The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots

by

Robert Dowlut*

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.

— James Madison[1]

INTRODUCTION

A written constitution is a reminder that governments can be unreasonable and unjust. By guaranteeing 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," the Second Amendment to the United States Constitution provides the citizens a means of protection against the unjust excesses of government.[2] The Framers placed this guarantee in the Bill of Rights because they considered the right to keep and bear arms peculiarly important and also uniquely vulnerable to infringement. The Amendment's command protects individuals against even popular conceptions of the public good. In addition to this protection within the United States Constitution,[3] the constitutions of forty-three states guarantee the right to keep and bear arms.[4] Despite the constitutional authority for this right, legislators and judges have consistently attempted to devalue it. Methods such as giving misleading labels to select firearms like "assault weapons"[5] or "Saturday Night Specials"[6] have been used to justify incremental disarmament.[7]

[T]he Second Amendment to the United States Constitution provides the citizens a means of protection against the unjust excesses of government.

American jurisprudence has deliberately devalued the right to keep and bear arms by disingenuously interpreting the right so as to effect a gradual change in American culture. To this end, for example, the Seventh Circuit has already upheld a civilian handgun ban by dismissing an historical analysis of the Constitution: "The debate surrounding the adoption of the Second and Fourteenth Amendments . . . has no relevance on the resolution of the controversy before us."[8] History teaches us the unfortunate lesson that cultural values supplant constitutional rights whenever the cultural elite consider a right too burdensome to suit the needs of the moment. The outlandish pronouncement in *Dred Scott* "that the Negro might justly and lawfully be

Robert Dowlut, J.D. 1979, Howard University; member D. C. Bar; attorney for the National Rifle Association. The views expressed here are those of the author.

reduced to slavery for his benefit,"[9] the shameful court-approved internment of Japanese-Americans during World War II,[10] and the separate but equal doctrine that officially existed until 1954[11] are all examples of the evils that result when cultural values are given more weight than constitutional rights. "Conceptually, the gun prohibition movement intends to: discredit the Second Amendment of the Constitution in its applicability to individual citizens . . .; weaken the concept and acceptability of self-defense . . . [and] change our traditions as they relate to firearms."[12] Although a spokesman for the Centers for Disease Control admitted that the gun control movement intended to "revolutionize" society's view of guns until they are considered "dirty, deadly—and banned,"[13] the Constitution continues to prohibit any such arms ban.

The Constitution does not define the term "arms." The Framers, however, intended the term to extend to those arms that were commonly kept and carried by the people for traditional purposes, such as self-defense, militia service, and killing game.[14] State courts have also protected weapons used for self-defense and in "civilized" warfare.[15] Accordingly, under the concepts of self-defense and civilized warfare, the Second Amendment protects pistols and semiautomatic firearms, despite their often misleading labels.[16] Weapons of mass destruction, on the other hand, are not protected by the Constitution.[17]

This article contains three distinct but interrelated theses: (1) The historical evidence surrounding the adoption of the Second Amendment indicates that it protects the right to self-defense, enables the establishment of a broad-based militia, and serves as a deterrent against government oppression; (2) the Framers of the Fourteenth Amendment intended the Second Amendment to apply to the states, mostly due to their concern for protecting the right to self-defense, especially after the horrors of the Reconstruction South; and (3) an insincere interpretation of the Second Amendment and its state equivalents has led to the militia movement and has eroded respect for American government.

I. A BRIEF REVIEW: ADOPTION OF THE SECOND AMENDMENT

British attitudes towards the right to keep and bear arms influenced the authors of the Bill of Rights. Historian Joyce Lee Malcolm notes "[t]he right of individuals to be armed had become, as the [English] Bill of Rights had claimed it was, an ancient and indubitable right. It was this heritage that Englishmen took with them to the American colonies and this heritage that Americans fought to protect in 1775."[18] The British effort to disarm the inhabitants of Boston (1,778 muskets, 973 bayonets, 634 pistols, and 38 blunderbusses were seized) was addressed in the July 6, 1775, *Declaration of the Causes and Necessity of Taking Up Arms* by the Continental Congress.[19] Such unhappy experiences with government efforts to disarm the people served as an impetus to include a right to bear arms in state constitutions as well as in the Bill of Rights.

Many young states adopted a right to bear arms in their constitutions.[20] Pennsylvania's Constitution, for example, guaranteed "[t]hat the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power."[21] North Carolina's Constitution guaranteed "[t]hat the people have a right to bear arms, for the defence of the State . . . ."[22] The North Carolina Supreme Court construed this right to mean that "[f]or any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun."[23] The court obviously felt that assigning a reason for a right to bear arms does not strictly limit that right's application to the assigned reason.

State constitutions influenced the state conventions for the ratification of the United States Constitution. A minority faction in the Pennsylvania convention was the first to make proposals for a Bill of Rights. On December 13, 1787, they made fifteen proposals. The seventh proposal, which ensured a right to bear arms, showed the influence of Pennsylvania's state constitution:

> That the people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power.[24]

Although all fifteen proposals were defeated, forty-six to twenty-three, the United States Constitution was finally approved with the understanding that a Bill of Rights would be adopted. The fundamental ideas proposed by the Pennsylvania minority, and by a similar minority in

Massachusetts, eventually found their way into the Bill of Rights and became the First, Second, Fourth, Fifth, Sixth, Eighth, and Tenth Amendments.[25]

Majorities in the state conventions finally started demanding a Bill of Rights. When the New Hampshire convention gave the Constitution the ninth vote needed for its adoption, it proposed that "Congress shall never disarm any citizen, unless such as are or have been in Actual Rebellion."[26] Virginia's convention also deemed the right to keep and bear arms necessary to its proposed Bill of Rights.[27] Virginians in the convention debates focused on the individual nature of the right to arms, as opposed to just demanding that the states be allowed to have a militia. There would be no need to command "[t]hat the people have a right to keep and bear arms" if the Framers intended only to allow a state to have an armed force. Anti-Federalist Patrick Henry asserted that "[t]he object is, that every man be armed . . . . Every one who is able may have a gun."[28] Federalist Zachariah Johnson argued that "[t]he people are not to be disarmed of their weapons. They are left in full possession of them."[29] George Mason defined for posterity the term militia: "I ask, Who are the militia? They consist now of the whole people, except a few public officers."[30]

The right to bear arms was proposed in seven state ratifying conventions. New York, New Hampshire, and Virginia ratified the United States Constitution while expressing their understanding that the people have a right to bear arms.[31] North Carolina and Rhode Island refused to ratify the Constitution until individual rights, including the right to bear arms, were recognized by amendments.[32] In Pennsylvania and Massachusetts, efforts to include various rights (including the right to bear arms) as a condition of ratification were defeated, because Federalists argued that a Bill of Rights was unnecessary when the powers of the national government were so limited.[33]

Discourse regarding the right to bear arms was not limited to the state ratifying conventions. An article in the *Federal Gazette & Philadelphia Evening Post* explained the right to keep and bear arms:

> As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, *the people are confirmed by the next article in their right to keep and bear their private arms.*[34]

This contemporaneous newspaper article demolishes claims that the Framers never intended to guarantee the private ownership of arms. It is consistent with a January 29, 1788, newspaper article, authored by James Madison under the name Publius, extolling the advantage of protecting the right to bear arms, lauding a broad-based militia, and scorning governments that do not trust people with arms:

> *Besides the advantage of being armed, which the Americans possess over the people of almost every other nation* , the existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprizes of ambition, more insurmountable than any which a simple government of any form can admit of. *Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms*.[35]

Madison reveals several things in this writing. First, members of the military can be armed without a constitutional right to keep and bear arms, as "in the several kingdoms of Europe." Second, the militia should be broad-based and subject to some state control. Third, only despotic governments are afraid to trust the people with arms. Thus, evidence shows that Madison, the author of the Second Amendment, supported the private ownership of arms and distrusted governments that did not protect their peoples' rights to bear arms.

