

No. 08-1521

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In The  
**Supreme Court of the United States**

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OTIS MCDONALD, et al.,

*Petitioners,*

v.

CITY OF CHICAGO, et al.,

*Respondents.*

  

—————◆—————

**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Seventh Circuit**

  

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**AMICUS CURIAE BRIEF OF  
ROCKY MOUNTAIN GUN OWNERS AND  
NATIONAL ASSOCIATION FOR GUN RIGHTS  
IN SUPPORT OF PETITIONERS**

  

—————◆—————

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**QUESTION PRESENTED**

Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

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**AMICUS CURIAE BRIEF OF  
ROCKY MOUNTAIN GUN OWNERS AND  
NATIONAL ASSOCIATION FOR GUN RIGHTS  
IN SUPPORT OF PETITIONERS**

Rocky Mountain Gun Owners (“RMGO”) and the National Association for Gun Rights (“NAGR”) respectfully submit this amicus curiae brief in support of Petitioners.<sup>1</sup>



**IDENTITY AND INTEREST  
OF AMICI CURIAE**

RMGO is Colorado’s largest State-based gun lobby. RMGO is a non-profit, member-supported advocacy group, organized under the laws of the State of Colorado and recognized by the Internal Revenue Service as a 501(c)(4) organization. It is dedicated to protecting the natural right to keep and bear arms through grass-roots and professional lobbying. RMGO also conducts concealed handgun training classes. The NAGR assists State-based gun-rights organizations, including RMGO and many others in the

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<sup>1</sup> In compliance with Supreme Court Rule 37, MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae’s intention to file this brief.

American West, by providing information and lobbying support locally and in Washington, D.C.

RMGO's and NAGR's members firmly believe that the individual right to keep and bear arms in defense of themselves, their loved ones, and their property against crime and tyranny is a fundamental natural right, necessary to ordered liberty and protected for all Americans by the Constitution. For them, that right is central to what it means to be an American citizen. Many of these members live and work in the American West and they have an abiding understanding of the deeply rooted nature of the right to keep and bear arms, both in their own lives and in the cultural heritage of the American West.<sup>2</sup>



## **SUMMARY OF THE ARGUMENT**

This Court has correctly decided that the Second Amendment protects the individual right to keep and bear arms; however, as this Court interprets that right in this and subsequent cases, it should be mindful that the right is fundamentally important to American citizens. Limitations on the right to keep and bear arms fly in the face of the natural right to

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<sup>2</sup> For purposes of this Brief, the Western United States, or West, generally consists of States west of the 100th meridian, including Alaska but excluding Hawaii. Though it is acknowledged that the West is home to much cultural, historical, and geographic diversity, a uniquely Western culture unquestionably exists. That culture is described herein.

self-defense, the nature of American citizenship, and 200 years of American jurisprudence.

In the American West, the right to keep and bear arms continues to be an essential component of citizenship. Strict protection of the right to possess firearms and a broad protection of an individual's right to use self-defense are universal values in the West. An examination of the law and culture of the West reveals several common themes, the most prominent being a total lack of tolerance for the sort of onerous prohibitions and registration requirements at issue in the instant case. Moreover, the trend from the antebellum period to modern day has been toward ever stronger legal protection for the right to keep and bear arms. Ultimately, the law and culture of the West reflects the views of the drafters of the Second Amendment and the drafters of the Fourteenth Amendment: That the right to keep and bear arms is both an individual and fundamental right, the exercise of which makes self-defense possible and protects against tyranny.



## ARGUMENT

### I. THE ORIGINAL UNDERSTANDING OF THE RIGHT TO KEEP AND BEAR ARMS AND THE IMPACT OF THE ANTEBELLUM PERIOD.

This Court's decision in *District of Columbia v. Heller*, 554 U.S. \_\_\_, 128 S.Ct. 2783, 2798-99 (2008),

provides a thorough historical examination of the right to bear arms, concluding quite correctly that “[b]y the time of the founding, the right to have arms had become fundamental for English subjects” and that the individual right had been protected by the Second Amendment. The colonial experience and the American Revolution strengthened the notion that an armed populace is essential to ordered liberty. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration in Guns: Who Should Have Them* 127, 132 (David B. Kopel, ed., Prometheus Books 1995). Yet, as this Court noted in *Heller*, this fundamental right was curtailed by slave States prior to the Civil War. 128 S.Ct. at 2810-11.

Many commentators have noted that antebellum gun control had a decidedly racist motivation. See, e.g., Cottrol & Diamond, at 136; Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 Kan. J.L. & Pub. Pol’y 17, 17-25 (1995). “The idea was to restrict the availability of arms to blacks, both slave and free, to the extent consistent with local conceptions of safety.” Cottrol & Diamond, at 136. “Local conceptions of safety” in slave States often required free blacks to be totally disarmed, e.g., in Texas, Mississippi, Florida, Maryland, Virginia, and Georgia. *Id.* at 136-37. States that stopped short of total disarmament of blacks instead required licenses to keep and bear arms, e.g., in Florida until 1831 (when a total ban was enforced) and in Delaware. *Id.* at 137. Other States instituted harsh punishments for blacks who

used firearms to aide slave rebellions or who bore arms against whites, e.g., in Kentucky. *Id.* at 136. This racist trend toward gun control continued with the post-bellum “black codes.” *Id.* at 140. Despite the clear intention of the drafters of the Fourteenth Amendment to end racially motivated gun control, by the time *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896), gave constitutional legitimacy to the black codes, significant attacks had been made on the Second Amendment in the name of racial prejudice. See Clayton E. Cramer, et al., “*This Right Is Not Allowed By Governments That Are Afraid Of The People*”: *The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 George Mason L. Rev. (forthcoming 2010) (manuscript at 21, available at <http://ssrn.com/abstract=1491365>).

Yet, the West avoided much of this racially motivated gun control. See Cramer, *Racist Roots*, at 17. Slavery was outlawed in the West until 1857, when *Scott v. Sanford* extended slavery to the Territories. 60 U.S. (19 How.) 393, 449-50 (1857). Perhaps because slavery was not, with the exception of Texas, a central institution in the Western territories and States, the racially motivated abridgments of the fundamental right to keep and bear arms that pervaded the slave States were much less prevalent in the Western territories and States. See Cramer, *Racist Roots*, at 17. The direct application of the Constitution in the Western territories may also have prevented racist factions from ravaging the right to keep

and bear arms in the West. See *Territory of Hawaii v. Mankichi*, 190 U.S. 197, 218-19 (1903) (“most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation. . . .”); see also *Webster v. Reid*, 52 U.S. (11 How.) 437, 460 (1850); *Am. Publishing Co. v. Fisher*, 166 U.S. 464, 468 (1897).

