Saint Thomas Law Review, 1992 Vol. 5:203-213.

BEARING ARMS IN STATE BILLS OF RIGHTS, JUDICIAL INTERPRETATION, AND PUBLIC HOUSING

Robert Dowlut [*]

INTRODUCTION

The second amendment, [1] which reads that "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," has recently been the subject of numerous law review articles, [2] and has attracted the attention of the United States Supreme Court. [3] This Constitutional guarantee of individual liberty within the federal system receives protection from both the federal and state constitutions. Reliance, however, should first be placed on a state's bill of rights, or declaration of rights, because the United States Supreme Court has explicitly acknowledged each state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." [4] In fact, the constitutions of forty-three states guarantee a right to bear arms. [5] Most state bills of rights provide greater protection of the right to arms than does the second amendment. [6] Presently, only five states track the language of the second amendment, [7] and only three link the right exclusively to the common defense. [8] Reliance on state bills of rights also avoids the necessity of convincing a court that the second amendment applies to the states directly or through the fourteenth amendment. [9]

Of the seven states that do not have an explicit constitutional guarantee to arms, three guarantee a right to self-defense [10] and one considers the right to life an inherent right. [11] The natural right to defend one's life is usually not effectively exercised with bare hands. There is also a pragmatic issue. Neither the state nor the police owe a duty to protect the individual. [12] The right to self-defense can only be given force and effect if its guarantee includes the right to own arms for defensive purposes. [13] Thus an implicit right to possess defensive arms should flow from the fundamental right to self-defense. [14] A state which effectively forbids the keeping and bearing of arms for self-defense, while at the same time owing no duty to protect its people,

acts as an uncaring master rather than a caring servant. It makes a brutish and morally indefensible demand: a victim of crime must be prepared to surrender his life, personal dignity and autonomy, and property to a criminal. Such laws may actually encourage rather than discourage crime. A moral law recognizes that there is no benefit in preserving the well-being of the victimizer at the expense of the victim. [15]

This article will review how state courts interpret state constitutional guarantees to arms, address the refusal by some courts to apply established rules on the interpretation of constitutional guarantees to arms cases, and examine discriminatory firearm bans in public housing.

STATE COURT INTERPRETATION FAVORING RIGHT TO BEAR ARMS

The federal constitution is a grant of limited power [16] and its bill of rights is a further restriction on governmental power. [17] The legislature of a state, unlike Congress, does not depend on a constitution for an expressed grant of legislative power. [18] Its powers are plenary unless otherwise restrained. [19] A state's bill or declaration of rights is a restriction on governmental power. [20] It must be examined to ascertain the restraints which the people have imposed upon the state legislature, not to determine the powers they have conferred. [21]

A written constitution is a reminder that governments are capable of being unreasonable and unjust. James Madison said it best: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." [22] A guarantee is placed in a bill of rights because it is deemed peculiarly important and peculiarly exposed to invasion. [23] Therefore, a rational basis standard of review is too weak to protect the constitutional guarantee. [24] Americans departed from the English system by having a written constitution. [25] Judges should utilize interpretivism in deciding constitutional issues. [26] This rule requires judges to confine themselves to enforcing norms that are stated clearly or implicitly in the written constitution. [27] Balancing tests and other vague, policy-oriented standards destroy the Bill of Rights as a document of law and make it a policy vehicle. Even an intent standard liberates judges from the text of the state constitution. Noninterpretivism is where courts go beyond the written document and enforce norms that cannot be discovered within the four corners of the document. [28] That approach should only be used to resolve a genuine ambiguity. [29]

Notwithstanding that some judges have an apparent reflexive bias against the right to keep and bear arms, [30] case law involving the interpretation of state guarantees indicates that state courts offer the most promise in protecting this individual liberty. State courts in at least 20 reported occasions have found a law to offend the right to arms. [31]