The constitutional convention rejected proposals that did not guarantee a right to keep and bear arms. A July 1789 proposed Bill of Rights, in Roger Sherman's handwriting, has been discovered in James Madison's papers.[36] It mentions the militia, but omits any right of the people to keep and bear arms:

> The militia shall be under the government of the laws of the respective States, when not in the actual Service of the united [sic] States, but such rules as may be prescribed by Congress for their uniform organization & discipline shall be observed in officering and training them, but military Service shall not

> be required of persons religiously scrupulous of bearing arms.[37]

The decision not to adopt Sherman's proposal indicates that the Framers felt that it was inadequate.

Sherman's proposal also exempted from military service those persons with religious objections to bearing arms. The Framers feared, however, that such an exclusion could be used as an excuse to disarm the people: "[T]his clause would give an opportunity to the people in power to destroy the Constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms."[38] Additionally, a motion in the Senate to insert "for the common defence" after the words "bear arms" was defeated on September 9, 1789.[39] Self-defense was considered a natural and common law right, and it was found in a number of state constitutions. The Framers took it for granted that the Second Amendment encompassed the right to keep and bear arms for personal defense. Thus, the Ninth Circuit Court of Appeals has recently opined that "[t]he Second Amendment embodies the right to defend oneself and one's home against physical attack."[40]

But the Framers were indeed aware of the dangers that the right to bear arms posed if such arms landed in the hands of the wrong people. Pennsylvania's minority proposal on arms reserved the explicit power to disarm people for "crimes committed" and where there was "real danger of public injury from individuals."[41] Massachusetts's minority proposal on arms would have restricted this right to "peaceable citizens."[42] New Hampshire's majority proposal on arms reserved the explicit power to disarm those who "are or have been in actual rebellion."[43] Explicit police powers like these, however, were not adopted. The Framers probably felt that such powers were unnecessary, because the constitutional right would not apply to well-accepted prohibitions against criminal misconduct.[44]

The Second Amendment in its final form guaranteed 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." Legislative history demonstrates that the Framers certainly recognized the importance of a militia to the security of a free state, but that they also intended to guarantee the individual right to keep and to bear arms, refusing to adopt proposals that omitted or limited an individual guarantee. Reflecting on the Second Amendment in its final form, historian Joyce Lee Malcolm concludes that:

> The Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual's right to have arms for self-defense . . . . The second and related objective concerned the militia, and it is the coupling of these two objectives that has caused the most confusion. The customary American militia necessitated an armed public . . . . The clause concerning the militia was not intended to limit ownership of arms to militia members, or [to] return control of the militia to the states, but rather to express the preference for a militia over a standing army.[45]

Thus, Congress still retained the powers to raise and support an army, mobilize the militia to execute the laws of the Union, suppress insurrections, and repel invasions. In addition, Congress retained the right to govern such part of the militia as may be employed in the service of the United States, but states retained the power to appoint officers.[46] However, the Constitution forbade states from keeping troops without congressional consent.[47] The military became subordinate to civilian rule by appointment of the President, who is a civilian, to commander-in-chief of the armed forces and state militias when called into the actual service of the United States.[48] The emphasis that other parts of the Constitution place on states' rights regarding military matters clarifies the value and meaning of the Second Amendment as a protection of individual rights.

Also of constitutional significance is the first reported opinion interpreting the Second Amendment. In this case, the Georgia Supreme Court considered the right to bear arms so fundamental that, despite the absence of a guaranteed right to bear arms in Georgia's constitution, the court extended the Second Amendment to the state. The court used the following reasoning to void a statute forbidding the sale, keeping, or having about the person a pistol, "save such pistols as are known and used as horseman's pistols":

> It is true, that these adjudications are all made on clauses in the State Constitutions; but these instruments confer no new rights on the people which did not belong to them before. . . . The language of the Second Amendment is broad enough to embrace both Federal and State Governments nor is there

> anything in its terms which restricts its meaning . . . . [D]oes it follow that because the people refused to delegate to the general government the power to take from them the right to keep and bear arms, that they designed to rest it in the State governments? Is this a right reserved to the States or to themselves? Is it not an unalienable right, which lies at the bottom of every free government? We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures. . . . The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of free State.[49]

Although this decision contravened the United States Supreme Court's holding that the Bill of Rights restrains only the national government,[50] many agreed with the Georgia Supreme Court's position. This view would ultimately prevail in the language and logic of the Fourteenth Amendment.[51]

The Framers were concerned that "in England, the authority of the Parliament runs without limits, and rises above control."[52] Because Americans developed a system of government in which the Constitution is supreme, the concerted effort to nullify an explicit constitutional right, and to disarm the people incrementally, cannot be justified.[53] Whether the pendulum of public opinion swings in favor of protecting or banning firearms, the Constitution guarantees the right to keep and bear arms.

II. THE SECOND AMENDMENT IN PRACTICE: THE SOUTH IN THE RECONSTRUCTION ERA

The conditions in the Reconstruction South demonstrated the horrors that can go unchecked when there is no right to keep and bear arms. Because neither the state nor the police owe a duty to protect the individual[54] (i.e., "there is no constitutional right to be protected by the state against being murdered by criminals or madmen"[55]), "[t]he right to defend oneself from a deadly attack is fundamental."[56] Because this right cannot be effectively exercised with bare hands, the right to keep and bear arms is the only efficient way to secure the fundamental right of self-defense. Blacks and Union sympathizers learned these principles the hard way during Reconstruction.

The Ku Klux Klan became a major catalyst for the adoption of the Fourteenth Amendment, and its activities explain Congress' desire to guarantee the right to keep and bear arms for self-defense. The Ku Klux Klan was founded during Reconstruction to establish a racist white government. Its members committed a wave of murders and assaults against blacks and Union sympathizers, who had little official redress since the Ku Klux Klan also controlled law enforcement and local courts.[57] Occasionally, governors used their state guards under color of law to carry out "Klan tactics."[58] A case where more than one hundred Klansmen were jointly indicted on charges including murder and violation of First and Second Amendment rights exemplifies the extent of the breakdown in social and legal order.[59]

Resistance to Reconstruction also took the form of racist legislation. Blacks suffered deprivation of constitutional rights after enactment of the Black Codes, which continued to treat freedmen as less than full citizens by infringing on fundamental rights like the right to keep and bear arms.[60] The Black Codes' roots included the United States Supreme Court's *Dred Scott* decision, in which the court refused to treat blacks as citizens because such treatment "would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and *to keep and carry arms wherever they went*."[61] The Court listed these rights as privileges and immunities. As a result, *Dred Scott* teaches that barring a person from enjoying the right to keep and bear arms is an incident and badge of slavery, and that the right to arms is a privilege and immunity of citizenship. On the other hand, citizens have a right to keep and bear arms because "[a]n armed populace . . . is the best means of defending the state, sensitizing the government to the rights of the people, preserving civil order and the natural right of self-defense, and cultivating the moral character essential to self-government."[62] The right to keep and bear arms is thus a badge and incident of citizenship.[63] The refusal of state authorities in the former Confederate States to recognize and enforce constitutional rights, including the right to keep and bear arms, prompted the enactment of civil rights legislation, and the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments.[64]