Whatever the reason, the right to keep and bear arms has been a fixture of Western law and life since at least the declaration of Texas independence in 1836 and the drafting of the Kansas Territorial Constitution in 1855. See *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming in the United States of America* 3543, 1179 (Francis Newton Thorpe, ed., Government Printing Office 1909). An examination follows of what the right to keep and bear arms has meant – and continues to mean – to the law and culture of the West.

## **II. THE ORIGINAL UNDERSTANDING OF THE RIGHT TO KEEP AND BEAR ARMS HAS BEEN PRESERVED IN THE AMERICAN WEST.**

The Bill of Rights directly limits only the powers of the national government. *Baron v. Baltimore*, 32 U.S. 243, 248 (1833). The Fourteenth Amendment, through both the Due Process Clause and the Privileges or Immunities Clause, makes many of the provisions of the Bill of Rights, as well as other

fundamental limitations on government power, applicable to the States. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 Pepp. L. Rev. 601, 631 n.178 (2001). This Court, however, has never ruled that the Second Amendment is incorporated against the States because the Court's cases dealing with the Second Amendment in this context pre-date modern Fourteenth Amendment jurisprudence. See *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

Modern Fourteenth Amendment jurisprudence asks whether a right is “fundamental to the American scheme of justice,” or “necessary to an Anglo-American regime of ordered liberty.” *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968). This inquiry considers the right's historical acceptance in the United States, its recognition by the individual States (including any trend regarding State recognition), and the nature of the interest secured by the right. *Id.* at 149, 154 (citing current state practice as evidence that the jury right is fundamental); see also *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (citing current state practice as evidence that the prohibition on double jeopardy is fundamental). A panel of the Ninth Circuit described this as a “culturally specific inquiry [that] compels us to determine whether the right is ‘deeply rooted in this Nation’s history and tradition.’” *Nordyke v. King*, 563 F.3d 439, 450 (9th Cir. 2009), *reh’g en banc granted*, 575 F.3d 890 (2009) (citing *Glucksberg*, 521 U.S. at 721).

Though the original understanding of constitutional text is the most intrinsically sound method of construction, *see, e.g., South Carolina v. United States*, 199 U.S. 437, 448 (1905), a more far-reaching cultural and historical examination has been undertaken in the Fourteenth Amendment incorporation analysis. *See, e.g., Duncan*, 391 U.S. at 149. Such an examination of the American West reveals that possession of arms for self-defense and protection against tyranny, the primary philosophically underpinnings of the Second Amendment as interpreted in *Heller*, have historically been, and remain to this day, fundamental elements of Western law and culture. Under the *Duncan* test, this is strong evidence that Second Amendment rights are necessary to “ordered liberty,” historically accepted by the States, and continue to be recognized by the States as “privileges or immunities of citizens of the United States.” U.S. Const. amend. XIV; *Duncan*, 391 U.S. at 149.

**A. The Law of the West Demonstrates Strong Acceptance Among Western States of the Right to Keep and Bear Arms for Self-Defense and Defense Against Tyranny.**

An examination of the law of the West reveals a direct connection between the right to bear arms and the “Anglo-American regime of ordered liberty.” *Duncan*, 391 U.S. at 149 n.14. Several common themes emerge that are relevant in the instant case, the most prominent being a total lack of tolerance, by both



courts and legislatures, for the sort of onerous prohibitions and registration requirements at issue here.<sup>3</sup>

Of the eighteen States comprising the American West, only California lacks an explicit constitutional protection for the right to keep and bear arms. Robert A. Creamer, *History is Not Enough: Using Contemporary Justifications for the Right to Keep and Bear Arms in Interpreting the Second Amendment*, 45 B.C. L. Rev. 905, 920-25 (2004). Of the remaining seventeen States, the Texas provision is the earliest, ratified in 1836. Texas Const. art. I, § 23 *reprinted in* Thorpe, at 3543. The second oldest in the West is that of Kansas, drafted in 1855. Kan. Const. Bill of Rights, § 4 *reprinted in* Thorpe, at 1179. Oregon's constitution, including protection for the individual right to keep and bear arms, was ratified in 1857. Or. Const. art. I, § 27 *reprinted in* Thorpe, at 3000. The rest of the Western States entered the Union after the start of the Civil War, and all of these States' constitutions guard the individual's right to bear arms. Alaska Const. art. I, § 19 (ratified 1959); Ariz. Const. art. II, § 26 (ratified 1912); Colo. Const. art. II, § 13 (ratified 1876); Idaho Const. art. I, § 11 (ratified 1889); Mont. Const. art. II, § 12 (ratified 1889); Neb. Const. art. I, § 1 (amended 1988); Nev. Const. art. I, § 11 (amended 1982); N.M. Const. art. II, § 6 (ratified 1912); N.D.

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<sup>3</sup> Several important aspects of state firearms law are summarized immediately below. A narrative overview of the firearms laws of the Western States that are particularly relevant to the instant case is provided at Part III.

Const. art. I, § 1 (amended 1984); Okla. Const. art. II, § 26 (ratified 1907); S.D. Const. art. VI, § 24 (ratified 1889); Utah Const. art. I, § 6 (ratified 1895); Wash. Const. art. I, § 24 (ratified 1889); Wyo. Const. art. I, § 24 (ratified 1889). The long and consistent history of State protection for the right to keep and bear arms, and the degree to which State constitutions explicitly protect an individual's right to bear arms, provide compelling evidence that the right to keep and bear arms is fundamental.

Paramount among the rights protected by these State constitutional provisions is the protection of the right to possess firearms, both inside and outside the home, for lawful purposes. Several Western States explicitly prohibit the regulations at issue in the instant case, i.e., the licensing of firearm possession in the home. *See* Idaho Const. art. I, § 11 (“No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition.”); N.D. Cent. Code § 62.1-03-01(2)(b); S.D. Codified Laws § 22-14-11; Utah Code Ann. § 76-10-500(1)(b); Wash. Rev. Code § 9.41.050.

The right to carry arms openly in public has existed in the law as long as the right to bear arms has existed, *see, e.g., Heller*, 128 S.Ct. at 2816, and the right to carry loaded firearms openly without a permit is protected by law in every Western State, with the exception of California, North Dakota, and Texas. *See* Alaska Stat. § 11.61.220; Ariz. Rev. Stat. § 13-3102(F); Colo. Rev. Stat. § 29-11.7-104; Idaho Code Ann. § 18-3302; Kan. Stat. Ann. § 21-4201; Mont. Code Ann. § 45-8-317; Neb. Rev. Stat. § 69-2430; Nev.