State courts utilize a variety of tests to determine if a law is an unconstitutional infringement on the right to bear arms or to keep arms. One test seeks to determine whether the law sweeps so broadly that it stifles the exercise of a right where the governmental purpose can be more narrowly achieved. [32] Another approach seeks to discern whether the enactment is arbitrary, discriminatory, capricious or unreasonable, and whether it bears a real and substantial relation to

health, safety, morals or the general welfare of the public. [33] Some courts have scrutinized legislation simply to determine if all arms have been banned. [34] The practical effect of this test is to render the arms guarantee lifeless on account of the police power becoming supreme rather than a constitutional right. [35] This analysis makes no serious effort to harmonize the police power with a constitutional right, something that courts face frequently. [36] It is limited in value on account of the unique language of the right to bear arms involved. [37]

In right to bear arms cases, courts have questioned whether arms are to be borne in such a manner as to render them wholly useless for the purposes guaranteed in the constitution. [38] The right to keep arms, as opposed to the right to bear arms, is interpreted through the following two-step analysis: (1) does the person come under the protection of the constitutional guarantee, and (2) does this specific arm enjoy constitutional protection. [39] The right to keep and bear arms also includes "the right to load them and shoot them and use them as such things are ordinarily used." [40] It likewise "necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such, and to keep them in repair." [41]

In *State v. Kessler*, [42] the Oregon Court established a test to determine which arms come under the constitution's protection. It held that a guarantee to bear arms for self-defense protects hand carried weapons commonly used for defense. The Court stated that should the guarantee to bear arms exist for the defense of the state, the arms protected are modern equivalents of arms used by colonial militiamen. The court, however, held that weapons of mass destruction used exclusively by the military are not constitutionally protected. [43]

The *Kessler* test avoids the application of emotion laden labels, such as gangster weapon or assault weapon. For example, the term "assault weapon" has become so elastic that it has been applied to a revolving firearm and even a single shot firearm. [44] In this area precise definitions are helpful. The military definition of an assault rifle is as follows: "Assault rifles are short, compact, selective-fire, weapons that fire a cartridge intermediate in power between submachinegun and rifle cartridges. Assault rifles have mild recoil characteristics and, because of this, are capable of delivering effective full automatic fire at ranges up to 300 meters." [45] This is in contradistinction to a submachinegun, which is a full automatic or selective fire firearm chambered for a pistol cartridge, [46] and an automatic rifle which is a full automatic or selective fire rifle chambered for a full power rifle cartridge. [47] Machine pistols differ from submachine guns only in size. They are quite compact. [48]

An automatic is a firearm design that feeds cartridges, fires and ejects cartridge cases as long as the trigger is fully depressed and there are cartridges available in the feed system. It is also called full auto and machine gun. [49] A semiautomatic, on the other hand, is a repeating firearm requiring a separate pull of the trigger for each shot fired, and which uses the energy of discharge to perform a portion of the operating or firing cycle (usually the loading portion). [50]

State guarantees to arms offer the most promise in protecting individual liberty because numerous state courts have taken the right seriously and have on at least twenty reported occasions found arms laws to be unconstitutional. [51] This has occurred even in states with a common defense or militia purpose. [52]

In addition, some state courts consider the right to bear arms to be a civil right, [53] a right to protect a liberty and property interest, [54] and hold that the right should not be chilled nor should an adverse inference be drawn from its exercise. [55] Thus, plaintiffs under the federal Civil Rights Act have sued state officials for violating a state created property or liberty interest to keep and bear arms. [56] State courts have also kept the right to bear arms in mind so as to prevent tort law from being used to destroy this right. [57]

In summation, some state courts take the right to keep and bear arms seriously. They do not view firearms as today's witch. They view firearms as property worthy of constitutional protection.

STATE COURT INTERPRETATION NARROWING RIGHT TO BEAR ARMS

Despite well-established principles of law on the interpretation of constitutional guarantees, some courts ignore these rules when interpreting both the right to keep arms and the right to bear arms. A recent case from Arizona serves as an example.