Tragically, the horrors of Reconstruction have been mirrored on a larger scale elsewhere, most recently in Rwanda

and Bosnia. "[G]enocide has cost the lives of more innocents this century than all the soldiers killed on all sides in all the world's wars in the same period. . . ."[65] Genocide "has overtaken countries both rich and poor, urbane and agrarian. Most of the people who were murdered by their own governments in this century would undoubtedly have said, before the fact, that their becoming the victims of any such wholesale mass-atrocities was a simply unthinkable eventuality."[66]

Victims of genocide cannot expect other nations to come promptly to the rescue. A panel of fifty-two international experts concluded that the international community failed to respond to what was clearly a genocidal massacre in Rwanda that claimed at least 500,000 lives.[67] In Bosnia, an inept United Nations force was unable to prevent "among the worst atrocities committed on European soil since World War II."[68] Given the helpless position of these peoples, weapon control laws have been called "gateways to victim oppression and genocide."[69] It matters little if the people could eventually be defeated by an oppressive government, because history teaches that "armed citizens continue to give pause to far better armed governments even in the age of nuclear weapons and intercontinental missiles."[70] Afghanistan is a modern reminder that a totalitarian nuclear power cannot always prevail against people who lack nuclear weapons, armor, or air power. Modern day civil wars demonstrate that an armed people can deter government oppression and successfully defend themselves.

III. THE RIGHT TO KEEP AND BEAR ARMS: AN ESSENTIAL ELEMENT OF CITIZENSHIP

The Fourteenth Amendment was the Reconstruction remedy by which all persons would be guaranteed the rights of citizenship. As stated earlier, one purpose of the amendment was to empower people who were rendered powerless by the *Dred Scott* decision.[71] Unlike the concise Thirteenth and Fifteenth Amendments, which, respectively, abolished slavery and guaranteed the right to vote, the Fourteenth Amendment is expansive, mandating privileges and immunities, due process of law, and equal protection for citizens.[72]

The Framers intended the Fourteenth Amendment to protect the right to keep and bear arms from state abridgment.[73] Senator Jacob Howard, providing a detailed analysis of section one of the Fourteenth Amendment, concluded that it protected the right to keep and bear arms:

> To these privileges and immunities, whatever they may be "for they are not and cannot be fully defined in their entire extent and precise nature" to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution . . . [including] *the right to keep and bear arms* . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.[74]

The right to keep and bear arms for personal security was also included in "An Act to Continue in Force and to Amend 'An Act to Establish a Bureau for the Relief of Freedmen and Refugees,' and for other Purposes," commonly called the Freedmen's Bureau Act, which was enacted after Congress overrode a veto by President Andrew Johnson. The act provided that "the right to . . . have full and equal benefit of all laws . . . *including the constitutional right to bear arms* , shall be secured to and enjoyed by all citizens of such State or district without respect to race or color, or previous condition of slavery."[75]

The Framers of the Fourteenth Amendment intended the Second Amendment to apply to the states, and their main concern was the right to self-defense.[76] Nevertheless, some courts still restrain the full force of the Second Amendment by interpreting it as simply allowing a state to have a militia, or by denying that the term "people" includes individuals, or by insisting that the Fourteenth Amendment does not extend the right to keep and bear arms to the states. Unfortunately, courts in this position often incorrectly dismiss the overwhelming evidence to the contrary as mere fodder for law review articles.[77]

As noted earlier, the most troubling aspects of judicial devaluation of the Second Amendment are disingenuous interpretations that gradually change our culture. For generations, the attitudes and behavior of law enforcement officials, legislators, and judges have frustrated the intent of the Reconstruction amendments and legislation.[78] Judicial minds have systematically rejected arguments that clashed with their ideologies.[79] Consequently, the forum of last resort has not checked the excesses of the executive and legislative branches. Fortunately, the judiciary eventually started to fulfill its obligation to uphold the supremacy of the Constitution. Accordingly, we no longer live under the tortured separate but equal interpretation of the Fourteenth Amendment's equal protection guarantee. Nevertheless, the application of the Fourteenth Amendment, as analyzed in detail by Senator Jacob Howard, has not yet been fully realized.

Application of the Second Amendment to the states through the Fourteenth Amendment would protect the civil right of millions of citizens to keep and bear arms and would undermine the concerted effort to stigmatize them and their rights. As of 1990, there are 200 million guns in this nation, and about half of all households admit to having a gun.[80] Those who claim that the average gun owner should be treated with distrust and disarmed are clearly biased, and they are easily refuted by respected academics.

> It perhaps goes without saying that the 'average' gun owner and the 'average' criminal are worlds apart in background, social outlooks, and economic circumstances. The idea that common, ordinary citizens are somehow transformed into potential perpetrators of criminally violent acts once they have acquired a firearm seems farfetched, most of all since there is substantial evidence that the typical gun owner is affluent, Protestant, and middle-class.[81]

Indeed, those who argue that a significant share of serious violence is perpetrated by previously nonviolent "average Joes" are clinging to a myth.[82] Nevertheless, nearly all of the gun control measures offered by gun prohibition groups "are founded on the belief that America's law-abiding gun owners are the source of the problem."[83] This erroneous belief promotes unjust and tragic outcomes, because "measures that effectively reduce gun availability among the noncriminal majority also would reduce DGUs [defensive gun uses] that otherwise would have saved lives, prevented injuries, thwarted rape attempts, driven off burglars, and helped victims retain their property."[84] Foes of the right to keep and bear arms view self-defense as morally wrong and gun ownership as an uncivilized usurpation of an exclusive state function.[85] But restricting arms to the military and police eviscerates the principle that power should flow from the people to government, and turns the government into a master rather than a servant. Those opposed to the Second Amendment have been charged with "project[ing] an elitist myopia that may well reflect their own safe and privileged position in society."[86] It should be discomforting to this elite group that gun control stems from racist roots,[87] and that it undermines feminism by "send[ing] women the message that they should not use force to defend themselves."[88]

The United States Supreme Court has been criticized for refusing to accept cases involving the possible incorporation of the Second Amendment through the Fourteenth Amendment.[89] Three cases from the last century hold that the Second Amendment serves as a shield against only federal action.[90] One of those cases, *United States v. Cruikshank,* involved federal convictions growing out of the Colfax Massacre in Louisiana, in which the Ku Klux Klan killed over one hundred blacks. The federal indictments charged denial of federal rights to peaceably assemble and to bear arms. The Supreme Court ruled for the Ku Klux Klan, holding that no federal rights were violated since private citizens rather than the federal government were accused of the violations.[91] This case, however, predates the first Supreme Court opinion applying a guarantee in the Bill of Rights to the states through the Fourteenth Amendment.[92] Eventually, the Supreme Court probably will apply the Second Amendment to the states through the Fourteenth Amendment, resting on a solid historical basis and compelling arguments made by academics.[93] This is not judicial activism. It is judicial responsibility, for courts act as the bulwark of our liberties.

