutionality is upon challenger)).

[261] *Palmer*, 317 N.E.2d at 247-48.

[262] 405 N.E.2d 1047 (Ohio 1980).

[263] *Id.* at 1050.

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] *Id.* at 1049 (citations omitted).

[268] Arnold v. City of Cleveland, 616 N.E.2d 163, 166 (Ohio 1993).

[269] In *Arnold*, the court stated:

In determining the constitutionality of an ordinance, we are mindful of the fundamental principal requiring courts to presume the constitutionality of lawfully enacted legislation .... Further, the legislation being challenged will not be invalidated unless the challenger establishes that it is unconstitutional beyond a reasonable doubt.

Id. (citations omitted). See text accompanying note 267, *supra*, for the standard of review as articulated by the *Hilton* court.

[270] 49 N.E.2d 412, 415 (Ohio 1943).

[271] *Arnold*, 616 N.E.2d at 171.

[272] *Compare supra* note 269 *with Correll*, 49 N.E.2d at 415:

Respecting, as we do, the legislative authority of the city council and its right to determine what ordinances shall be passed, yet when an act of such body is challenged we must determine whether the act conforms to rules of fundamental law designed to curb and check unwarranted exercise of unreasonable and arbitrary power. With these principals in mind, let us consider whether this ordinance bears a real and substantial relation to the health, safety, morals or general welfare of the public.

[273] 151 N.E. 775 (Ohio 1926), *aff'd*, 275 U.S. 505 (1927). *Kresge* involved a challenge to a municipal ordinance requiring all commercial and industrial buildings to have outward opening doors, and prohibiting rolling, sliding, or revolving doors. *Id.* at 776. These restrictions were deemed necessary to protect occupants in case of fire. The restrictions were challenged as an undue restriction of the plaintiff's business. *Id.* The court of common pleas and the Ohio Court of Appeals both found the restrictions unreasonable, granting the plaintiff's request for an injunction. The Ohio Supreme Court reversed these decisions, upholding the constitutionality of the municipal restriction. *Id.*

[274] 281 N.E.2d 21 (Ohio Ct. App. 1972). *Alsenas* was a challenge to a municipal zoning ordinance. The plaintiff was restricted to developing only single family residences on land on which he held a purchase option instead of the multi-family apartments which he wished to build. *Id.* at 22. The plaintiff was limited in the number of single family residences he could build because of the topography of the land in question. *Id.* The plaintiff challenged the zoning ordinance as a taking. The trial court found that only 38% of the plots on the land could be developed under existing zoning restrictions, and declared the zoning ordinance unconstitutional as applied to the land in question. The court of appeals reversed, finding the ordinance constitutional. *Id.* at 26.

[275] 383 N.E.2d 892 (Ohio 1978). *Renalist* was a challenge to a state restriction on acting as a real estate broker without a license. The defendant had compiled information about rental properties and sold it to potential renters. *Id.* at 893. The defendant challenged the licensing requirement as a violation of its right to engage in commercial speech. *Id.* at 894.

[276] 120 N.E. 836 (Ohio 1918). This case concerned a petition for a writ of mandamus to the City Building Commissioner to reissue a building permit previously issued and revoked. *Id.* at 837. The petitioner had received a building permit and was building an animal hair processing plant within the limits of Cincinnati. After the petitioner had begun construction, the city council proposed and passed an ordinance prohibiting the construction or use of any building in Cincinnati for the purpose of processing animal hair. *Id.*

[277] 317 N.E.2d 246, 248 (Ohio Ct. App. 1974) (upholding ordinance prohibiting parking at night on city streets for longer than five consecutive hours, effectively prohibiting overnight parking, because appellant failed to rebut presumption of constitutionality given to ordinance).

[278] 168 N.E. 227, 229 (Ohio Ct. App. 1929) (upholding municipal ordinance charging license and inspection fee for erection of commercial signage where no evidence that fee was unreasonable).