The Arizona Declaration of Rights guarantees the following: "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." [58]

This guarantee of the Arizona Constitution should be interpreted in accordance with the rules of construction established by the Arizona Supreme Court. A right explicitly guaranteed in Arizona's Declaration of Rights is deemed to be fundamental, [59] and must be construed liberally to carry out the purposes for which it was adopted. [60] Every doubt about the sweep of a constitutional guarantee must be resolved in favor of a right or liberty. [61] When the words of the constitutional guarantee are clear, judicial construction is neither required nor proper. [62] Courts are not at liberty to impose their views of the way things ought to be, otherwise no recorded word, no matter how explicit, could be saved from judicial tinkering. [63] In the event of an ambiguity, records of the Arizona constitutional convention are given great weight. [64]

Nevertheless, Arizona courts have paid no attention to these well-established rules when construing Arizona's guarantee to possess or bear arms. Despite Arizona's clear guarantee to bear arms for self-defense, its Court of Appeals has held that only arms used in civilized warfare are protected. [65] Arguably, this could mean that a person may not possess an oriental club but may possess a bazooka. The court's narrow interpretation of the term "arms" has been justifiably criticized. [66]

A page in history is worth more than a volume of idle speculation or even logic. The adoption of Arizona's guarantee to bear arms is well-documented. The records of the 1910 constitutional convention reveal the framers intended that a ban on the concealed carrying of arms would constitute an impairment. [67] Besides the proposal adopted, five other proposals surfaced in the convention. [68] The alternative proposals would have allowed the state to regulate the wearing of arms to prevent crime or to ban concealed carrying. [69] They were not adopted. Furthermore,

the framers specifically voted down two efforts to amend the present guarantee in such a fashion that the concealed carrying of arms could be banned. [70] This was done in the face of impassioned pleas from a former Chief Justice of the Territorial Supreme Court (who initially wanted no guarantee to arms) and a former Speaker of the Territorial House of Representatives that "six-shooters" and "knives" should not be worn under the shirt or under the coat. [71] The concealed carrying of arms was even described as a "vile and pernicious practice." [72] The arguments to dilute the right to arms were not heeded. The arguments in those debates sound like a typical modern day argument over the right to bear arms. To ignore the clear intent of the framers would be the equivalent of ignoring the Federalist and Elliot's Debates when construing the national constitution. Thus, the records of the Arizona constitutional convention clearly reveal the framers vision of a broad right to bear arms not the narrow right construed in *Swanton* restricting the protection of the arms guarantee to only those arms used in war. [73]

Arizona's Court of Appeals has recently furthered restrictions in this broad right. In *Dano v. Collins*, [74] the Court held that Arizona's statute forbidding the concealed carrying of arms did not impair the right to bear arms. The plaintiffs in that case were two private detectives and process servers. Since arms may be carried in only two ways, openly or concealed, a 50% destruction of a right arguably constitutes impairment. The court made no attempt to decipher the meaning of the word "impair" in the arms guarantee. Nor did the court consider the records of the Arizona constitutional convention, which make clear that the broad ban on concealed carrying, especially by plaintiffs with quasi-police powers, would constitute impairment. Here, the court's actions are directly in conflict with the legislative history of the constitutional provision which repudiated the very ban on concealed weapons upheld by the Court. If the courts are free to ignore well-established principles of constitutional construction [75] in regard to the right to bear arms, then every other constitutionally protected right may also be in peril.

BEARING ARMS IN PUBLIC HOUSING

It has been argued that gun control sprouts from racist soil. [76] Antebellum laws prevented freed men from owning firearms, and the Black Codes later reinstated such firearm laws. [77] There is a history of discrimination in housing, [78] public accommodations, [79] equal employment, [80] and voting. [81] Hence, in order to avoid a return to racist lawmaking, governmental action that has a disproportionate impact on Afro-Americans' right to keep arms should be subjected to careful strict scrutiny and condemnation. It does not matter that a law on its face applies to all. A law will be deemed unconstitutional if "the reality is that the law's impact falls on the minority." [82]

The Chicago Housing Authority has a rule or lease provision forbidding a tenant to possess any firearm or ammunition within the tenants' apartment. [83] This prohibition applies to a tenant who is otherwise in full compliance with state law and Chicago's firearm registration ordinance. [84] The Chicago Housing Authority created pursuant to state law, is a governmental body. [85] Thus, its infringement on the right to keep arms in the home constitutes state action. [86]