IV. THE RISE OF THE MILITIA MOVEMENT

Title 10 of the U.S. Code, section 311, defines the unorganized militia as able-bodied males between seventeen and forty-five and makes a distinction between the National Guard and the militia. Numerous state statutes recognize the unorganized militia and define it as essentially the entire able-bodied population.[94] Many state constitutions also define the militia broadly, using terms such as "all able-bodied persons residing in the State"[95] or "all persons over the age of seventeen."[96] Courts also recognize that the militia may consist of more than the National Guard, and that two classes of the militia, organized militia and the reserve, exist.[97] The unorganized militia was called for duty during World War II because the National Guard was federalized and sent overseas. This left many states poorly defended, especially along the coasts. In response to these security needs, a number of governors called upon the citizenry at large, who were members of the unorganized militia under state law and state constitutions, to serve in the militia. For example, in Maryland these militiamen were called the Maryland Minute Men. They were expected to *bring their own firearms* , to train, and to perform various security duties, such as patrolling the coast and guarding bridges.[98] At a time when Nazi submarines were sinking ships in the Atlantic and landing saboteurs on American soil, and Americans were fighting the Japanese on

Alaska's Aleutian Islands, the militia provided much needed security.[99]

The Supreme Court has heard a Second Amendment challenge to federal legislation only once this century, in 1939. In *United States v. Miller*, the Court reversed the district court's decision sustaining a demurrer and quashing an indictment on Second Amendment grounds:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[100]

Although it appears as if interpretation of the Second Amendment was simple and obvious to the Court, the Court considered only the government's representations and arguments because the defendants did not appear and were not represented. Nonetheless, the Court did not find that the right to arms was a collective right, or that it belonged only to the militia or the National Guard. Furthermore, in remanding the case, the Supreme Court did not suggest that the district court inquire as to the defendants' membership in the militia or the National Guard.

Miller has been described as protecting a private right to keep arms "usually employed in civilized warfare."[101] *Miller* leaves unanswered just how far this test for arms may be extended. One commentator predicts that the Supreme Court will abandon *Miller*'s military application test for arms and adopt a balancing test.[102] At a minimum, the Second Amendment should protect the modern rifle, shotgun, pistol, and edged weapons because militia statutes from the time of the adoption of the Bill of Rights labeled these weapons as arms.[103]

Lower courts have strayed so far from the original holding in *Miller* that they have been accused of being "intellectually dishonest."[104] The Supreme Court's refusal to hear a Second Amendment challenge since 1939 has allowed lower courts to notify the American people that courts will not protect their right to keep and bear arms. For example, the courts have devalued legal reasoning by ruling that the term "people" does not include individuals and instead only protects a collective right. Courts have also read only the precatory language in the amendment, ignoring the amendment's command that "the right of the people to keep and bear arms shall not be infringed," to pronounce that the amendment only gives the state a right to have a National Guard.[105]

The collective right argument supplants Supreme Court decisions that hold that the term "people," as used throughout the Bill of Rights, applies to individuals.[106] The collective right argument also ignores Supreme Court decisions that include the Second Amendment in the catalog of individual rights.[107] Furthermore, a recent Supreme Court decision significantly undermines the argument that the right belongs only to the National Guard. In *Perpich v. Department of Defense*, the governor of Minnesota lost a challenge to a federal law requiring the Minnesota National Guard to train in Central America. The Supreme Court ruled that the federal government has plenary power over a state's National Guard, without mentioning the Second Amendment even once.[108] Such an omission implicitly signals that the Second Amendment is not a source of state power over its militia or National Guard.[109]

Nevertheless, the lower courts persist in ignoring the high court's signals.[110] On the basis of their decisions, it is reasonable to conclude that many judges have a constitutionally unsound ideological opposition to a person's right to keep and bear arms. Reported cases in which some judges demonstrate wholehearted support for gun prohibition groups buttress this conclusion.[111] Any concealed bias upon which a judge may act is unacceptable and works to undermine the constitutional legal system that generations of Americans have fought to protect.

Gun prohibitionists often point out that some police organizations support them. Support from the police is a flawed measure of the constitutionality of legislation, since historically the police have opposed any extension of constitutional rights to individuals under their control. Law enforcement groups denounced *Miranda v. Arizona*[112] because it "puts another handcuff on the police"[113] and results in the "diminishing of law and order."[114] Chicago's police superintendent called for the suspension of constitutional rights to fight crime because "his visit to China underscored what he s[aw] as constitutional obstructions to police work."[115]

Newspapers publicize criminal misconduct by some policemen, including "concocting bogus arrest and search warrants."[116] Recently, a senior F.B.I. official pleaded guilty to obstruction of justice for destroying evidence favorable to

the defense in the Ruby Ridge siege, involving a white separatist,[117] and a former Los Angeles police detective pleaded no contest to a perjury charge stemming from the O. J. Simpson trial.[118] Furthermore, some members of law enforcement routinely view civilians, especially members of minority groups, as suspects rather than citizens. Appearances of impropriety, such as attendance at the "Good Ol' Boy Roundup,"[119] do not promote a healthy image of law enforcement. This behavior explains why a 1995 poll disclosed that respect for federal law enforcement had declined somewhat in forty-three percent of a sample of 1,581 people; seventeen percent of the respondents stated that their respect had declined greatly.[120]

In another 1995 poll, fifty-five percent of registered voters surveyed responded that they thought "the federal government has become so large and powerful that it poses a threat to the rights and freedoms of ordinary citizens."[121] The poll did not explore the reasons behind such opinions, but it is reasonable to attribute at least some of the responses to the perception that the government, and all its branches, is unjust. Courts are supposed to protect rights and freedoms. A federal court system that is willing to ignore an explicit guarantee in the Bill of Rights will be viewed as unjust.

Such injustice also spawns bigotry toward gun owners, who are condemned not for what they do but for what they own.[122] U. S. District Court Judge Charles L. Brieant has recognized this bias: "Since it is not disputed that these handguns are . . . personal property, there is no way for the state to get them away . . . without compensation, in light of the Fourteenth Amendment of the United States Constitution. Guns may not be politically correct property, but they remain property."[123] Polls show that up to eighty-seven percent of people believe they have a constitutional right to own a firearm.[124] Hence, a sizable segment of the population feels victimized by bigotry, political correctness, and federal courts who give their Second Amendment rights no respect. But, as one commentator has aptly noted:

> The lengths to which the political establishment has gone to deny that this enumerated right is fundamental and that it applies to the states via the Fourteenth Amendment, suggests to millions of reasonable law-abiding citizens that the Constitution is being willfully interpreted in a politically partisan way by those who disagree with the merits of the Second Amendment. At a minimum, it is hard to dismiss the frustration of such persons as unreasonable or irrational.[125]

This frustration has led to a revolt at the polls and provided Republicans with control of the 104th Congress. President Clinton admitted that as many as thirty-two incumbent House members who supported gun control lost their seats in the 1994 election.[126] Expressions of frustration have not been confined to elections; they are also partially responsible for the recent militia movement. Court decisions attempting to nullify the Second Amendment by claiming it only applies to the militia have legitimized this phenomena.[127] This is an example of the law of unintended consequences.

Understanding of the militia movement, which has been called the "neomilitia movement,"[128] is limited because "[m]uch of what Americans know about militias is based on uncritical media repetition of statements from activists who demonstrate that the militia movement does not have a monopoly on paranoia and misinformation."[129] Contrary to stereotypes, African-Americans, Jews, Latinos, and women are members of militia groups.[130] Furthermore, some militia groups have denied membership to persons associated with more traditional hate group activities.[131] In light of these facts, the militia movement cannot be so easily dismissed as a group of irrational white males upset by America's growing multiculturalism. Such a dismissal does not explain away all of the movement's grievances.

Taking the predominant interpretation of the Second Amendment to its logical conclusion, some Americans have organized into militia groups. Militia movement members often believe that membership in a militia is necessary to protect their right to keep and bear arms.[132] Their status as members of the unorganized militia generally rests on federal and state militia statutes, state constitutional provisions on the militia, and American legal precedents.