Rev. Stat. § 202.350(1)(d)(3); N.M. Stat. § 30-7-2; Okla. Stat. Ann. tit. 21, § 1289.7; Or. Rev. Stat. § 166.250(a); S.D. Codified Laws § 22-14-9; Utah Code Ann. § 76-10-505; Wash. Rev. Code § 9.41.050; Wyo. Stat. Ann. § 6-8-104. Moreover, traditional legal protections for carrying arms openly have been supplemented by the modern trend, adopted in every Western State, to also allow law-abiding citizens to carry concealed weapons outside the home. *See* Alaska Stat. § 18.65.700; Ariz. Rev. Stat. § 13-3112; Cal. Penal Code § 12025; Colo. Rev. Stat. § 18-12-203; Idaho Code Ann. § 18-3302; Kan. Stat. Ann. §§ 75-7c01 to -c26; Mont. Code Ann. § 45-8-317; Neb. Rev. Stat. § 69-2430; Nev. Rev. Stat. § 202.3657; N.M. Stat. § 29-19-4; N.D. Cent. Code § 62.1-04-03; Okla. Stat. Ann. tit. 21, § 1290.3; Or. Rev. Stat. § 166.250(a); S.D. Codified Laws § 23-7-7; Tex. Govt. Code Ann. § 411.172; Utah Code Ann. § 53-5-704; Wash. Rev. Code § 9.41.070; Wyo. Stat. Ann. § 6-8-104.

Thus, the right to keep and bear arms for purposes of self-defense, both inside and outside the home, remains an important value in the West, protected by law and outside the State's power to permit or deny. For Westerners, there are few other rights as important as the right, as individuals, to keep and bear arms and they have protected the right accordingly through law.

Likewise, Western courts have not hesitated to protect an individual's right to keep and bear arms for self-defense or as protection against government tyranny. For example, the Oregon Supreme Court has

explained that the purpose of the constitutional protection of the right to keep and bear arms in its State constitution is to protect self-defense and as a check on government power. *State v. Hirsch*, 114 P.3d 1104, 1114 (Or. 2005) (citing *State v. Kessler*, 614 P.2d 94, 97 (Or. 1980)). Similarly, the South Dakota Supreme Court has concluded that the State constitution, including the right to bear arms, protects an individual's right to self-defense. *Conaty v. Solem*, 422 N.W.2d 102, 104-05 (S.D. 1988). These holdings are in accord with those of other Western states, as discussed in Part III.

All of the States, to various degrees, sanction the use of deadly force as a last resort for self-defense. *See, e.g., Beard v. United States*, 158 U.S. 550, 563 (1895) (establishing no duty to retreat under federal law based on decisions from various states); Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269, 327 (1996).<sup>4</sup> Many Western States have expanded the right to self-defense through “make my day” or “castle doctrine”

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<sup>4</sup> A man may repel force by force in defense of his person, habitation, or property against anyone or many who manifestly intend and endeavor to commit a known felony by violence or surprise or either. In such case he is not compelled to retreat, but may pursue his adversary until he finds himself out of danger, and if, in the conflict between them he happen to kill him, such killing is justifiable.

*Beard*, 158 U.S. at 563 (quoting 2 Whart. Cr. Law § 1019).

laws that give individuals a broad right to use deadly force for self-defense within the home, even if not a last resort. Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. Econ. & Pol'y 331, 336-39 (2006). Currently, at least eleven of the eighteen Western States have some form of "make my day" or "castle doctrine" statutes on the books, eight of which have been enacted in the past four years. Most States having such laws are "stand your ground" States that do not impose a duty to retreat. Alaska Stat. § 11.81.335; Ariz. Rev. Stat. § 13-418; Colo. Rev. Stat. § 18-1-704.5; Idaho Code Ann. § 6-808; Kan. Stat. Ann. § 21-3218; Mont. Code Ann. § 45-3-103; N.D. Cent. Code § 12.1-05-07; Okla. Stat. Ann. tit. 21, § 1289.25; S.D. Codified Laws § 22-18-4; Texas Penal Code Ann. § 9.31; Utah Code Ann. § 76-2-405.

Furthermore, many Western courts have interpreted an individual's right to self-defense outside the home broadly. *See, e.g., State v. Starks*, 627 P.2d 88, 91 (Utah 1981) (defendant may use deadly force in self-defense even after defendant armed himself and went to a location where he knew he would find the deceased); *State v. Bristol*, 84 P.2d 757, 762-63 (Wyo. 1938) (defendant who armed himself, sought out his enemy, and was attacked, unprovoked, by his enemy, could use deadly force against his enemy in self-defense); *Thomas v. State*, 51 S.W. 1109, 1110 (Tex. Crim. App. 1899) (deadly force may be used in self-defense even if defendant seeks out deceased to

provoke difficulty, so long as there was no actual provocation).

The only limitation on the right to keep and bear arms universally accepted by Western courts and legislatures is a ban on felons possessing firearms. *See, e.g., People v. Blue*, 544 P.2d 385, 391 (1975). Yet, even felons may not be disarmed as a class when their purpose in possessing firearms is defense of person or property. *E.g., id.*; *Conaty v. Solem*, 422 N.W.2d 102, 104 (S.D. 1988); *Carfield v. State*, 649 P.2d 865, 872 (Wyo. 1982); *State v. Cartwright*, 418 P.2d 822, 829 (Or. 1966).

Ultimately, the law of the West reflects the views of the Second Amendment held by the Framers of the Constitution and the Fourteenth Amendment. *See Cramer, This Right Is Not Allowed*, at 1. Specifically, the right to keep and bear arms is both an individual and fundamental right, the exercise of which makes self-defense possible and protects against tyranny. As detailed above, the trend from the antebellum period forward has been toward ever stronger protections for the right to keep and bear arms.

**B. The History and Culture of the West Demonstrate Strong Acceptance Among Western States of the Right to Keep and Bear Arms for Self-Defense and Defense Against Tyranny.**

Even before “an Anglo-American regime of ordered liberty” emerged in the West, the gun culture

had taken root. In a very real way, this made the gun a prerequisite to the development of Anglo-American society.

Prior to 1754, Indian tribes used guns, acquired through trade with French fur traders, for defense against attacking tribes. David B. Kopel, *The Samurai, The Mountie, and the Cowboy* 307-08 (Prometheus Books 1992). After the French defeat in the French and Indian War, Indians acquired guns from British traders. *Id.* In part because of the presence of armed Indians, “life itself would have been impossible for the new people who would be called ‘Americans,’” because the new settlers frequently had to defend themselves with their own guns. *Id.* at 309. Western expansion was regularly met with resistance, and thus arms were essential for self-defense from the 17th Century. *Id.*

Likewise, the rapid westward expansion, occurring around the time the Fourteenth Amendment was drafted, debated, and ratified, surpassed the government’s ability to enforce the law. *Id.* at 323. Even in frontier towns that employed some form of official police, the law enforcement officers that did exist often lacked the resources to pursue criminals beyond the town border or were too corrupt themselves to do so. *Id.* at 323, 326. Thus, settlers were left to “repel force by force when the intervention of society in his behalf, [was] too late to prevent an injury.” *Heller*, 128 S.Ct. at 2799 (internal quotation omitted).