A ban on the possession of firearms in one's home by a governmental body should be impermissible in view of Article I, § 22 of the Illinois Constitution, which guarantees a right to

keep and bear arms. The Illinois Supreme Court in another case has opined that a complete ban on firearms and ammunition would be unconstitutional. [87]

In addition, it is also well-settled law that the government may not condition entitlement to a public benefit, whether gratuitous or not, upon the waiver of constitutional rights that the government could not abridge by direct action. [88] Thus, the government is not free to place unconstitutional prerequisites upon the securing of public housing. Eligibility for low income housing provided by a housing authority plainly is a public benefit or privilege. The concept that constitutional rights turn upon whether a governmental benefit is characterized as a right or privilege has been rejected by the Supreme Court. [89] While the Chicago Housing Authority may lawfully condition eligibility on satisfaction of income criteria and other factors designed to ensure that only eligible tenants reside in that housing, the Chicago Housing Authority may not require an otherwise eligible individual to surrender his or her right to keep arms under Article I, § 22 of the Illinois Constitution in order to obtain low income housing.

Forbidding tenants in public housing to possess firearms and ammunition will have a disproportionate impact on persons of African heritage. The purpose of the 13th Amendment was not merely to abolish slavery, but also to eradicate the badges and incidents of slavery. [90] Historically, the denial of the right to possess arms to African Americans was an effort to maintain their servile condition. The Fourteenth Amendment was adopted in part to remedy this condition. [91]

The Housing Authority of Portland, Oregon, has also proposed like regulations. [92] The State Attorney General opined that this proposed lease provision which would prohibit the possession of any firearm within a resident's apartment or on the Housing Authority's property, would violate the state constitutional guarantee to bear arms. [93]

It remains to be seen how courts will respond when tenants who live in public housing challenge bans on the possession of firearms and ammunition in the home.

CONCLUSION

Humankind's oldest right is personal and communal defense. State constitutions, some of which predate the federal constitution, serve as a people's reminder that the people are supreme and that the state and its organs shall not have a monopoly on arms. [94] The constitution is a reminder that judges must be restrained by something more than their own predilections. Legislative bodies also have an obligation to defend constitutional rights. However, ultimately the constitution also restrains legislative bodies. Responsible judges will make certain that all constitutional rights are protected, regardless of personal feelings. Should any provision be deemed worthy of change, every state constitution provides a process which ensures that change is only accomplished after suitable deliberation has taken place. [95] Unless the integrity of the process for the interpretation and Amendment of rights is not followed, no right will be safe. [96]

---

[*] B.S., 1975, Indiana University; J.D., 1979, Howard University. Member D.C. Bar.

[1] U.S. Const. amend. II.

[2] *See* Akhil Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1162 (1991); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1205-06, 1218, 1245 n.228, 1265 (1992); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989).

[3] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 266-67. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2805 (1992).

[4] Prune Yard Shopping Ctr. v. Robbins, 447 U.S. 74, 81 (1980).

[5] *See* Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U. L. Rev. 177, 236 (1982); Mary Jo Valentine, Note, *An Analysis of Initiative 403: The Impact on Existing Nebraska Statutes Restricting the Right to Keep and Bear Arms*, 23 Creighton L. Rev. 489, 507 (1990).

[6] *See, e.g.*, Six states guarantee a right to bear arms for defensive purposes *and* hunting and recreational use. Del. Const. art. I, § 1; Nev. Const. art. II, § 6; N.D. Const. art. I, § 1; W. Va. Const. art. III, § 22. Idaho Const. art. I, § II provides that "No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition." Charles II introduced in 1660 a form of firearms registration in an attempt to disarm "any person disaffected." Joyce Lee Malcolm, *Charles II and the Reconstruction of Royal Power*, 35 Hist. J. 307, 319 (1992).

[7] Alaska Const. art. I, § 19; Haw. Const. art. I, § 15; N.C. Const. art. I, § 30; S.C. Const. art. I, § 20; Va. Const. art. I, § 13.

[8] Ark. Const. art. II, § 5; Mass. Decl. of Rights pt. I, art. 17; Tenn. Const. art. I, § 26.