Commentators who recognize that the Second Amendment guarantees an individual right to keep and bear arms often argue that self-formed militia groups are not the militia contemplated by the Second Amendment. They argue that the militia language in the Second Amendment neither expands nor contracts the right to arms. They also note that in forming these groups, members have not followed the state-created structure for the militia's training and use because the governor, who is the militia's commander-in-chief, has not called for their formation, and because the militias are not the product of a great majority acting by consensus as a course of last resort.[133] Under such a rubric, a state militia would not be formed as long as the majority of the people

decides that "the existing structure of the government provides for peaceful and orderly change."[134]

A generation ago, during the Watergate crisis, Americans approached this level of doubt in the political system. Citizens feared that the President might overstep his legitimate powers and direct the army to prevent Congress from meeting to impeach him, or to block the courts from enjoining his illegal acts, or even to thwart a new federal election in 1976. Respected *New York Times* columnist Tom Wicker considered these issues and recognized that legitimate force could prevent these disastrous outcomes: "Even had he or some other President taken over Washington with tanks and machine guns, opposition might swiftly have been rallied around powerful state governors."[135] The National Guard could not restrain a President acting beyond his authority because the National Guard is "a federally funded and controlled force with a (very) thin facade of state control."[136] An armed populace, serving as another check and balance, provides meaningful deterrence. In considering the possible illegitimate excesses of our government, it is important that "[t]he Second Amendment recognizes the same reality as Mao Zedung's statement 'Political power grows out of the barrel of a gun.' The underlying objective of the Framers, however, was precisely the opposite of Mao's; the Framers wanted ultimate power to belong to the people and not the government."[137]

Long before any controversy surrounding the present militia movement existed, Judge Thomas Cooley explained the relationship between the precatory language of the Second Amendment (stating that a well regulated militia is necessary to the security of a free state) and the amendment's guarantee (that the right of the people to keep and bear arms shall not be infringed):

> It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment [sic] of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. But this enables the government to have a well regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.[138]

The present militia movement is probably temporary. It may disappear or shrink significantly as soon as federal courts stop devaluing the Second Amendment and start interpreting it as its Framers intended. On the other hand, the movement may be a sign of the larger problem of Americans' declining confidence in government, which is a more serious concern. A more sincere interpretation of the Second Amendment could represent a significant advance in restoring the people's faith in government.

State courts have provided reason for cautious optimism. Some have held that the right to possess a firearm is a civil right.[139] Some courts have also interpreted the right to keep arms liberally, so that it includes the purchase of arms and ammunition.[140] State courts have voided restrictive laws that infringe on the right to bear arms on at least twenty-one reported occasions,[141] and some courts have even been sensitive to the right to arms when construing tort law.[142] These judicial decisions not only preserve judicial integrity through their genuine interpretation of the right to keep and bear arms, but they also calm fears of illegitimate government action against individuals. Furthermore, state court decisions will likely influence the Supreme Court, when it finally accepts a Second Amendment case for review.[143]

V. CONCLUSION

The right to keep and bear arms is as old as this country. It was first guaranteed by state constitutions, then by the Second Amendment, and subsequently reaffirmed by the Fourteenth Amendment. It is as sacred as trial by jury and freedom of speech and press. It is a part of our nation's

heritage. Disastrous periods of our history, such as the mistreatment of Blacks during Reconstruction, were facilitated by denying the victims their right to bear arms. At the same tine, crises in the United States have not risen to the same scale as those in places such as Bosnia and Rwanda, perhaps in part due to our right to bear arms, even in its judicially-weakened form.

Gun prohibitionists have not restricted themselves to ad hominem attacks,[144] but have introduced legislation to repeal the Second Amendment.[145] Unlike judicial nullification, repeal is at least part of the legitimate political process. In the meantime, courts have an obligation to uphold the Second Amendment and ensure that it continues to protect citizens from their government. When they fail to fulfill these duties, they provide emotional ammunition to the potentially dangerous militia movement and ignore the clear intention of the Second Amendment's Framers. A more sincere interpretation of the Second Amendment will prevent historical inaccuracies from marring our Constitution and will protect our nation's future.

NOTES

1. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob B. Cook ed., 1961).

2. *See* David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL'Y 1 (1987); Wendy Kaminer, *Second Thoughts on the Second Amendment*, ATLANTIC MONTHLY, Mar. 1996, at 32.

3. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1205-06, 1208, 1210, 1245 n.228, 1261, 1264-66, 1284 (1992).

4. *See* David B. Kopel et al., *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMPLE L. REV. 1177, 1180 n.13 (1995).

5. *See* David B. Kopel, *Rational Basis Analysis of Assault Weapon Prohibition*, 20 J. CONTEMP. L. 381, 386 (1994); Eric C. Morgan, Note, *Assault Rifle Legislation: Unwise and Unconstitutional*, 17 AM. J. CRIM. L. 143 (1990). Foes of the right to bear arms have exhibited an elitist willingness to misinform and disinform. They exploit ignorance according to one of their reports: "The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons." Josh Sugarmann, *Assault Weapons and Accessories in America* (1988), *cited in* William R. Tonso, *Gun Control*, AM. LEGION, Mar. 1991, at 19, 50.

6. *See* T. Markus Funk, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 85 J. CRIM. L. & CRIMINOLOGY 764 (1995).

7. *See* Nicholas J. Johnson, *Shots Across No Man's Land: A Response to Handgun Control, Inc.'s Richard Aborn*, 22 FORDHAM URB. L.J. 441, 443 (1995).

8. Quilici v. Village of Morton Grove, 695 F.2d 261, 270 n.8 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

9. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 407 (1857).

10. *See* Korematsu v. United States, 323 U.S. 214 (1944).

11. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

12. Vernon Gray, *Civil Disobedience*, ST. MARY'S TODAY, May 28, 1996, at 39.

13. *See* William Raspberry, *Sick People with Guns*, WASH. POST, Oct. 19, 1994, at A23 (quoting Mark Rosenberg, Director of the National Center for Injury Prevention at the CDC); *see also* Tanya K. Metaksa, *Lawmakers Get It Right*, USA TODAY, July 1, 1996, at 12A. For criticism of politicized, results-oriented research from the medical community, see Don B. Kates et al., *Guns and Public Health: Epidemic of Violence, or Pandemic of Propaganda?*, 62 TENN. L. REV. 513 (1995); Edgar A. Suter, *Guns in the Medical Literature: A Failure of Peer Review*, 83 J. MED. ASS'N GA. 133 (1994).

14. *See* State v. Kessler, 614 P.2d 94, 98 (Or. 1980).

15. *See, e.g.*, Wilson v. State, 33 Ark. 557, 560 (1878); Rinzler v. Carson, 262 So. 2d 661, 666 (Fla. 1972); Hill v. State, 53 Ga. 473, 474 (1874); People v. Zerillo, 189 N.W. 927 (Mich. 1922); *Kessler*, 614 P.2d at 94; Andrews v. State, 50 Tenn. (3 Heisk.) 165, 179, 186-87 (1871); State v. Rupe, 683 P.2d 571, 594 (Wash. 1984).

16. *See* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480, 500-04 (1995); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1254 n.56 (1994); Scott Bursor, Note, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEX. L. REV. 1125, 1146-49 (1996).

17. *See* State v. Kerner, 107 S.E. 222, 224 (N.C. 1921); *Kessler*, 614 P.2d at 99.

18. JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 134 (1994).

19. *See* The Declaration of the Causes and Necessity of Taking Up Arms (1775), *reprinted in* DOCUMENTS OF AMERICAN HISTORY 92, 94 (Henry Steele Commager, ed., 5th ed. 1949); *see also* RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON AND OF THE BATTLES OF LEXINGTON,

CONCORD AND BUNKER HILL 95 (6th ed. 1903).