[279] *See, e.g.*, Posades de Puerto Rico Ass'n v. Tourism Co., 478 U.S. 328, 340 (1986) (remarking that commercial speech receives limited First

Amendment protection so long as it concerns lawful activity and is not misleading or fraudulent); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980) (noting that protection available for particular commercial speech turns on nature both of the expression and of governmental interest served by its regulation).

To the extent that the Ohio cases did involve First Amendment commercial speech, they may have been wrongly decided. *See* Edenfield v. Fane, 113 S. Ct. 1792, 1799 (1993) (government carries burden of proof that regulation on commercial speech advances the government interest in a direct and material way).

[280] 578 N.E.2d 881 (Ohio Ct. App. 1990), *review denied*, 877 P.2d 120 (Ohio 1994).

[281] *Id.*

[282] Arnold v. City of Cleveland, 616 N.E.2d 163, 166 (Ohio 1993).

[283] *Hale*, 578 N.E.2d at 883-84 (citations omitted).

[284] Ohio Pub. Interest Action Group, Inc. v. Public Utilities Comm'n, 331 N.E.2d 730 (Ohio 1975). In this case, a public interest group challenged the Ohio Legislature's prohibition of any state agency from restricting advertising by any regulated public utility. *Id.* at 733. The interest group wanted the regulatory boards to prohibit the utilities from advertising. *Id.* at 735. The constitutional challenge involved the group's assertion that allowing advertising by the utilities was contrary to the "common welfare" clauses of the United States and Ohio Constitutions. *Id.*at 733.

[285] State *ex rel.* Dickman v. Defenbacher, 128 N.E.2d 59, 60-61 (Ohio 1955), was a challenge to an act of the Ohio Legislature appropriating funds to several veterans organizations for the purposes of rehabilitating war veterans and promoting patriotism. The challengers were taxpayers who questioned the constitutionality of giving state funds to private organizations solely for the benefit of those organizations' members. *Id.* at 61. The Ohio Supreme Court upheld the appropriation as a proper legislative determination of what constituted a public good.*Id.* at 65, 67.

[286] Cincinnati v. Welty, 413 N.E.2d 1177 (Ohio 1980), *cert. denied*, 451 U.S. 939 (1981). The appellees were convicted of violating this ordinance by driving a Sherman tank and a "half-track" on the city streets. *Id.* The supreme court upheld the ordinance, stating that the appellees, who had prevailed in the court of appeals, had the burden of proving by "clear and convincing evidence" that the ordinance lacked a "real and substantial relation" to the purpose of preserving street surfaces. *Id.* at 1178.

[287] Benjamin v. City of Columbus, 146 N.E.2d 854, 857 (Ohio 1957), *cert. denied*, 357 U.S. 904 (1958). *Benjamin* involved a municipal ordinance making it a misdemeanor to possess pinball games because of the possibility

that the games could be converted to gambling devices, regardless of whether the games had been converted. *Id.* The Ohio Supreme Court upheld this ordinance using a standard which presumed that an exercise of the police power was valid. *Id.* at 859. The court indicated that legislative enactments were presumed to "bear a real and substantial relation to the public health, safety, morals or general welfare of the public." *Id.* at 860. The court also indicated that it would not invalidate an enactment unless the legislative decisions on the constitutional questions were "clearly erroneous." *Id.*

[288] 49 N.E.2d 412, 414 (Ohio 1943).

[289] Arnold v. City of Cleveland, 616 N.E.2d 163, 171 (Ohio 1993) (quoting Cincinnati v. Correll, 49 N.E.2d 412, 414 (Ohio 1943)).

[290] *Correll*, 49 N.E.2d at 414.

[291] *Arnold*, 616 N.E.2d at 172 (emphasis added).

[292] *Correll*, 49 N.E.2d at 414.

[293] *Arnold*, 616 N.E.2d at 176-77 (Hoffman, J., concurring in part and dissenting in part).