[9] *See* 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 (1991); Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 107 (Univ. of New Mex. Press 1984); Robert A. Sprecher, *The Lost Amendment*, 51 A.B.A.J. 554, 665 (2 parts) (1965); Nunn v. State, 1 Ga. 243 (1846) (direct application).

[10] Cal. Const. art. I, § 1; Iowa Const. art. I, § 1; N.J. Const. art. I.

[11] Wis. Const. art. I, § 1.

[12] DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989); Everton v. Willard, 468 So. 2d 936 (Fla. 1985). An armed citizenry discouraged looting and behaved responsibly in the aftermath of Hurricane Andrew. *After Andrew, New Debate on Gun Control*, Miami Herald, Sept. 27, 1992, at 5J.

[13] *See* Commonwealth v. Ray, 272 A.2d 275, 278-79 (Pa. 1970); *In re* Reilly, 31 Oh. Dec. 364, 367-68 (C.P. 1919).

[14] United States v. Panter, 688 F.2d 268, 271 (5th Cir. 1982) (right to self-defense is fundamental).

[15] Some have argued self-defense is immoral because criminals are members of the larger community no less than others. Don B. Kates, Jr., *The Value of Handgun Possession as a Deterrent to Crime or a Defense Against Crime*, 18 Am. J. Crim. L. 113, 119 n.18 (1991).

[16] The Federalist No. 78, at 524 (Alexander Hamilton) (Jacob B. Cooke ed., Wesleyan University Press 1961).

[17] *See* Creating the Bill of Rights: The Documentary Record from the First Federal Congress *ix* (1991); Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 496 (1984).

[18] Union High Sch. Dist. No. 1 v. Taxpayers of Union High Sch. Dist. No. 1, 172 P.2d 591, 594 (Wash. 1946).

[19] Fain v. Chapman, 569 P.2d 1135, 1139 (Wash. 1977).

[20] Alderwood Assoc. v. Washington Envtl. Council, 635 P.2d 108, 113 (Wash. 1981).

[21] State *ex rel.* Farley v. Brown, 157 S.E.2d 850, 853 (W. Va. 1967).

[22] Alexander Hamilton, James Madison and John Jay, The Federalist No. 51 at 349 (Jacob B. Cooke ed., Wesleyan University Press 1961).

[23] *In re* Public Utility Comm'r, 268 P.2d 605, 617 (Or. 1954); Vanhorne's Lessee v. Horrance, 2 U.S. 304, 308 (1795).

[24] See Bryant v. Continental Conveyor Equipment Company, 751 P.2d 509 (Ariz. 1988); Utter, *supra* note 17, at 508, 517-18.

[25] Powell v. McCormack, 395 U.S. 486, 523 n.46 (1969).

[26] John Hart Ely, Democracy and Distrust 1 (1980).

[27] *Id.*

[28] *Id.*

[29] See State *ex rel.* City of Princeton v. Buckner, 377 S.E.2d 139 (W. Va. 1988); Earl M. Maltz, *Individual Rights and State Autonomy*, 12 Harv. J.L. & Pub. Pol'y 163, 165 (1989); 7 Utter, *supra* note 17, at 517-18.

[30] *See, e.g.*, Adams v. Williams, 407 U.S. 143, 149-51 (1972) (Justice Douglas dissenting) (opinion criticizes Connecticut's "free-and-easy" policy on firearms, the gun lobby, and calls for "watering down" of right to arms). An attempt to force a $2,500 contribution to a gun prohibition group, as part of a sentence for possessing an unlicensed pistol, was voided in People v. Warren, 452 N.Y.S.2d 50 (1982). Stocking veniremen, without voir dire, who believed in the principles of the National Rifle Association, were members or former members of NRA, or had a family member who belonged to NRA was held reversible error in United States v. Salamone, 800 F.2d 1216, 1226-27 (3rd Cir. 1986). *See also* Douglas Laycock, *Vicious Stereotypes in Polite Society*, 8 Const. Commentary 395, 397 (1991) (gun owners subjected to vicious stereotypes).