To this day, self-defense remains a core value amongst many Westerners. In December 2007, when an attacker opened fire at a church in Colorado Springs, one of the church members, who had volunteered to carry her firearm to defend the congregation, saved hundreds of lives when she shot and wounded the attacker. Judith Kohler, *Police: Gunman Had Been Thrown Out of Missionary School*, Dec. 10, 2007, Denver Post. Similar examples of private citizens using their guns to defend themselves abound throughout the West. See, e.g., *Conaty*, 422 N.W.2d at 104-05; *Starks*, 627 P.2d at 91; *Bristol*, 84 P.2d at 761-62; *Thomas*, 51 S.W. at 1109-10; The Armed Citizen Archive, <http://www.nrila.org/ArmedCitizen/> (last visited Nov. 18, 2009).

This respect for self-defense and self-reliance is inherent in the nature of the West particularly, but also the United States more generally. The West is one of the most sparsely settled, rural areas in the United States. Of the 16 States with the lowest population density, 15 are located in the West. U.S. Census Bureau, *Population, Housing Units, Area, and Density: 2000*, [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-ds\\_name=DEC\\_2000\\_SF1\\_U&-CONTEXT=gct&-mt\\_name=DEC\\_2000\\_SF1\\_U\\_GCTPH1\\_US9&-redoLog=false&-\\_caller=geoselect&-geo\\_id=&-format=US-9|US-9S&-\\_lang=en](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-ds_name=DEC_2000_SF1_U&-CONTEXT=gct&-mt_name=DEC_2000_SF1_U_GCTPH1_US9&-redoLog=false&-_caller=geoselect&-geo_id=&-format=US-9|US-9S&-_lang=en) (last visited Nov. 18, 2009). As such, Western culture is primarily a “land-based culture” closely associated with ranching and farming activities. Erin Morrow, *The Environmental Front: Cultural Warfare in the West*, 25 J. Land Resources



& Env'tl. L. 183, 208 (2005); H.R. Res. 411, 109th Cong. (2005) ("Ranching is an important part of the culture and economy of many rural communities throughout the American West, and the rural West depends on a healthy and thriving ranching industry."). Much like the "individualist philosophy of our Founders," *Silveira v. Lockyer*, 328 F.3d 567, 571 (9th Cir. 2003) (Kleinfeld, J., dissenting), this rural Western culture emphasizes individualism, independence, self-sufficiency, and self-governance. Morrow, *The Environmental Front*, at 209-216.

A report by the National Institute of Justice shows that these characteristics also typify the modern gun culture. Specifically, the Institute concluded that the modern gun culture is "best typed as rural rather than urban: . . . emphasiz[ing] independence, self-sufficiency, mastery over nature, [and] closeness to the land. . . ." Kopel, at 305 (citing James Wright, Peter Rossi & Kathleen Daly, *Under the Gun: Weapons, Crime and Violence in America* 113 (Aldine 1983)). Additionally, even to this day, the gun culture generally distrusts government and is skeptical of government's intentions. Erik Luna, *The .22 Caliber Rorschach Test*, 39 Hous. L. Rev. 53, 77 (2002). "To many gun owners, firearms [and the threat of their use] represent the last line of defense against official tyranny . . . ," although actual armed conflicts with the government are rare. *Id.*

It is likely that widespread possession of guns amongst the populace often serves to deter government tyranny without resorting to actual violence.

David Harmer, *Securing A Free State: Why the Second Amendment Matters*, 1998 B.Y.U. L. Rev. 55, 92 (1998). Perhaps that is why one prominent 20th Century conflict that arose with the Federal government in the West was largely non-violent. During the Sagebrush Rebellion, Westerners revolted against the federal government's restrictive land-use policies. James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 Geo. L.J. 1003, 1018-19 n.72 (2003). No shots were fired, and the issues were addressed in federal court. *Id.*

Unlike the Sagebrush Rebellion, violence has ensued when force was initiated by the federal government. *Harris v. Roderick*, 126 F.3d 1189, 1192-94 (9th Cir. 1997). In 1992, at Ruby Ridge, Idaho, private citizens exercised their right to bear arms in an attempt to defend themselves against an overzealous government siege. *Id.* Tragically, government agents killed a fourteen-year-old boy, a mother holding her infant daughter, and the family dog. *Id.* at 1194.

As these examples illustrate, defense against tyranny to protect individual liberty is thus also fundamental to Western culture and to the "Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14.

### III. AN OVERVIEW OF WESTERN FIREARMS LAW - THE ORIGINAL AND CONTEMPORARY UNDERSTANDING OF THE RIGHT TO KEEP AND BEAR ARMS.

#### Alaska

Alaska law recognizes the right to keep and bear arms and tolerates very few limits on the right. Alaska Const. art. I, § 19. The Alaska Constitution protects the right to keep and bear arms with the same language as the Second Amendment, but the Alaska Constitution goes further. *Id.* In 1994, Alaskans reinforced the prohibition that “the right of the people to keep and bear arms shall not be infringed” by adding this language to the state constitution: “The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State.” *Id.* Courts have interpreted this language to allow very limited regulation of firearms, such as prohibiting possession of firearms by intoxicated persons or by violent felons. *See Morgan v. State*, 943 P.2d 1208, 1212 (Alaska Ct. App. 1997); *Gibson v. State*, 930 P.2d 1300, 1301 (Alaska Ct. App. 1997).

Alaska law has long recognized the right to carry a firearm, either openly or concealed, for any lawful purpose. *See* Alaska Stat. § 11.61.220. No permit is required to carry a handgun in Alaska, although the state issues permits that are valid in other States. *See* Alaska Stat. § 18.65.700. Moreover, Alaska law recognizes the natural right to use deadly force in self-defense. *See* Alaska Stat. § 11.81.335.

## Arizona

The laws of the New Mexico Territory, which included Arizona until 1863, protected the right to use armed self-defense. *See* Laws for the Government of the Territory of New Mexico art. II, § 1 (1846), *available at* [http://avalon.law.yale.edu/19th\\_century/kearney.asp](http://avalon.law.yale.edu/19th_century/kearney.asp) (“Every person who shall kill another in the necessary defense of his own life, or that of any other persons, or of his own house or property, or in the legal execution of any process, or in order to prevent great bodily harm to himself or another, shall be deemed guiltless.”). This legal protection for armed self-defense was continued in the Arizona Constitution of 1912 and the Arizona statutes. *See* Ariz. Const. art. II, § 26; Ariz. Rev. Stat. § 13-404, -418.