[294] The *Arnold* dissent characterized the appropriate standard of review as follows:

[A] stricter standard must be utilized when the legislation places restrictions upon fundamental rights, particularly where the legislation prescribes an outright prohibition of possession as opposed to mere regulation of possession. A "strict scrutiny," test, i.e., whether the restriction is *necessary* to promote a *compelling governmental interest*, as opposed to the less demanding "reasonable" or "rational relationship test" ought to be applied.... Exercise of the police power may not be achieved by a means which sweeps unnecessarily broadly. *Lakewood v. Pillow* (1972), 180 Colo. 20, 501 P.2d 744.

Arnold, 616 N.E.2d at 176.

[295] *Id.* at 171-172.

[296] *Lakewood*, 501 P.2d at 745.

[297] *Id.*; *see also* State v. Nieto, 130 N.E. 663, 664 (Ohio 1920) (remarking that police power has bounds and noting that state constitution contains no prohibition against legislature making police regulations "as may be *necessary* for the welfare of the public at large as to the manner in which arms shall be borne") (emphasis added).

[298] *Id.* at 6. For example, one Colorado case invoked *Lakewood* to find as unconstitutionally overbroad a statute prohibiting operation of a motor vehicle with a suspension system altered from the manufacturer's original design. People v. Von Tersch, 505 P.2d 5, 6 (Colo. 1973).

[299] See *supra* note 209 for a discussion of some cases that cited *Lakewood*'s application of the overbreadth doctrine.

[300] Robertson v. City of Denver, 874 P.2d 325, 331 nn.13, 14 (Colo. 1994).

[301] People v. Seven Thirty-Five East Colfax, 697 P.2d 348, 370 (Colo. 1985) notes, "the state has demonstrated no interest in the broad prohibition of these articles sufficiently compelling to justify the infringement on the privacy right of those seeking to use them in legitimate ways. Thus, we hold the statutory prohibition against the promotion of obscene devices to be unconstitutional." *Id.*

[302] City of Lakewood v. Pillow, 501 P.2d 744, 745 (Colo. 1972) (stating narrow means should be employed when end can be achieved in that way). *Cf.* People v. French, 762 P.2d 1369, 1374-75 (Colo. 1988) (various restrictions on fundraising, a First Amendment activity, were unconstitutional because more narrowly tailored options were available to achieve desired end).

[303] *Robertson*, 874 P.2d at 334-35.

[304] *Lakewood*, 501 P.2d at 745.

[305] Arnold v. City of Cleveland, 616 N.E.2d 163, 176 (Ohio 1993) (Hoffman, J., dissenting).

[306] *See, e.g.*, American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). The *Hudnut* court stated:

[W]e accept the premises of this legislation [against sexualized depictions of women]. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turns leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets .... Yet all is protected as speech, however insidious.

Id. at 329-30.

[307] *Arnold*, 464 P.2d at 517-18 (vagrancy ordinance stricken, although city argued "forcefully and quite compellingly" that ordinance was necessary to fight crime). The *Arnold* court described the limits of the state police power as follows:

[N]o matter how necessary to law enforcement a legislative act may be, if it materially infringes upon personal liberties guaranteed by the constitution, then that legislation must fail. Grim as it may be, if effective law enforcement must be dependent upon unconstitutional statutes, then the choice of the way ahead is for the people to act or fail to act under the amendatory processes of the constitution.

Id.

[308] *Compare* Brandon Centerwall, *Homicide and the Prevalence of Handguns: Canada and the United States, 1976 to 1980*, 134 Am. J.