[20] Vermont's constitutional guarantee to bear arms tracked that of Pennsylvania. *See* VT. CONST. ch. I, art. XV. Massachusetts's declaration of rights guaranteed that "[t]he people have a right to keep and bear arms for the common defence." MASS. CONST. art. XVII (1776). The Massachusetts Supreme Court judicially repealed this guarantee on the Bicentennial by noting that the people no longer need to keep arms for the common defense. The court turned a blind eye to history, supplanted the intent of the Framers and the people, and acted as if they learned their constitutional law from British General Thomas Gage. *See* Commonwealth v. Davis, 343 N.E.2d 847 (Mass. 1976).*Cf.* Glenn H. Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647, 666-67 (1994) (guarantee to keep arms for common defense is a personal right and includes self-defense).

[21] PA. CONST. art. XIII.

[22] N.C. CONST. art. XVII.

[23] State v. Huntley, 25 N.C. 418, 422 (1843).

[24] PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 422 (J. McMaster & F. Stone eds., 1888).

[25] *See* EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 50-56 (1957). In February, 1788, the minority proposals in the Massachusetts convention were introduced by Samuel Adams:

> [T]hat the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or *to prevent the people of the United States, who are peaceable citizens, from keeping their own arms* ; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceful and orderly manner, the federal legislature, for a redress of grievance; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.

DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788, at 86-87 (Bradford K. Peirce & Charles Hale eds., 1856); see also id. at 266. As in Pennsylvania, the proposed Bill of Rights was rejected.

[26] 1 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (J. Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES]. The Pennsylvania and Massachusetts proposed Bill of Rights, including the proposals on arms, are not found in *Elliot's Debates*.

[27] 3 *id*. at 659 (Virginia proposed "[t]hat the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.").

[28] *Id*. at 386.

[29] *Id*. at 646.

[30] *Id*. at 425.

[31] New York proposed "[t]hat the people have a right to keep and bear arms; that a well regulated militia, including the body of the people, capable of bearing arms, is the proper, natural, and safe defence of a free state." 1 *id*. at 328. As in the Virginia proposal, *see supra* note 27, New York's declaration "[t]hat the people have a right to keep and bear arms" is set off by a semicolon and thus guarantees a fundamental individual right to bear arms independent of any preference for a militia over a standing army. *See* Arnold v. Cleveland, 616 N.E.2d 163, 169 (Ohio 1993) (holding that Ohio's right to bear arms provision set off by a semicolon is evidence that each independent clause secures a separate protection). New York's unlimited language would satisfy the supporters of the proposals on arms that surfaced in Pennsylvania, Massachusetts, New Hampshire, and Virginia. Furthermore, the pronouncement in New York's proposal that the militia includes the body of the people capable of bearing arms is consistent with George Mason's broad-based definition of militia.

[32] North Carolina copied Virginia's proposal on arms. *See* 4 ELLIOT'S DEBATES, *supra* note 26, at 244. Rhode Island copied that of New York. *See* 1 *id*. at 335.

[33] *See* THE FEDERALIST NO. 84, *supra* note 1, at 579 (Alexander Hamilton).

[34] *Remarks on the First Part of the Amendments to the Federal Constitution, Moved on the 8th Instant in the House of Representatives*, FED. GAZETTE & PHILA. EVENING POST, June 18, 1789, at 2 (emphasis added).

[35] THE FEDERALIST NO. 46, *supra* note 1, at 321-22 (James Madison) (emphasis added).

[36] *See* Herbert Mitgang, *Handwritten Draft of a Bill of Rights Found*, N.Y. TIMES, July 29, 1987, at A1.

[37] *Id.* at C21.

[38] 1 ANNALS OF CONGRESS 749 (Joseph Gales ed., 1789) (statement of Rep. Gerry). The proposal that Representative Gerry opposed provided: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms." *Id.*

39. *See* JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (1820).

40. United States v. Gomez, 1996 U.S. App. LEXIS 7815. at *9 n.7 (9th Cir. 1996). See the disagreement over the meaning of the Second Amendment and adherence to precedent between the special concurring opinion (supporting an individual right) and the majority (supporting a collective right) in *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1614 (1993).

41. *See* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, *supra* note 24, at 422.

42. *See* DEBATES AND PROCEEDINGS IN THE MASSACHUSETTS CONVENTION, *supra* note 25, at 86-87, 266.

43. *See* 1 ELLIOT'S DEBATES, *supra* note 26, at 326.

44. The Framers felt no need to specifically mention that which seemed obvious. *See* Nevada v. Hall, 440 U.S. 410, 431 (1979) (Blackmun, J., dissenting); *see also* Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897).

45. MALCOLM, *supra* note 18, at 162-63.

46. *See* U.S. CONST. art. I, § 8, cls. 12, 15, 16.

47. *See* U.S. CONST. art. I, § 10, cl. 3.

48. *See* U.S. CONST. art. II. § 2, cl. 1.

49. Nunn v. State, 1 Ga. (1 Kel.) 243, 249-51 (1846). Nunn should be given great weight because Chief Justice Joseph Henry Lumpkin, author of the opinion, started practicing law at a time when several of the Framers were still alive, and he grew up in a prominent Georgia family surrounded by members of the generation that conceived of and drafted the United States Constitution and its Bill of Rights. He was known as a reformer. *See* Judge Lumpkin In Memoriam, 36 Ga. 19 (1867); *see also* 6 DICTIONARY OF AMERICAN BIOGRAPHY 502 (Dumas Malone ed., 1933); AMERICAN HISTORICAL SOCIETY, STORY OF GEORGIA 243 (1938).

50. *See* Baron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

51. *See* Amar, *supra* note 3, at 1210-12.

52. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (1795). Justice William Paterson, a signer of the Constitution, authored the opinion.

53. *See* Reynolds, *supra* note 16, at 461; *see generally* Van Alstyne, *supra* note 16.

54. *See* DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189 (1989); Fox v. Custis, 712 F.2d 84 (4th Cir. 1983); Warren v. District of Columbia, 444 A.2d 1, 2 (D.C. 1981); Ashburn v. Anne Arundel County, 510 A.2d 1078 (Md. 1986).

55. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

56. United States v. Panter, 688 F.2d 268, 271 (5th Cir. 1982).

57. *See* Capital Square Review and Advisory Bd. v. Ku Klux Klan, 132 L. Ed. 2d 650, 666 (1995) (Thomas, J., concurring); Heck v. Humphrey, 512 U.S. 477, 501-02 (1994) (Souter, J., concurring); Ngiraingas v. Sanchez, 495 U.S. 182, 187-88 (1990).

58. *See* Reynolds, *supra* note 20, at 660.

59. *See* United States v. Cruikshank, 92 U.S. 542, 560 (1876).

60. *See* Amar, *supra* note 3, at 1217, 1228; Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341, 347 (1995).

61. *See Dred Scott*, 60 U.S. (19 How.) at 417 (emphasis added). The Court further stated that Congress could not "deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding." *Id.* at 450.

62. Bursor, *supra* note 16, at 1129.

63. *See* John Prescott Kappas, *The Right Most Valued by Free Men: Origins and Historical Development of the Citizen's Right to Keep and Bear Arms*, 7 PERSPECTIVES IN HISTORY 41, 42 (1991-92). Making it a criminal act for a law-abiding citizen to keep and bear arms is tantamount to a badge of slavery. *See* Stephen P. Halbrook, *Second-Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEO. MASON U. CIV. RTS. L.J. 105, 178 (1995).

64. *See* Will v. Michigan Dept. of State Police, 491 U.S. 58, 84-85 (1989) (Brennan, J., dissenting); Goodman v. Lukens Steel Co., 482 U.S. 656, 672 (1987) (Brennan, J., concurring).