Arizona law has long expressed a preference for the wearing of arms openly, and this is one of the few limitations on the right to keep and bear arms that Arizona courts have tolerated. *State v. Moerman*, 895 P.2d 1018, 1021 (Ariz. Ct. App. 1994); *Dano v. Collins*, 802 P.2d 1021, 1022 (Ariz. Ct. App. 1990). Despite this preference for open carry, Arizona is one of a majority of States, including all Western States, that readily issue permits to carry concealed firearms to law-abiding citizens. *See* Ariz. Rev. Stat. § 13-3112. No permit is required or available for open carry. *See* Ariz. Rev. Stat. § 13-3102(F).

Arizona law prohibits felons from possessing firearms unless their civil rights have been restored. *State v. Rascon*, 519 P.2d 37, 38 (Ariz. 1974). Arizona

courts have also allowed local governments to enact time, place, and manner restrictions on the right to keep and bear arms. *See City of Tucson v. Rineer*, 971 P.2d 207, 212 (Ariz. Ct. App. 1998) (upholding ban on possession of firearms in municipal parks). Although, this makes Arizona an outlier among Western states. *Cf. In re Brickey*, 70 P. 609, 609 (Idaho 1902) (holding unconstitutional a prohibition on carrying deadly weapons within a municipality); *City and County of Denver v. State*, No. 03-3809, slip op. at 8 (Colo. Dist. Ct. Nov. 5, 2004), *aff'd without opinion by an equally divided court*, 139 P.3d 635 (Colo. 2006) (striking down ban on concealed carry in vehicles and public parks).

## **California**

There is no protection for the right to keep and bear arms in the California Constitution. However, state law specifically protects the right to possess a handgun in a person's residence or place of business without a permit. *See* Cal. Penal Code §§ 12026, 12031(h), 12031(l). Loaded firearms may not be carried outside the home without a permit; however, unloaded firearms may be carried openly in public without a permit. *See* Cal. Penal Code §§ 12025, 12050. California courts have allowed felons to be denied the right to possess firearms. *People v. Flores*, 86 Cal.Rptr.3d 804, 807 (Cal. Ct. App. 2008).

## Colorado

The Colorado Supreme Court has held consistently for more than seventy years that the Colorado Constitution protects the right to possess a firearm for self-defense. Colo. Const. art. II, § 13; *Robertson v. City and County of Denver*, 874 P.2d 325, 333 (Colo. 1994); *People v. Nakamura*, 62 P.2d 246, 247 (Colo. 1936). Even in cases where Colorado courts have tolerated regulation of the right to keep and bear arms, “outright prohibitions on the possession of all firearms have been held to violate constitutional protections.” *Robertson*, 874 P.2d at 330 n.10. Prohibitions on the keeping and bearing of arms violate the Colorado Constitution because outright prohibitions “den[y] the right as opposed to regulating it.” *Id.*; see also *Lakewood v. Pillow*, 501 P.2d 744 (Colo. 1972) (striking down ban on deadly weapons outside the home); *Nakamura*, 62 P.2d at 247 (striking down ban on firearm ownership by unnaturalized foreign-born residents).

Colorado courts have allowed regulation of narrow categories of weapons, possession by felons, and local regulation of open carry; however, no Colorado regulation of the right to keep and bear arms can abrogate the right to use self-defense. See, e.g., *Robertson*, 874 P.2d at 333 (upholding regulation of certain guns because there remain “literally hundreds of alternative ways in which citizens may exercise the right to bear arms in self-defense”); *Trinen v. City and County of Denver*, 53 P.3d 754, 756 (Colo. Ct. App. 2002) (upholding concealed carry regulations because

of self-defense exception). Even felons may not be disarmed as a class when their purpose in possessing firearms is defense of person or property. *People v. Blue*, 544 P.2d 385, 391 (1975).

Open carry is generally legal in Colorado without a permit, Colo. Rev. Stat. § 29-11.7-104, and concealed carry permits are readily available to law-abiding residents. Colo. Rev. Stat. § 18-12-203. Moreover, Colorado law recognizes the natural right to use deadly force in self-defense. *See* Colo. Rev. Stat. §§ 18-1-704 to -705.

## **Idaho**

The Idaho Constitution, ratified in 1889, was amended in 1978 to strengthen legal protection of the right to keep and bear arms. Idaho Const. art. I, § 11; *State v. Grob*, 690 P.2d 951, 954 (Idaho Ct. App. 1984) (noting 1978 amendment narrowed the scope of permissible firearms regulation). Yet, even before the 1978 amendment, it was well established that the government could not regulate the right to keep and bear arms so as to deny the right completely. *See In re Brickey*, 70 P. 609, 609 (Idaho 1902) (holding unconstitutional prohibition on carrying deadly weapons within any city, town, or village). The use of arms for self-defense has also long been a fixture of Idaho law. *See State v. Woodward*, 74 P.2d 92, 97 (Idaho 1937) (“The law does not require any one to submit meekly to indignities or violence to his person; he may lawfully repel them or it with as much of such

character of necessary resistance as is at the time available to him.”).

Firearms regulations that have been sanctioned by Idaho courts focus on the use of firearms to commit felonies and the carrying of concealed weapons. *State v. Hart*, 157 P.2d 72, 73 (Idaho 1945) (upholding municipal concealed firearms ordinance); *Grob*, 690 P.2d at 954 (affirming ten-year sentence for using a firearm during commission of a felony).

The Idaho Constitution protects the right to openly carry a firearm, and the state legislature has created a permit system for concealed carry of firearms. Concealed carry permits are readily available to law-abiding citizens. See Idaho Code Ann. § 18-3302. Idaho law also acknowledges the natural right to use deadly force in self-defense. Idaho Code Ann. § 19-201 to -203; *State v. Woodward*, 74 P.2d 92, 96 (Idaho 1937).

## **Kansas**

In Kansas, the constitutional guarantee of the right to keep and bear arms dates to 1855, when statehood was first proposed. Kan. Const. Bill of Rights, § 4 *reprinted in* Thorpe, at 1179.<sup>5</sup> In 1905, the

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<sup>5</sup> An amendment to clarify that the right to keep and bear arms is an individual one has been proposed for the November 2, 2010, ballot: “A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose; but  
(Continued on following page)



Kansas Supreme Court adopted the view, rejected in *Heller*, that “the people” guaranteed the right to bear arms in the Kansas and United States Constitutions were the militia. *City of Salina v. Blaksley*, 83 P. 619, 620-21 (Kan. 1905); *Heller*, 128 S.Ct. at 2799. Nonetheless, Kansas courts have struck down laws that prohibit the transportation of arms outside the home. *City of Junction City v. Mevis*, 601 P.2d 1145 (Kan. 1979). Moreover, Kansas statutes have been protective of the right to keep and bear arms.