Epidemiology 1245, 1248 (1992) (analyzing handgun homicides in United States and Canada and concluding that prevalence of handguns does not increase homicide rate) *with* Brandon Centerwall, *Exposure to Television As a Risk Factor for Violence*, 129 Am. J. Epidemiology 643, 651 (1989) (concluding that exposure to television is responsible for major fraction of inter-personal violence in United State) *and* Brandon Centerwall, *Young Adult Suicide and Exposure to Television*, 25 Soc. Psy. And Psychiatric Epidemiol. 121, 151-52 (1990) (comparing suicide trends in United States, Canada and South Africa and concluding that exposure to television is significant risk factor for young adult suicide).

[309] University of Cal. Regents v. Bakke, 438 U.S. 265, 307 (1978) (plurality opinion of Powell, J.). Similarly, no matter how compelling a state interest in differentially distributing services in light of its citizens' length of residence may be, "that objective is not a legitimate state purpose" under equal protection and the right to travel. Zobel v. Williams, 457 U.S. 55, 63 (1982).

[310] Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York, 360 U.S. 684, 688-89 (1959) (stating that Constitutional guarantee is not confined to expression of ideas that are conventional or shared by majority); *see also American Booksellers*, 771 F.2d at 330-33 (holding unconstitutional ordinance which regulated pornography).

[311] *Cf.* Hunter v. Underwood, 471 U.S. 222, 233 (1985) (observing that statute violates equal protection when legislature motivated by both legitimate and illegitimate purposes).

[312] Multnomah County, Or., Ordinance No. 646 (1990).

[313] Cleveland, Ohio, Ordinance ch. 628 (1989) provides in pertinent part:

628.01 Findings

The Council finds and declares that the proliferation and use of assault weapons is resulting in an ever-increasing wave of violence in the form of uncontrolled shootings in the City, especially because of an increase in drug trafficking and drug-related crimes, and poses a serious threat to the health, safety, welfare and security of the citizens of Cleveland. The Council finds that the primary purpose of assault weapons is anti-personnel and any civilian application or use of such weapons is merely incidental to such primary antipersonnel purpose. The Council further finds that the function of this type of weapon is such that any use as a recreational weapon is far outweighed by the threat that the weapon will cause injury and death to human beings. Therefore, it is necessary to establish these regulations to restrict the possession or sale of these weapons. It is not the intent of the Council to place restrictions on the use of weapons which are primarily designed for hunting, target practice, or other legitimate sports or recreational activities.

Id.

[314] Denver, Colo. Rev. Mun. Code art. IV, § 38-130 (1989) provides in pertinent part,

(a) *Legislative intent*. The city council hereby finds and declares that the use of assault weapons poses a threat to the health, safety and security of all citizens of the City and County of Denver. Further, the council finds that assault weapons are capable both of a rapid rate of fire as well as of a capacity to fire an inordinately large number of rounds without reloading and are designed primarily for military or antipersonnel use.

Id.

[315] Cleveland, Ohio, Ordinance ch. 628, *see supra* note 313.

[316] Denver, Colo. Rev. Mun. Code art. IV, § 38-130. *See supra* note 314. A later paragraph did disavow any intent to restrict "weapons which are primarily designed and intended for ... legitimate sports or recreational activities and *the protection of home, person and property*." Denver, Colo. Rev. Mun. Code, art. IV, § 38-130(a) (emphasis added). The disavowal's dishonesty is evident by comparison to the California Roberti-Roos Act after which the Denver Ordinance is modeled. California's constitution has no right to keep and bear arms and the Roberti-Roos Act made no pretense that defensive firearms were exempted. Cal. Penal Code § 12275.5 (West 1989) disavows only the intent to restrict "weapons which are primarily designed and intended for ... legitimate sports or recreational activities." Denver made no independent examination of the arms to be banned. Denver simply parroted the California list of banned firearms and the California disavowal of intent to harm sports, but added a false disavowal of intent to ban arms designed for self-defense. Indeed, so blithely did Denver follow California that Denver banned various misnamed and non-existent firearms which were on the California list. *Compare* Denver, Colo. Rev. Mun. Code, art. IV, § 38-130(h) (listing specific prohibited "assault weapons") *with* Cal. Penal Code § 12276 (West 1989).