[31] Courts have held on at least 20 reported occasions that an arms law was void because it impermissibly infringed the right to keep or bear arms. *See, e.g.*, Wilson v. State, 33 Ark. 557 (1878); City of Lakewood v. Pillow, 501 P.2d 744 (Co. 1972) (en banc); People v. Nakamura, 62 P.2d 246 (Co. 1936) (en banc); Nunn v. State, 1 Ga. 243 (1846); *In re* Brickley, 70 P. 609 (Idaho 1902); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90 (1822); People v. Zerillo, 189 N.W. 927 (Mich. 1922); State v. Kerner, 107 S.E. 222 (N.C. 1921); City of Las Vegas v. Moberg, 485 P.2d 737 (N.M. Ct. App. 1971); *In re* Reilly, 31 Ohio Dec. 364 (1919); Barnett v. State, 695 P.2d 991 (Or. Ct. App. 1985); State v. Delgado, 692 P.2d 610 (Or. 1984); State v. Blocker, 630 P.2d 824 (Or. 1981); State v. Kessler, 614 P.2d 94 (Or. 1980); Glasscock v. City of Chattanooga, 11 S.W.2d 678 (Tenn. 1928); Andrews v. State, 50 Tenn. (3 Heisk.) 165, (1871); Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214 (1866); Jennings v. State, 5 Tex. App. 298 (1878); State v. Rosenthal, 55 A. 610 (Vt. 1903); State *ex rel.* City of Princeton v. Buckner, 377 S.E.2d 139 (W. Va. 1988).

[32] *State ex rel. City of Princeton*, 377 S.E.2d at 146.

[33] State v. Hogan, 58 N.E. 572, 573 (Ohio 1900).

[34] Kalodimos v. Village of Morton Grove, 470 N.E.2d 266, 279 (Ill. 1984) (handgun ban upheld). *Cf.* Robarge v. State, 432 So. 2d 669, 672 (Fla. 5th DCA 1983) (handgun ban would be impermissible).

[35] Numerous countries allow their citizenry to possess some sort of firearm. The British have a lenient shotgun licensing system. New Zealand even did away with its long gun registration system as a useless crime control measure. A permissive licensing system allows the licensee to buy unlimited numbers of rifles and shotguns. Members of shooting clubs and collectors may obtain a handgun license. The Swiss have a high rate of gun ownership, including machine guns. David B. Kopel, The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies? 78, 238-40, 278-83 (1992). "As the case of Switzerland illustrated, guns do not cause trouble on their own; if the people are willing to control their own behavior, they will use guns only in a responsive manner." *Id.* at 303. "In practical terms, handguns are still obtainable [by Canadians]." Canada's gun laws are less restrictive than in

many American jurisdictions. David B. Kopel, *Canadian Gun Control: Should the United States Look North for a Solution to its Firearms Problem?*, 5 Temp. Int'l & Comp. L.J. 1, 13, 16-17 (1991).

[36] State v. Kessler, 614 P.2d 94, 99 (Or. 1980) (law voided on account of right to arms but held it is not "an unrestricted right").

[37] Ill. Const. art. I, § 22 is "subject only to the police power."

[38] State v. McAdams, 714 P.2d 1236, 1237 (Wyo. 1986); Glasscock v. City of Chattanooga, 11 S.W.2d 678 (Tenn. 1928); Hill v. State, 53 Ga. 473, 480-81 (1874).

[39] *See* State v. Kessler, 614 P.2d 94 (Or. 1980); People v. Zerillo, 189 N.W. 927 (Mich. 1922).

[40] Hill v. State, 53 Ga. 473, 480 (1874).

[41] Andrews v. State, 50 Tenn. 165, 178 (1871).

[42] 614 P.2d 94 (Or. 1980). *See also* State v. Kerner, 107 S.E. 222 (N.C. 1921).

[43] *Kessler*, 614 P.2d at 98-99.

[44] Cal. Penal Code § 12276 (c)(2) & (c)(3) (West 1991).