Carrying a firearm in public without a permit generally is legal in Kansas, so long as the firearm is not concealed. Kan. Stat. Ann. § 21-4201; *but cf. State v. Doile*, 648 P.2d 262 (Kan. Ct. App. 1982) (upholding municipal regulation of concealed firearms outside the home). Kansas has followed the modern trend to allow concealed carry with a permit. Kan. Stat. Ann. §§ 75-7c01 to -c26. Kansas law also recognizes the right to use deadly force in self-defense. Kan. Stat. Ann. §§ 21-3211 to -3213.

## Montana

Montana entered the Union in 1889 and guaranteed the right to keep and bear arms in its constitution with a provision that closely echoes Colorado’s.

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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.” Senate Concurrent Resolution No. 1611 (2009).

Mont. Const. art. II, § 12; Colo. Const. art. II, § 13. This right was included among the Montana “Declaration of Rights” because it is a fundamental right that is among the “significant components of liberty . . . any infringement of which will trigger the highest level of scrutiny, and, thus, the highest level of protection by the courts.” *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 12 (Mont. 2002) (internal quotations omitted).

Very few Montana cases have construed article II, section 12. Among those that have, courts truly have applied the “highest level of scrutiny” to this “significant component of liberty.” *Id.* In *State v. Rathbone*, despite the State’s authority to regulate the taking of wild game, the Montana Supreme Court held that a statute regulating the taking of elk must include an exception for defense of self and property. 100 P.2d 86, 90 (Mont. 1940) (“If the plea of justification for the killing of an elk or other destructive wild animal cannot be relied upon by a defendant in an action charging him with such killing, the constitutional provisions referred to become a nullity.”). Although Montana law does allow felons to be denied the right to possess firearms, Mont. Code Ann. § 46-18-801, courts have interpreted this provision strictly, requiring the sentencing court to explicitly prohibit the possession of firearms. *See United States v. Brooks*, 890 P.2d 759, 762 (Mont. 1995).

Firearms are loosely regulated in Montana. Open carry is protected by the State constitution, and

concealed carry is largely unregulated, even though concealed carry enjoys no constitutional protection. Mont. Code Ann. § 45-8-317. The Montana legislature has gone so far as to summarily “license” all law-abiding citizens within the meaning of the federal Gun-Free School Zones Act, 18 U.S.C. § 922(q), so as to nullify most of the provisions contained in that Act. Mont. Code Ann. § 45-8-360. Montana law also recognizes the right to use deadly force in self-defense. Mont. Code Ann. §§ 45-3-102 to -104.

## **Nebraska**

Nebraska’s right to keep and bear arms provision was added to the State constitution in 1988. Neb. Const. art. I, § 1. As such, it provides little guidance about the nature of the right to keep and bear arms as it was understood by the framers of the Second and Fourteenth Amendments. Nevertheless, consistent with other Western courts, Nebraska courts have approved only very narrow regulation of the right to keep and bear arms. *State v. LaChapelle*, 451 N.W.2d 689, 691 (Neb. 1990) (upholding short-barreled shotgun ban); *State v. Comeau*, 448 N.W.2d 595, 596 (Neb. 1989) (upholding felon-in-possession ban; serial number requirement).

As in most Western States, firearms may be carried openly outside the home in Nebraska, and the state legislature has created a permit system for concealed carry of firearms. *See* Neb. Rev. Stat. § 69-2430. Concealed carry permits are readily available

to law-abiding citizens. *See id.* Nebraska law also acknowledges the natural right to use deadly force in self-defense. Neb. Rev. Stat. §§ 28-1409 to -1411. Local governments have the authority to regulate only the discharge, but not the possession, of unconcealed firearms. Neb. Rev. Stat. § 17-556.

## **Nevada**

Nevada's constitutional protection of the right to keep and bear arms was added in 1982, and there are no Nevada cases directly interpreting that right. Nev. Const. art. I, § 11. Nevertheless, the Nevada legislature has statutorily provided robust protection for the right to keep and bear arms. All regulation of the possession of weapons is reserved to the state legislature. Nev. Rev. Stat. §§ 269.222, 268.418. Moreover, the state legislature has done little to regulate the right; the few Nevada firearms regulations are similar to those of other Western States: Felons are prohibited from possessing firearms, concealed carry is regulated, and there are some limitations on where firearms can be carried. Nev. Rev. Stat. §§ 202.360 (felon-in-possession); 202.350(1)(d)(3) (concealed carry); 202.265 (restrictions on firearms in schools and child care facilities).

As in most Western States, Nevada law does not prohibit the open carrying of firearms, and the state has a permit system for concealed carry. *See* Nev. Rev. Stat. § 202.350(1)(d)(3). Concealed carry permits are readily available to law-abiding citizens. *See* Nev.

Rev. Stat. § 202.3657. Nevada law also acknowledges the natural right to use deadly force in self-defense. Nev. Rev. Stat. § 200.120.

### **New Mexico**

The laws of the New Mexico Territory protected the right to use armed self-defense. *See* Laws for the Government of the Territory of New Mexico art. II, § 1 (1846), *available at* [http://avalon.law.yale.edu/19th\\_century/kearney.asp](http://avalon.law.yale.edu/19th_century/kearney.asp) (“Every person who shall kill another in the necessary defense of his own life, or that of any other persons, or of his own house or property, or in the legal execution of any process, or in order to prevent great bodily harm to himself or another, shall be deemed guiltless.”). This legal protection for armed self-defense was continued in the New Mexico Constitution of 1912 and the New Mexico statutes. *See* N.M. Const. art. II, § 6; N.M. Stat. § 14-5170 to -5172. An amendment in 1971 added language explicitly protecting the right to keep and bear arms for hunting, recreational use, and “other lawful purposes.” N.M. Const. art. II, § 6 (amended 1971). Prohibition on local regulation of the right was added in 1986. *See* N.M. Const. art. II, § 6 (amended 1986).

Open carry is generally legal in New Mexico without a permit, and concealed carry permits are readily available to law-abiding residents. N.M. Stat. §§ 30-7-2, 29-19-4. Local regulation of openly carried firearms has been held to violate the right to keep

and bear arms. *City of Las Vegas v. Moberg*, 485 P.2d 737, 738 (N.M. Ct. App. 1971). Moreover, even though the State constitution does not protect concealed weapons, New Mexico courts have recognized a right to possess unloaded concealed weapons in public and loaded concealed weapons in the home or while traveling. *State v. Ramirez*, 444 P.2d 986, 989 (1968) (noting that state law protects the right to carry an unloaded concealed weapon); *Lopez v. Chewiwie*, 186 P.2d 512, 513 (1947) (acknowledging that state law protects the right to carry deadly weapons in residence and when traveling); *State v. Starr*, 173 P. 674, 679-80 (1917) (noting the right of travelers to carry weapons).