[317] Multnomah County, Or., Ordinance No. 646, § 1, H provides:

Assault weapons are identified a such herein because their design, high rate of fire and capacity to cause injury render the a substantial danger to human life and safety, outweighing any function as a legitimate sports or recreational firearm.

Id.

[318] See *supra* note 13 and accompanying text illustrating explicit language of state constitutions.

[319] Factually, the argument that "assault weapons" are different from "sporting" weapons devolves into a complaint that the guns are too well-made. The Denver city attorney complained that the banned guns "do not move off target as much after each shot." Appellant's Brief at 19, Robertson v.

City of Denver, No. 90CV603 (Denver Dist Ct. Feb. 28, 1993), *rev'd*, 874 P.2d 325 (Colo. 1994). Councilwoman Cathy Reynolds, sponsor of Denver's "assault weapon" prohibition, complained that the guns "are very easy to use." Cathy Reynolds, *Headlines*, Summer 1989 (newsletter).

[320] Denver, Colo. Rev. Mun. Code, art. IV, § 38-130(f)(2).

[321] *Robertson*, No. 90CV603. The lower court stated:

The Court finds that limiting the use of the weapons in such a manner that the weapons cannot be legally used for the purpose of defense of person, property or home is in direct conflict with Article II, Section 3 and 13, of the Colorado Constitution. The ordinance makes unlawful the possession of an assault weapon, notwithstanding that the possessor is otherwise in legal possession, when the possessor uses the weapon for defense of home person or property. Therefore, Section 38-130(e)(3) of the ordinance is unconstitutionally overbroad as it pertains to persons in legal possession of an assault weapon. It precludes Constitutionally protected conduct.

Id., slip op. at 12.

[322] Center to Prevent Handgun Violence Amicus Brief at 21, Robertson v. City of Denver, 874 P.2d 325 (Colo. 1994).

[323] *Robertson*, 874 P.2d at 331.

[324] Arnold v. City of Cleveland, 616 N.E.2d 163, 169-73 (Ohio 1993).

[325] *Robertson*, 874 P.2d at 328-30.

[326] *Arnold*, 616 N.E.2d at 165.

[327] *Robertson*, 874 P.2d at 327.

[328] *See* Colo. R. Civ. P. § 56(c) (stating that trial court must accept plaintiff's pleadings as true on motion for summary judgment) and Ohio Rev. Code Ann. § 56(c) (Anderson 1994) (benefit of truth of facts given to non-moving party).

[329] *Arnold*, 616 N.E.2d at 165, 176-77.

[330] *Id.* at 173.

[331] *Id.*

[332] *See, e.g.*, Brief of Amici Curiae, The League of Ohio Sportsmen, Law Enforcement Alliance of America, American Fed'n of Police, Ohio Gun Collectors Ass'n, Jews for the Preservation of Firearms Ownership, Heartland Inst., Ohio Women, and Ohio Rifle & Pistol Ass'n, at 30, Arnold v. City of Cleveland, 616 N.E.2d 165 (Ohio 1993).

[333] Denver City Council: Hearing, Nov. 6, 1989, at 6, reproduced at Defendants' exhibit B (affidavit of Barbara Romero, Senior Secretary for City Council) in support of Defendants' Motion for Summary Judgment, in Robertson v. City of Denver, 874 P.2d 325 (Colo. 1994).

[334] Denver, Colo., Rev. Mun. Code art. IV, § 38-130(a).

[335] Police Firearms Data, plaintiffs' exhibit 65, in *Robertson*, 874 P.2d 325.

[336] Plaintiffs' exhibit 64, in *Robertson*, 874 P.2d 325.

[337] For a more recent version of such data, see David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. Contemp. L. 381, 404-10 (1994) (summarizing police data from around nation).