65. Don B. Kates, Jr. & Daniel D. Polsby, *Of Genocide and Disarmament*, 86 J. CRIM. L. & CRIMINOLOGY 247, 255 (1995).

66. *Id.* at 250.

67. *See* Catherine Toups, *Rwanda Report Assails World's Lack of Response*, WASH. TIMES, Mar. 11, 1996, at A11.

68. John Pomfret, *Exorcising the Demons of Srebrenica*, WASH. POST, July 12, 1996, at A1; *see also* Jonathan C. Randal, *Mandatory Arrest Warrants Issued For Indicted Bosnian Serb Leaders*, WASH. POST, July 12, 1996, at A30.

[69.] TO BE A VICTIM: ENCOUNTERS WITH CRIME AND INJUSTICE 295 (Diane Sank & David I. Caplan eds., 1991).

[70.] Jeremy Rabkin, *Constitutional Firepower: New Light on the Meaning of the Second Amendment*, 86 J. CRIM. L. & CRIMINOLOGY 231, 245 (1995).

[71.] *See* Amar, *supra* note 3, at 1223 n.134, 1233-34.

[72.] "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[73.] *See* Amar, *supra* note 3, at 1236-38; Halbrook, *supra* note 60, at 415-17; Van Alstyne, *supra* note 16, at 1252.

[74.] 14 CONG. GLOBE, 39th Cong., 2765-66 (1866) (emphasis added).

[75.] An Act to Continue in Force and to Amend "An Act to Establish a Bureau for the Relief of Freedmen and Refugees," and for Other Purposes, 14 Stat. 173, 176, 177 (1866) (emphasis added); *see also* Halbrook, *supra* note 60, at 377 n.186, 418, 423.

[76.] *See* STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 153 (1984); Amar, *supra* note 3, at 1261-66; Halbrook, *supra* note 60, at 341, 380 n.198, 390, 433-34.

[77.] *See* Love v. Pepersack, 47 F.3d 120, 124 (4th Cir.), *cert. denied*, 133 L. Ed. 2d 27 (1995).

[78.] *See* Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Property Rights and Ambitions Following Emancipation, 1865-1910*, 70 CHI.-KENT L. REV. 439, 467-69 (1994).

[79.] *See, e.g.*, Dyett v. Turner, 439 P.2d 266, 271-74 (Utah 1968) (questioning the ratification of the Fourteenth Amendment).

[80.] *See* GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 18 (1991); *see also* JAMES D. WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA 84 (1983).

[81.] WRIGHT ET. AL., *supra* note 80, at 137.

[82.] *See* KLECK, *supra* note 80, at 144; *see also* Kates et al., *supra* note 13, at 572, 579.

[83.] Jeffrey R. Snyder, *A Nation of Cowards*, 113 PUB. INTEREST 40, 45 (1993).

[84.] Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 180 (1995).

[85.] *See* Don B. Kates, Jr., *Gun Control: Separating Reality from Symbolism*, 20J. CONTEMP. LAW 353, 356-58 (1994); David B. Kopel, *The Ideology of Gun Ownership and Gun Control in the United States*, Q. J. IDEOLOGY, June 1995, at 3, 11-15.

[86.] T. Markus Funk, *Is the True Meaning of the Second Amendment Really Such a Riddle? Tracing the Historical "Origins of an Anglo-American Right,"* 39 HOW. L.J. 411, 423 (1995) (reviewing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994)).

[87.] *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); *see also* HALBROOK, *supra* note 76, at 107-23; Halbrook, *supra* note 60, at 347-48; Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67 (1991).

[88.] Inge Anna Larish, Note, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. ILL. L. REV. 467, 505; *see also* Sayoko Blodgett-Ford, Note, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL'Y REV. 509 (1993).

[89.] *See* Amar, *supra* note 3, at 1262; Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 653-54 (1989); Michael J. Quinlan, *Is There a Neutral Justification for Refusing to Implement the Second Amendment or is the Supreme Court Just Gun Shy?*, 22 CAP. U. L. REV. 641 (1993); Van Alstyne, *supra* note 16, at 1239 n.10, 1240.

[90.] *See* Miller v. Texas, 153 U.S. 535 (1894); Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1876).

[91.] *See Cruikshank*, 92 U.S. at 551, 553-54, 560; *see also* L.A. Powe, Jr., *Guns, Words, and Interpretation*, 38 WM. & MARY L. REV. (forthcoming 1997).

[92.] *See* Chicago B. & Q. R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

[93.] *See, e.g.*, HALBROOK, *supra* note 76, at 107; MALCOLM, *supra* note 18, at 162-63; Amar, *supra* note 3, at 1264; Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1003 (1995); Halbrook, *supra* note 60, at 369; Levinson, *supra* note 89, at 652; Reynolds, *supra* note 16, at 498; Van Alstyne, *supra* note 16, at 1251; David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007, 1009 (1994); Daniel D. Polsby, *Second Reading: Treating the Second Amendment as Normal Constitutional Law*, REASON, Mar. 1996, at 32; *see generally* Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992);

94. *See, e.g.*, CONN. GEN. STAT. § 27-2; KAN. STAT. ANN. § 48-904(e); MD. CODE ANN. art. 65, § 1.

95. ILL. CONST. art. XII, § 1.

96. IND. CONST. art. XII, § 1.

97. *See* Presser v. Illinois, 116 U.S. 252, 265 (1886); State *ex rel.* McGaughey v. Grayston, 163 S.W.2d 335 (Mo. 1942).

98. *See* Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 197-98, 233-35 (1982).

99. *See id.*; *see also* Robert Dowlut, Comment, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 91-92 (1983).

100. United States v. Miller, 307 U.S. 174, 178 (1939).

101. Reynolds, *supra* note 16, at 502.

102. *See* Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. (forthcoming 1997).

103. *See, e.g.*, 1 Stat. 271 (1792). An act passed by a Congress, many of whose members took part in the convention which framed the Constitution, is a contemporaneous exposition of the highest authority. *See* Patton v. United States, 281 U.S. 276, 300-01 (1930).

104. Brannon P. Denning, *Can the Simple Cite Be Trusted? Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1996).

105. *See* United States v. Warin, 530 F.2d 103, 108 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); Stevens v. United States, 440 F.2d 144, 149 (6th Cir. 1971); Sandidge v. United States, 520 A.2d 1057, 1059 (D.C. Cir.), *cert. denied*, 484 U.S. 868 (1987).

106. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1991); *see also Patton*, 281 U.S. at 298 ("The first ten amendments . . . were substantially contemporaneous and should be construed in *pari materia*.").

107. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Verdugo-Urquidez, 494 U.S. at 265.

108. *See* Perpich v. Department of Defense, 496 U.S. 334 (1990).

109. *See* Glenn H. Reynolds & Don B. Kates, Jr., *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995); Gregory Lee Shelton, *In Search of the Lost Amendment: Challenging Federal Firearms Regulation Through the "State's Right" Interpretation of the Second Amendment*, 23 FLA. ST. U. L. REV. 105 (1995).

110. *See* Love v. Pepersack, 47 F.3d 120, 123 (4th Cir.), *cert. denied*, 133 L. Ed. 2d 27 (1995).

111. *See, e.g.*, United States v. Salamone, 800 F.2d 1216, 1223 (3d Cir. 1986); People v. Warren, 452 N.Y.S.2d 50 (1982).