[45] Defense Intelligence Agency, United States Department of Defense Small Arms Identification and Operation Guide--Eurasian Communist Countries 105 (1976). *See also* Gary Kleck, Point Blank: Guns and Violence in America 65 (1991); Note, *Assault Rifle Legislation: Unwise and Unconstitutional*, 17 Am. J. Crim. L. 143 (1990). Note, *State Assault Rifle Bans and the Militia Clauses of the U.S. Constitution*, 67 Ind. L.J. 187 (1991).

[46] Ian V. Hogg & John Weeks, Military Small Arms of the 20th Century 13, 69, 78 (5th ed. 1985).

[47] *Id.* at 158-59.

[48] *Id.* at 11, 31, 40, 53, 67.

[49] Glossary of the Ass'n of Firearm and Toolwork Examiners 2 (2nd ed. 1985).

[50] *Id*. at 3.

[51] *See supra* note 31.

[52] *See* Wilson v. State, 33 Ark. 557 (1878); State v. Kerner, 107 S.E. 222 (N.C. 1921); Glasscock v. City of Chattanooga, 11 S.W.2d 678 (Tenn. 1928).

[53] Williams v. State, 402 So. 2d 78, 79 (Fla. 1st DCA 1981); Andrews v. State, 50 Tenn. 165, 182 (1871).

[54] Kellogg v. City of Gary, 562 N.E. 2d 685, 694 (Ind. 1990).

[55] State v. Rupe, 683 P.2d 571, 595 (Wash. 1984).

[56] *See supra* note 34. *See also* Bill Dolan, *Hatcher, City Owes Thousands--Gary Taxpayers Face Bill For Illegal Denial of Gun Permits*, Post-Trib., Oct. 18, 1991, at B1.

[57] Hilberg v. F.W. Woolworth Co., 761 P.2d 236, 240 (Colo. Ct. App. 1988); Rhodes v. R.G. Industries, Inc., 325 S.E.2d 465, 466 (Ga. 1985); Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984); Lopez v. Chewiwie, 186 P.2d 512, 513 (N.M. 1947).

[58] Ariz. Const. art. II, § 26.

[59] Bryant v. Continental Conveyor & Equip. Co., Inc., 751 P.2d 509 (Ariz. 1988).

[60] Loas v. Arnold, 685 P.2d 111 (Ariz. 1984).

[61] Stone v. Stidham, 393 P.2d 923 (Ariz. 1964).

[62] Hudson v. Brooks, 158 P.2d 661 (Ariz. 1945); Clark v. City of Tucson, 403 P.2d 936 (Ariz. 1965).

[63] Kilpatrick v. Superior Court of Maricopa County, 466 P.2d 18 (Ariz. 1970).

[64] Desert Waters, Inc. v. Superior Court, 370 P.2d 652 (Ariz. 1962).

[65] State v. Swanton, 692 P.2d 98 (Ariz. App. 1981).

[66] *See* Note, *Nunchakus and the Right to Bear Arms in Arizona*, 24 Ariz. L. Rev. 134 (1982).

[67] *See, e.g.*, Brief of Appellants pp. 3-7, Dano v. Collins, 802 P.2d 1021 (Ariz. Ct. App. 1990); Stephen J. Twist & Mark Edward Hessinger, *New Judicial Federalism: Where Law Ends and Tyranny Begins*, 3 Emerging Issues in St. Const. Law 178, 185 (1990); Stephen J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New "Rights" in State Constitutions*, 21 Ariz. St. L.J. 1005, 1058 (1989).

[68] 21 Ariz. St. L.J. at 1057-59.

[69] *Id.*

[70] *See* Twist & Hessinger, *supra* note 67, at 187; Twist & Munsil, *supra* note 67, at 1058.

[71] *Id.*

[72] *Id.*

[73] *See* John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L.J. 1, 83 (1988); Stephen J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New "Rights" in State Constitutions*, 21 Ariz. St. L.J. 1005, 1056 (1989); Stephen J. Twist & Mark Edward Hessinger, *New Judicial Federalism: Where Law Ends and Tyranny Begins*, 3 Emerging Issues in St. Const. Law 173, 181 (1990).

[74] 802 P.2d 1021 (Ariz. App. 1990), *rev. denied*, 809 P.2d 960 (Ariz. 1991).

[75] *See supra* note 43 and accompanying text.