The defendants and their amici did not challenge the veracity or reliability of the police data, but did offer as counter-evidence (1) numerous assertions (without any data) from various government employees that "assault weapons" were a serious problem; and (2) a series of newspaper articles from the *Atlanta Constitution* which, after reviewing BATF trace data, reported that "assault weapons" were ten percent of crime guns. Jim Stewart & Andrew Alexander, *Assault Guns Muscling in on Front Lines of Crime*, Atlanta J.-Atlanta Const., May 21, 1989, at A1, A8. Only two percent of crime guns were traced, and many gun traces do not involve crime guns. Thus, as the courts were told, the Bureau of Alcohol, Tobacco & Firearms (BATF), the bureau which conducted the traces, specifically denied the Atlanta newspaper's assertions. Letter from Daniel M. Hartnett, Director, Bureau of Alcohol, Tobacco & Firearms, to Rep. Richard T. Schulze, 3 (March 31, 1992) ("concluding that assault weapons are used in 1 of 10 firearms related crimes is tenuous at best since traces and/or the UCR [FBI Uniform Crime Reports] may not truly be representative of all crimes").

[338] *See Robertson*, 874 P.2d at 333 (terming irrelevant, for constitutional purposes, statistics which support inference that ban on weapons unlikely to have effect on crime); Arnold v. City of Cleveland, 616 N.E.2d 163, 173 (Ohio 1993) (stating that even if statistics presented are accurate, threat to public safety is not diminished).

[339] Given that both cases involved pretrial motions, the courts had to assume that all facts would be found as the plaintiffs might have been able to prove at trial. *See supra* note 328 and accompanying text.

[340] It is true that while courts do not require strong proof that obscenity causes harm, courts still uphold obscenity laws. But in contrast to non-obscene, erotic speech, obscene speech may not be considered "speech" within the meaning of "speech" when used as a First Amendment term of art. *See, e.g.*, Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 Am. B. Found. Res. J. 737, 763 & n.57 (1987); Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 Sup. Ct. Rev. 285, 285-86 (1982) (noting that child pornography is unanimously held to be "unprotected by the First Amendment"). Similarly, the Oregon Court of Appeals found that certain semiautomatics were not "arms" within the meaning of the Oregon Constitution. Oregon State Shooting Ass'n v. Multnomah County, 858 P.2d 1315, 1318-20 (Or. Ct. App. 1993), *rev. denied*,

877 P.2d 1202 (1904). In contrast, the Colorado and Ohio courts never theorized that "assault weapons" were not among the "arms" protected by their states' constitutions. *See Robertson*, 874 P.2d at 328; *Arnold*, 616 N.E.2d at 169-70 (discussing language of Ohio Constitution but not addressing definition of "arms"). Rather, those courts found that prohibition of some arms were reasonable as long as others were not prohibited. *See Robertson*, 874 P.2d at 333 (concluding that statute not invalid because it might have gone further in regulating arms); *Arnold*, 616 N.E.2d at 173 (stating city would have violated its authority had it banned all firearms).

[341] "It is not the intent of the Council to place restrictions on the use of weapons which are primarily designed and intended for hunting, target practice or other legitimate sports or recreational activities." Cleveland, Ohio, Ordinance ch. 628 § 628.01.

[342] *See Arnold*, 616 N.E.2d at 173 (stating appellants can prove no set of facts that would entitle them to relief).

[343] *Id.* at 166.

[344] Similarly, the Ohio Court of Appeals in *Hale* upheld the constitutionality of Columbus's "assault weapon" ordinance, doing so using a rational basis test that considered whether the ordinance had a real and substantial relationship to the health and welfare of the citizens of Columbus. In so doing, the court expressly declined to overrule the findings of the city council that gun registration would benefit the citizens of Columbus. Hale v. City of Columbus, 578 N.E.2d 881, 884-86 (Ohio Ct. App. 1990), *cause dismissed*, 569 N.E.2d 513 (Ohio 1991).