112. Miranda v. Arizona, 384 U.S. 436 (1966).

113. Leonard Downie, Jr., *Police Move To Meet New Court Ruling*, WASH. POST, June 15, 1966, at A1.

114. Bernard Weinraub, *Leary Says Court Decision Will Hurt Law and Order*, N.Y. TIMES, June 15, 1966, at A1.

115. Lauren Ina, *To Fight Crime, Official Would Suspend Rights*, WASH. POST, July 13, 1991, at A6.

116. Joseph A. Slobodzian, *City Tries To Contain Cop Scandal Damage*, NAT'L L.J., Feb. 5, 1996, at A10; *see also* Mark Curriden, *Secret Threat to Justice*, NAT'L L.J., Feb. 20, 1995, at A1; *Fifth Trooper Faces Charges of Tampering*, N.Y. TIMES, Aug. 18, 1993, at B1.

117. *See* David Johnston, *Senior F.B.I. Official Pleads Guilty to Cover-Up on Idaho Siege*, N.Y. TIMES, Oct. 31, 1996, at A19.

118. *See* Steve James, *Fuhrman Pleads No Contest to Perjury*, WASH. TIMES, Oct. 3, 1996, at A1.

119. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, ALLEGATIONS OF RACIAL AND CRIMINAL MISCONDUCT AT THE GOOD OL' BOY ROUNDUP 8 (1996) ("From our careful review of the evidence as to the specific allegations of racist misconduct, we found substantial credible evidence of racist signs, skits, and actions in 1990, 1992, and 1995. We also found credible evidence of apparently isolated instances of racially insensitive conduct in 1985, 1987, 1989, and 1993.").

120. *See* American Dream Poll of Sept. 26 to Oct. 2, 1995, at 168 (Luntz Research and Strategic Services, Arlington, Va.) (on file with *Stanford Law & Policy Review*).

121. *The Roll of Government*, POLLING REPORT, Dec. 4, 1995, at 3.

122. *See* Johnson, *supra* note 93, at 72 n.227; Douglas Laycock *Vicious Stereotypes in Polite Society*, 8 CONST. COMMENTARY 395, 397 (1991); Snyder, *supra* note 83, at 46.

123. Ellman v. Davis, 838 F. Supp. 90, 100 (S.D.N.Y. 1993), *rev'd on other grounds*, 42 F.3d 144 (2nd Cir. 1994), *cert. denied*, 115 S.Ct. 2269 (1995).

124. *See* Gary A. Mauser & David B. Kopel, *"Sorry, Wrong Number": Why Media Polls on Gun Control Are Often Unreliable*, 9 POL. COMM. 69, 87

n.2 (1992) (finding 87% believe they have a constitutional right to own a firearm). *Cf. The Fight to Bear Arms*, U. S. NEWS & WORLD REP., May 22, 1995, at 29 (finding 75% support).

[125.] Randy E. Barnett, *Foreword: Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443, 450-51 (1995).

[126.] *See* Jill Smolowe, *The N.R.A.: Go Ahead, Make Our Day*, TIME, May 29, 1995, at 18, 21; Evelyn Theiss, *Clinton Blames Losses on NRA*, CLEVELAND PLAIN DEALER, Jan. 14, 1995, at 1-A.

[127.] *See* Barnett, *supra* note 125, at 452.

[128.] Brannon P. Denning, *Palladium of Liberty? Causes and Consequences of the Federalization of State Militias in the Twentieth Century*, 21 OKLA. CITY U. L. REV. (forthcoming 1997).

[129.] David B. Kopel, *The Militias Are Coming*, REASON, Aug./Sept. 1996, at 57.

[130.] *See* Denning, *supra* note 128.

[131.] *See id.*

[132.] *See* Reynolds, *supra* note 16, at 511.

[133.] *See id.* at 507-11.

[134.] Dennis v. United States, 341 U.S. 494, 501 (1951). The Declaration of Independence provides examples of when peaceful and orderly change is impossible.

[135.] Tom Wicker, *In the Nation: Could It Happen Here?*, N.Y. TIMES, June 29, 1975, at A5.

[136.] Reynolds, *supra* note 16, at 491.

[137.] David B. Kopel, *It Isn't About Duck Hunting: The British Origins Of The Right To Arms*, 93 MICH. L. REV. 1333, 1361 (1995) (book review) (footnote omitted).

[138.] THOMAS COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 298-99 (3d ed. 1898).

[139.] *See* Williams v. State, 402 So.2d 78, 79 (Fla. Dist. Ct. App. 1981); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 182 (1871).

[140.] "The right to keep arms, 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 arms, and to keep them in repair." *Andrews*, 50 Tenn. (3 Heisk.) at 178.

[141.] *See* Wilson v. State, 33 Ark. 557 (1878) (striking down pistol carrying statute as too restrictive); City of Lakewood v. Pillow, 501 P.2d 744 (Colo. 1972) (invalidating gun law on sale, possession, and carrying as too broad); People v. Nakamura, 62 P.2d 246 (Colo. 1936) (striking law prohibiting possession of a firearm); Nunn v. State, 1 Ga. (1 Kel.) 243 (1846) (invalidating carrying statute as too restrictive); *In re* Brickey, 70 P. 609 (Idaho 1902) (striking gun carrying statute as too restrictive); Junction City v. Mevis, 601 P.2d 1145 (Kan. 1979) (striking gun carrying ordinance as too broad); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, (1822) (invalidating concealed carrying statute as infringement on right to arms; the constitution was later amended to allow regulation of concealed carrying of arms); People v. Zerillo, 189 N.W. 927 (Mich. 1922) (striking statute prohibiting possession of a firearm); State v. Kerner, 107 S.E. 222 (N.C. 1921) (invalidating pistol carrying license and bond requirement law as too restrictive); City of Las Vegas v. Moberg, 485 P.2d 737 (N.M. Ct. App. 1971) (invalidating gun carrying ordinance as too restrictive); *In re* Reilly, 31 Ohio Dec. 364 (C.P. 1919) (striking down ordinance forbidding the hiring of an armed guard to protect property); State v. Delgado, 692 P.2d 610 (Or. 1984) (invalidating prohibition of possession of switchblade knife); State v. Blocker, 630 P.2d 824 (Or. 1981) (striking prohibition of carrying a club); State v. Kessler, 614 P.2d 94 (Or. 1980) (striking prohibition of possession of a club); Barnett v. State, 695 P.2d 991 (Or. Ct. App. 1985) (invalidating prohibition of possession of black jack); Glasscock v. City of Chattanooga, 11 S.W.2d 678 (Tenn. 1928) (invalidating gun carrying ordinance as too restrictive); *Andrews*, 50 Tenn. (3 Heisk.) 165 (invalidating pistol carrying statute as too restrictive); Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214 (1866) (calling gun confiscation law an infringement on right to arms); Jennings v. State, 5 Tex. App. 298 (1878) (holding that statute requiring forfeiture of pistol after misdemeanor conviction is an infringement on right to arms); State *ex rel.* Princeton v. Buckner, 377 S.E.2d 139 (W.Va. 1988) (invalidating gun carrying law as too restrictive); State v. Rosenthal, 55 A. 610 (Vt. 1903) (holding that pistol carrying ordinance is too restrictive).

[142.] *See, e.g.*, Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984); Hilberg v. F. W. Woolworth Co., 761 P.2d 236, 240 (Colo. Ct. App. 1988); Rhodes v. R. G. Indus., 325 S.E.2d 465, 466 (Ga. Ct. App. 1984); Lopez v. Chewiwie, 186 P.2d 512, 513 (N.M. 1947); *see also* David B. Kopel & Richard E. Gardner, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGIS. J. 737 (1995).

[143.] *See* Harmelin v. Michigan, 501 U.S. 957, 966, 977-78, 983 (1991) (demonstrating that the Supreme Court looks to state constitutions and caselaw for guidance).

[144.] *See* Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. (forthcoming 1997).

[145.] *See* H.R.J. Res. 81, 103d Cong. (1994).