New Mexico courts have allowed the State to regulate firearms carried in bars and other licensed establishments. *See State v. Dees*, 669 P.2d 261, 264 (N.M. Ct. App. 1983) (ban on firearms in licensed liquor establishments). However, this regulation does not apply to unloaded firearms, or individuals licensed to carry concealed firearms. N.M. Stat. § 30-7-2(A)(5), (B).

## **North Dakota**

The 1889 North Dakota Constitution initially did not protect the right to keep and bear arms; however, the right of self-defense is inherent in the explicit declaration of rights, which included the right of “*defending life and liberty*; acquiring, possessing and *protecting property* and reputation; *pursuing and*

*obtaining safety. . . .*” N.D. Const. art. I, § 1 (emphasis added) *reprinted in* Thorpe, at 2854. The 1889 North Dakota Constitution also reserved to the people the right to “alter or reform [government] whenever the public good may require.” *Id.* Explicit protection for the right to keep and bear arms was eventually added to the constitution. N.D. Const. art. I, § 1 (amended 1985).

Like all Western States, North Dakota has no permitting system for possessing firearms within the home. *See* N.D. Cent. Code § 62.1-03-01(2)(b). A permit is required, however, to carry a loaded firearm outside the home. N.D. Cent. Code § 62.1-04-03. Perhaps because its constitution did not at first explicitly protect the right to keep and bear arms, North Dakota is an outlier among Western States in that it does not allow open carry without a license. Like most other Western States, North Dakota courts have permitted the State to regulate the possession of firearms by felons. *State v. Ricehill*, 415 N.W.2d 481, 484 (N.D. 1987). North Dakota law also acknowledges the natural right to use deadly force in self-defense. N.D. Cent. Code § 12.1-05-07.

## **Oklahoma**

Oklahoma courts have recognized the right to possess a firearm only inside the home. *Pierce v. State*, 275 P. 393, 395 (Okla. Crim. App. 1929). Courts have been reluctant to strike down any regulation of the right to bear arms in public because of a peculiar

grant of authority in the Oklahoma Constitution that allows the legislature to regulate the carrying of weapons. Okla. Const. art. II, § 26; see *State ex rel. Oklahoma State Bureau of Investigation v. Warren*, 975 P.2d 900, 902 (Okla. 1998) (state may regulate the carrying of firearms outside the home).

Although the Oklahoma Constitution has been interpreted to only protect the right to possess a firearm inside the home, the state legislature has protected the right to possess an unloaded firearm in a vehicle. See Okla. Stat. Ann. tit. 21, § 1289.7. Also, the legislature has followed the modern trend and made permits to carry concealed handguns readily available to law-abiding citizens. See Okla. Stat. Ann. tit. 21, § 1290.3. As in other Western States, Oklahoma also protects the right to use deadly force in self-defense. See Okla. Stat. Ann. tit. 21, § 1289.25.

## **Oregon**

Written in 1857, the Oregon Constitution protects the right to keep and bear arms in no uncertain terms. Or. Const. art. I, § 27 *reprinted in* Thorpe, at 3000. In the State's early history, firearms statutes were "directed at prohibiting dueling and increasing punishment for crimes that involved the use of dangerous weapons." *State v. Hirsch*, 114 P.3d 1104, 1121 (Or. 2005). It was not until 1885 that the legislature regulated concealed firearms carried in public. *Id.* To this day, open carry remains generally unregulated. Or. Rev. Stat. § 166.250(a). The right to



keep and bear arms remains inviolate in the home. *State v. Kessler*, 614 P.2d 94, 100 (Or. 1980).

Oregon courts have repeatedly prohibited the legislature from enacting “a total proscription of the mere possession” of firearms. *See, e.g., State v. Blocker*, 630 P.2d 824, 826 (Or. 1981). Only felons and the violent mentally ill may be disarmed as a class; however, courts have suggested that the right to bear arms for self-defense against an imminent threat can never be denied. *See State v. Cartwright*, 418 P.2d 822, 829 (Or. 1966); *State v. Owenby*, 826 P.2d 51, 53 (Or. Ct. App. 1992). This steadfast protection for the right of self-defense is consistent with Oregon statutes that protect the right to use deadly force in self-defense. Or. Rev. Stat. §§ 161.205, .209, .219.

### **South Dakota**

South Dakota has protected the right to keep and bear arms since its admission to the Union in 1889. S.D. Const. art. VI, § 24. The South Dakota Supreme Court has allowed the legislature to regulate felons’ possession of firearms, although even felons may not be disarmed as a class if their purpose in possessing firearms is self-defense. *Conaty v. Solem*, 422 N.W.2d 102, 104 (S.D. 1988).

Open carry is generally legal in South Dakota and no permit is required or available. S.D. Codified Laws § 22-14-9. State law explicitly protects the right to possess a handgun in the home without a permit. S.D. Codified Laws § 22-14-11. Concealed carry is

regulated by state law, but permits are readily available to law-abiding citizens. S.D. Codified Laws § 23-7-7. South Dakota law also protects the right to use deadly force in self-defense. S.D. Codified Laws § 22-16-34.

## **Texas**

Texas has guaranteed the right to keep and bear arms since it became an independent republic in 1836. Constitution of the Republic of Texas, Declaration of Rights, § 14 (1836) *reprinted in* Thorpe, at 3543; Tex. Const. art. I, § 23. The protection of the right to keep and bear arms reflects the historical English and American tradition of an armed and free populace, but also is a consequence of the denial of the right by the Mexican Government. Texas Declaration of Independence *reprinted in* Thorpe, at 3529 (“It [the Mexican Government] has demanded us to deliver up our arms, which are essential to our defense, the rightful property of freemen, and formidable only to tyrannical governments.”). Given this strong tradition of arms bearing in defense of freedom, Texas law allows only limited regulation of the right to keep and bear arms.

The right to carry arms has long been recognized in Texas. *Cockrum v. State*, 24 Tex. 394, 402 (Tex. 1859) (“The right to carry a bowie-knife for lawful defense is secured, and must be admitted.”). Although in the antebellum period, the right was circumscribed, due in large part to racial pressures. *See*

*English v. State*, 24 Tex. 394, 401-02 (1859); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 Kan. J.L. & Pub. Pol’y 17, 17-25 (1995) (discussing *English*). Texas arms jurisprudence has focused mainly on the way in which arms are carried, *State v. Duke*, 42 Tex. 455, 458 (Tex. 1874) (upholding requirement that defensive pistols be carried openly), and by whom, *Wilson v. State*, 44 S.W.3d 602, 605 (Tex. App. 2001) (upholding regulation of possession of firearms by felons). Texas law also allows the legislature to regulate certain types of arms. See *Masters v. State*, 653 S.W.2d 944, 946-47 (Tex. App. 1983) (upholding ban on carrying swords in public); *Morrison v. State*, 339 S.W.2d 529, 532 (Tex. Crim. App. 1960) (upholding machine gun regulations). Although, such regulation is constitutionally suspect if it reaches arms “appropriate for open and manly use in self-defense. . . .” *Duke*, 42 Tex. at 458.