[345] *Arnold*, 616 N.E.2d at 177.

Realistically speaking, the idea that there is some kind of distinction between "sporting" firearms and "anti-personnel" firearms is nonsense; guns have always been designed for both purposes, and often what makes a gun good for one purpose tends to make it good for the other. For example, in a gun reference book cited by the Colorado Supreme Court (and by the City of Denver), one chapter details how slide and pump action shotguns such as the Winchester Model 1897 and the Remington Model 1910 were selected by the U.S. Army for combat use. In combat, these guns "induced pure 'battle terrorism.'" So devastating was the "terrible effectiveness" of these "trench guns" and "riot guns" during World War I that the German government protested that their use violated the articles of war. The Winchester Model 12 and Model 97 pump action guns were widely used in the Pacific during World War II and in Korea. The Model 12 "proved ideal in the jungles of Vietnam." The Winchester Model 97, which "can be emptied quickly by holding the trigger down and pumping the handle," is reliable and has been the weapon of choice for many in the police and military. Jack Lewis, Assault Weapons

208-14 (1st ed. 1986). *See also* Jack Lewis, Assault Weapons 223 (2d ed. 1989). These Winchester and Remington shotguns are unquestionably rapid fire combat shotguns, having (unlike the shotguns banned by various "assault weapon" laws) been selected for use in combat. Yet these guns, because they are widely owned, commonly used for hunting and skeet shooting, have a traditional appearance, and were invented many decades ago, are somehow considered "legitimate" sporting firearms.

In the "assault weapon" case, the Oregon Court of Appeals claimed that "assault weapons" are not used for defense, making the point that "the listed weapons are called assault weapons for a reason." Oregon State Shooting Ass'n v. Multnomah County, 858 P.2d 1315, 1320 (Or. Ct. App. 1993), *review denied*, 877 P.2d 1202 (1994). By doing so, the court ignored the*Delgado* court's rejection of this distinction: "It is not the design of the knife but the use to which it is put that determines its 'offensive' or 'defensive' character." State v. Delgado, 692 P.2d 610, 612 (Or. 1984).

[346] Denver, Colo. Rev. Mun. Code, art. IV, § 38-130(a) (1989).

[347] *Oregon State Shooting Ass'n*, 858 P.2d at 1319.

[348] *Id.* at 1320-21.

[349] *Id.* at 1320-21 n.8.

[350] Jack Smith, *Even Short Quotations Leave a Mark*, L.A. Times, Mar. 7, 1994, at E1.

[351] Ross & Kathryn Petras, The 776 Stupidest Things Ever Said 61 (1993).

[352] Coleman v. Chafin, No. D-67151 (Fulton Sup. Ct. July 31, 1989).

[353] *Id.*, slip op. (concluding that firearms restriction was pre-empted by Ga. Code Ann. § 43-16-1 *et seq.* (concerning licensing of firearms dealers) and Ga. Code Ann. § 16-11-120 *et seq.* (defining and regulating possession of weapons)).

[354] *See* Sanford Levinson, Constitutional Faith 52 (1988) (arguing that "Death of Constitutionalism" and "Death of God" have arisen from same forces). *See also* Levinson, *supra* note 2, at 643-57 (surveying various theories of constitutional interpretation and concluding that all of them suggest treating Second Amendment as respected individual right).

[355] Owen v. City of Independence, 445 U.S. 622, 669 (1980) (Powell, J., dissenting).

[356] *See* Dan Pier et al., *Solace, Unity Found in Tapestry of Religions*, Boston Globe, August 15, 1993, at B1 (discussing rebirth of faith and 1993 Gallup Poll in which 93% of respondents expressed belief in God).

[357] Larry Tye, *The World's Fastest-growing Religion Started in this Country*, Boston Globe, Nov. 21, 1994, *available in* 1994 WL 6010751 (discussing rise of Pentecostalism).