[76] Examples may be found in old cases. Scott v. Sandford, 60 U.S. (19 How.) 393, 416-17 (1857); United States v. Cruikshank, 92 U.S. 542, 544-45, 548 (1876). Examples may also be found in modern cases. Watson v. Stone, 148 Fla. 516, 524 (1941) (Buford, J. concurring); Application of Merriweather, N.J. Super. Ct. App. Div., No. A4801-91T1, Appellant's Letter Brief at pp. 6-8 (Sept. 15, 1992).

[77] D. Kates, Jr., Restricting Handguns: The Liberal Skeptics Speak Out 12 (1979); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991). Stefan Tahmassebi, *Gun Control and Racism*, 2 Geo. Mason U. Civil Rts. L.J. 67 (1991).

[78] 42 U.S.C. § 3601 *et. seq.*

[79] 42 U.S.C. § 2000a *et. seq.*

[80] 42 U.S.C. § 2000e *et. seq.*

[81] 42 U.S.C. § 1971 *et. seq.*

[82] Hunter v. Erickson, 393 U.S. 385, 391 (1969).

[83] George Papajohn, *NRA Takes A Shot At CHA Ban On Guns*, Chicago Tribune, May 18, 1991, P. 1, § 1, col. 1.

[84] Ill. Rev. Stat. ch. 38 § 24-1 § 83-1 *et. seq.* (1992), and Chicago Code § 8-20-040.

[85] Ill. Ann. Stat. ch. 67 1/2, para. 3 (1992).

[86] Richmond Tenants Org., Inc. v. Richmond Redev. and Housing Auth., 751 F.Supp. 1204 (E.D.Va. 1990) (although the right to bear arms was not raised, the court voided a weapons ban as unreasonable and upheld a firearms ban).

[87] Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (Ill. 1984). *Cf.* People v. Liss, 94 N.E.2d 320, 323 (Ill. 1950).

[88] *See, e.g.* Lefkowitz v. Turley, 414 U.S. 70 (1973); Keyishian v. Board of Regents, 385 U.S. 589, 606 (1967); Sherbert v. Verner, 374 U.S. 398 (1963).

[89] Morrisey v. Brewer, 408 U.S. 471, 481 (1972).

[90] Jones v. Alfred H. Mayor Co., 392 U.S. 409, 440-41 (1968).

[91] Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 Geo. Mason U. L. Rev. 1, 15, 18 (1981); Scott v. Sandford, 60 U.S. 393, 417, 450 (1857).

[92] Opinion No. 8196 Or. Atty. Gen., Sept. 12, 1988.

[93] *Id.*

[94] It was argued that a federal bill of rights was not necessary. "The State Declarations of Rights are not repealed by the Constitution; and being in force are sufficient." (Roger Sherman of Conn.), 2 Max Farrard, Records of the Federal Convention of 1787, at 588 (1974). State decisions have influenced the U.S. Supreme Court, *e.g.*, to make applicable to the states the double jeopardy prohibition and to adopt a right to counsel in noncapital cases. Benton v. Maryland, 395 U.S. 784, 794-96 (1969); Gideon v. Wainwright, 372 U.S. 335, 345 (1963). State courts have also more broadly interpreted controversial rights, such as the right to arms and abortion. *Cf.* State v. Delgado, 692 P.2d 610 (Or. 1984), and Junction City v. Mevis, 601 P.2d 1145 (Kan. 1979), to Fresno Rifle and Pistol Club v. Van de Kamp, 965 F.2d 723 (9th Cir. 1992) (arms). *Cf. In re* T.W., 551 So. 2d 1186 (Fla. 1989), to Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992) (abortion).

[95] Fla. Const. art. I, § 8 was amended in 1990. It was a product of compromise: it guaranteed a right to keep and bear a handgun but imposed a waiting period, with exceptions, before a handgun could be purchased. For an argument that waiting periods are a public placebo, *see* Kleck, *supra* note 45, at 333-35.

[96] An unduly burdensome standard of review on the unenumerated right to an abortion and restrictions, including a 24-hour waiting period and reporting requirements has been upheld. Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992).

.