Unlike most Western States, Texas does not allow the open carrying of firearms. Tex. Penal Code Ann. § 46.035. Instead, Texas requires firearms to be carried concealed and with a permit that is readily available to all law-abiding citizens. Tex. Govt. Code Ann. § 411.172. Self-defense is a robust defense in Texas, available even if force is used against property, not a person. Tex. Penal Code Ann. § 9.31; *Boget v. State*, 74 S.W.3d 23, 31 (Tex. Crim. App. 2002).

## Utah

As ratified in 1895, the Utah Constitution protected the right to keep and bear arms, but allowed the legislature to “regulate the exercise of this right by law.” Utah Const. art. I, § 6 *reprinted in* Thorpe, at 3702. An amendment clarified that the right applies to individuals. Utah Const. art. I, § 6 (amended 1984). Although, both before and after the 1984 constitutional amendment, Utah courts allowed only limited regulation of the individual right to keep and bear arms. *See State v. Beorchia*, 530 P.2d 813, 814 (Utah 1974) (holding aliens may be denied weapons); *State v. Willis*, 52 P.3d 461, 462 (Utah Ct. App. 2002) (“This statute only restricts that right under very limited circumstances – such as a felony indictment or conviction.”).

Open carry of an unloaded firearm is generally legal in Utah and no permit is available or required. Utah Code Ann. § 76-10-505. State law explicitly protects the right to possess a handgun in the home without a permit, and only the state legislature may regulate firearms. Utah Code Ann. § 76-10-500(1)(b); *University of Utah v. Shurtleff*, 144 P.3d 1109, 1115 (Utah 2006). Concealed carry is regulated, but permits are readily available to law-abiding citizens. Utah Code Ann. § 53-5-704. Utah also protects the right to use deadly force in self-defense. Utah Code Ann. §§ 76-2-402, -405 to -407.

## Washington

The Washington Constitution's protection of the right to keep and bear arms dates to 1889. Wash. Const. art. I, § 24. The Washington Supreme Court has held that possession of firearms in the home "falls squarely within the confines of the right guaranteed." *State v. Rupe*, 683 P.2d 571, 596 (Wash. 1984). State law reinforces this protection. See Wash. Rev. Code § 9.41.050. State law also protects the right to purchase firearms without obtaining a permit. Wash. Rev. Code § 9.41.110(12). Moreover, firearms may be carried openly without a permit. Wash. Rev. Code § 9.41.050; *but see State v. Spencer*, 876 P.2d 939, 942 (Wash. Ct. App. 1994) (open carry of certain rifles may be regulated). Concealed carry is regulated; however, permits are readily available to law-abiding citizens. Wash. Rev. Code § 9.41.070. While courts have allowed regulation of the carrying of arms, a ban on mere possession would violate the Washington Constitution. See *City of Seattle v. Montana*, 919 P.2d 1218, 1224 (Wash. 1996). Washington also protects the right to use deadly force in self-defense. Wash. Rev. Code §§ 9A.16.020, .050.

Washington courts have upheld limited regulation of firearm possession by violent felons. *State v. Krantz*, 164 P.2d 453, 455 (Wash. 1946). Yet, even this restriction on the right to keep and bear arms is limited by several factors. Felons may raise the defense of necessity to a charge of possession of a firearm. *State v. Jeffrey*, 889 P.2d 956, 958 (Wash. Ct. App. 1995). Moreover, while the state may prohibit

violent felons from possessing firearms, the state may not prohibit felons from owning firearms. *State v. Spiers*, 79 P.3d 30, 35 (Wash. Ct. App. 2003) (state may prohibit possession by felons, either convicted or accused, but not ownership).

## Wyoming

Protection for the right to keep and bear arms was included in the first Wyoming Constitution of 1889. Wyo. Const. art. I, § 24. That protection has remained consistently strong, reinforced by state law that prevents local governments from denying the right to keep and bear arms. *See* Wyo. Stat. Ann. § 6-8-401. Firearms may be carried openly without a permit throughout the state. *See* Wyo. Stat. § 6-8-104. Concealed carry has been regulated since 1890, however permits are readily available to law-abiding citizens. *See id.*; *Mecikalski v. Office of Attorney General, Div. of Criminal Investigation*, 2 P.3d 1039, 1040 (Wyo. 2000) (citing 1890 Wyo. Territorial Sess. Laws, Ch. 73 § 96 (11th Legislative Assembly)). Wyoming also protects the right to use deadly force in self-defense. Wyo. Stat. Ann. § 6-2-602.

Wyoming courts have upheld limited regulation of firearm possession by violent felons. *Carfield v. State*, 649 P.2d 865, 872 (Wyo. 1982). However, courts have suggested that the right to bear arms for self-defense against an imminent threat can never be denied. *Id.* at 871.



**CONCLUSION**

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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**APPENDIX OF  
STATE CONSTITUTIONAL PROVISIONS**

Alaska Const. art. I, § 19.

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. The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State.

Ariz. Const. art. II, § 26.

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.

Colo. Const. art. II, § 13.

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.

Idaho Const. art. I, § 11.

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 passage of legislation providing minimum sentences for crimes committed



## App. 2

while in possession of a firearm, nor prevent the passage of 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.

Kan. Const. Bill of Rights, § 4.<sup>6</sup>

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.

Mont. Const. art. II, § 12.

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.

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<sup>6</sup> An amendment to clarify that the right to keep and bear arms is an individual one has been proposed for the November 2, 2010, ballot: "A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose; 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." Senate Concurrent Resolution No. 1611 (2009).

App. 3

Neb. Const. art. I, § 1.

All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, 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. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

Nev. Const. art. 1, § 11.

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.

N.M. Const. art. II, § 6.

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. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.

N.D. Const. art. I, § 1.

All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending

App. 4

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 the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

Okla. Const. art. II, § 26.

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.

Or. Const. art. I, § 27.

The people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the military shall be kept in strict subordination to the civil power.

S.D. Const. art. VI, § 24.

The right of the citizens to bear arms in defense of themselves and the state shall not be denied.

Tex. Const. art I, § 23.

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.

App. 5

Utah Const. art. I, § 6.

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.

Wash. Const. art. 1, § 24.

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.

Wyo. Const. art. 1, § 24.

The right of citizens to bear arms in defense of themselves and of the state shall not be denied.

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