[358] 18 U.S.C. § 922(s) (1993) (providing for waiting period of 5 business days for purchases of handguns from federally licensed gun dealers).

[359] *E.g.*, Romero v. United States, 883 F. Supp. 1076 (W.D. La. 1995); Frank v. United States, 860 F. Supp. 1030 (D. Vt. 1994); McGee v. United States, 863 F. Supp. 321 (S.D. Miss. 1994). *Contra* Koog v. United States, 852 F. Supp. 1376 (W.D. Tex. 1994).

[360] For example, Cleveland's 1976 handgun registration law achieved less than twelve percent compliance. David T. Hardy & Kenneth L. Chotiner, *The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibition*, *in* Restricting Handguns 201 (Don B. Kates ed., 1979).

[361] A few weeks after the November 1994 elections, President Clinton telephoned one of the leading Democratic supporters of the "assault weapon" ban. After congratulating the Congressman on his re-election, the President opined that the "assault weapon" ban had cost the Democrats twenty-one seats in the House of Representatives. President Clinton later told the Cleveland *Plain-Dealer* that the "assault weapon" issue and the National Rifle Association's efforts had given the Republicans twenty additional seats. Evelyn Theiss, *Gun Lobby Shot Down Democrats in Congress: Clinton Confident of Comeback*, Plain Dealer (Cleveland) Jan. 14, 1995, at A1 ("The fight for the assault-weapons ban cost 20 members their seats in Congress .... The NRA is the reason the Republicans control the House").

The President's conclusion was consistent with analysis in *Campaigns and Elections* magazine, which identified numerous Congressional races in which the winning (pro-gun) candidate's margin of victory was smaller (often much smaller) than the number of self-identified NRA supporters in the district (or state). Brad O'Leary, *Fire Power*, Campaigns & Elections, Dec./Jan. 1995, at 32-34. Of the 55 House races and ten Senate races identified, 38 House races and seven Senate races resulted in a pro-gun Republican taking the seat away from Democratic control (by defeating an incumbent, or, more typically, winning an open seat from which a Democrat was retiring). Ten Senate races also involved a pro-gun winner winning by less than the number of self-identified NRA members in the state. *Id.*

[362] T.C. Brown & Mary Beth Lane, *Fisher Vows Return to Arena: Loss Attributed to Party's Weak Slate, National Backlash*, Plain Dealer, Nov. 10, 1994, at 11B.

[363] For an account of the intensity of the fervor of gun-rights advocates in the 1994 Ohio election, see Mary Beth Lane, *Protestors Come Out Gunning for Reno; Demonstrators Attack Her Gun-Control Stand*, Plain Dealer, July 7, 1994, at 5B.

[364] Four years before, Freese, then the chair of the state Democratic party, had worked to re-elect incumbent Attorney General Duane Woodard, even though Woodard had sent the Attorney General's office into battle against the

Denver gun ban. *See* Peter Blake, *Dick Freese considers attorney general bid*, Rocky Mountain News, May 3, 1993, at 5A.

[365] George Lane, *Norton Leaves Freese in Cold*, Denver Post, Nov. 9, 1994, at A10.

[366] H.B. 2784 was the only one of the more than 50 bills vetoed by Oregon's governor in 1995 for which the legislature overrode the veto.

[367] *See* Levinson, *supra* note 2 at 642 (discussing reasons for elites' disdain for Second Amendment).

[368] The Oregon dissent observed that "for those who are concerned about 'the expanding tentacles of government gun control', the majority's holding will give credence to their worst fears." Oregon State Shooting Ass'n v. Multnomah County, 858 P.2d 1315, 1324 (Or. Ct. App. 1993) (Edmonds, J., concurring in part, dissenting in part).

[369] Robert J. Cottrol, *Want Gun Control? Enforce the Second Amendment*, 1991 Texas Lawyer June 10, 1991, at 32.

[370] See *supra* note 12 and accompanying text for a list of these cases.