

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07 – 15763
DC# CV 99-4389-MJJ

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U.S. COURT OF APPEALS

RUSSELL ALLEN NORDYKE, *et al.*,
Appellants

v.

MARY V. KING, *et al.*,
Appellees

**AMICUS CURIAE BRIEF
(ON SECOND AMENDMENT ISSUES ONLY)
OF PROFESSORS OF LAW, HISTORY, POLITICAL SCIENCE
OR PHILOSOPHY IN SUPPORT OF THE APPELLANTS
AND IN SUPPORT OF REVERSAL**

Vanessa A. Zecher
Law Offices of Vanessa A. Zecher
111 West St. John Street, Suite 710
San Jose, CA 95113
Telephone: (408) 271-9977
Facsimile: (408) 271-9555
Attorney for Amici

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Facsimile: (408) 271-9555
Attorney for Amici

CORPORATE DISCLOSURE STATEMENT

Amici are scholars employed at various institutions of higher education throughout the United States. In subscribing to this brief amici represent only themselves personally, not the institutions which employ them nor any other entity.

Date: September 30, 2008

Law Offices of Vanessa A. Zecher



Vanessa A. Zecher
Attorney for Amici

MOVANTS

All parties have consented to the filing of this brief. Movants (hereinafter “amici”) are:

Jonathan Bean, Professor of History, Southern Illinois University.

Robert J. Cottrol, Harold Paul Green Research Professor of Law and History, George Washington University, author of Gun Control and the Constitution and co-author of "The Fifth Auxiliary Right" 104 Yale L. J. 995-1026 (1994).

Brannon Denning, Associate Professor of Law, Sanford University, author of "Gun Shy: The Second Amendment as an 'Under enforced Constitutional Norm'", 21 Har. J. L. & Pub. Pol. 719 (1998) and co-author with Glenn H. Reynolds of "Telling Miller's Tale: A Reply to David Yassky," 65 Law & Contemp. Probs. 113 (2002).

Morris P. Fiorina, Wendt Family Professor of Political Science, Stanford University.

Timothy Hall, Associate Professor of Philosophy at Oberlin College, and author of, "Is There a Right to Bear Arms?", in 20 Public Affairs Quarterly 293-312 (2006).

Jeffrey Roger Hummel, Associate Professor of Economics and History, San Jose State University.

Nicholas J. Johnson, Professor, Fordham University School of Law, author of "Principles and Passions: The Intersection of Abortion and Gun Rights," 50 Rutgers Law Rev. 97 (1997) and "Plenary Power and Constitutional Outcasts: Federal Power, Critical Race Theory and the Second, Ninth and Tenth Amendments," 57 OHIO ST. L. J. 1556 (1996).

MOVANTS CONT.

Michael A. Lawrence, Professor of Law, Michigan State University School of Law, author of "Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses," 72 Mo. L. Rev. 1, 12 (2007).

Joyce Lee Malcolm, Professor of Law, George Mason University School of Law author of To Keep and Bear Arms: The Origins of an Anglo-American Right (Harvard, 1994).

Calvin R. Massey, Professor, Hastings College of the Law, author of "Guns, Extremists and the Constitution," 57 Washington & Lee Law Rev. 1095 (2000).

Richard E. Morgan, William Nelson Cromwell Professor of Constitutional Law and Government, Bowdoin College.

Andrew P. Morriss, H. Ross & Helen Workman Professor, University of Illinois School of Law.

Michael C. Munger, Earl D. McLean Professor and Chair, Department of Political Science, Duke University.

Leonard J. "Jack" Nelson, III, Professor of Law, Samford University.

Joseph Edward Olson, Professor of Law, Hamline University and co-author (with Clayton E. Cramer) of "What Did 'Bear Arms' Mean in the Second Amendment?" 6 Georgetown J. L. & Pub. Pol. 511 (2008).

Robert J. Pushaw Jr., James Wilson Endowed Professor, Pepperdine University School of Law.

MOVANTS CONT.

L.A. Scot Powe, Jr., Anne Green Regents Chair, University of Texas School of Law, author of "Guns, Words and Interpretation," 38 WM. & M. L. REV. 1311-1403 (1997).

William A. Schroeder, Professor of Law, Southern Illinois University, School of Law.

Larry Schweikart, Professor of History, University of Dayton.

Aeon J. Skoble, Professor of Philosophy, Bridgewater State College.

Kyle Sinisi, Professor of History, The Citadel.

Mary Zeiss Stange, Professor of Women's Studies and Religion, Skidmore College, author of "Arms and the Woman: A Feminist Reappraisal," in David Kopel, Editor, Guns: Who Should Have Them? And Co-author with Carol K. Oyster of Gun Women: Firearms and Feminism in Contemporary America.

Raymond Tatalovich, Professor of Political Science, Loyola University Chicago.

Samuel C. Wheeler III, Professor of Philosophy, Director of Graduate Studies in Philosophy, University of Connecticut, author of "Self-Defense Rights and Coerced Risk-Acceptance," 11 Public Affairs Q. 431 (1997) and "Arms as Insurance," 13 Public Affairs Q. 111 (April, 1999).

Roy T. Wortman, Kenyon College Emeritus Distinguished Professor in History.

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House Judiciary Committee, Subcommittee on Crime Report, vol. I at 127	9

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J. Alviani & W. Drake, Handgun Control: Issues and Alternatives, (Handgun Control Staff of the U.S. Conference of Mayors, 1975)	12
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Nelson Shields, Guns Don't Die, People Do, p.124-5(1981)	6, 11
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OTHER AUTHORITY (CONT.)

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AMICIS' INTEREST

Amici are professors of law, history, philosophy and/or political science with expertise in the areas of public or constitutional law. Their interest is in seeing the legally and historically correct principles used for determining the applicability of the Second Amendment to state and local governments. Amici believe that their observations will be helpful to the court in analyzing the historical and legal issues involved in this appeal.

It bears emphasis that amici do not claim any interest in the subject of gun control generally or in the validity of the local government act involved in this case.

Date: September 30, 2008

Law Offices of Vanessa A. Zecher

A handwritten signature in black ink, appearing to read 'Vanessa A. Zecher', written over a horizontal line.

Vanessa A. Zecher
Attorney for Amici

INTRODUCTION - CAVEAT

To reiterate, as to the desirability of gun laws, or the validity of the regulation challenged in this case, amici take no position. The sole issue which amici wish to address is whether the Fourteenth Amendment makes the right to arms applicable to state and local governments.

As to that the brief offers two overall points: First, there can be no doubt that as an historical matter the Fourteenth Amendment was specifically intended to make the right to arms applicable against state and local governments. The *Heller* opinion itself expressly recognizes that 19th Century Americans emphatically believed the right to arms to be a sacrosanct personal right. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2811 (2008).

Second, the traditional standard for incorporation of a specific right has been whether the right is essential to the American scheme of ordered liberty, i.e., fundamental in our traditions. We recognize that the traditional determinant of fundamentality has been the Founding Fathers' viewing of the right as essential to ordered liberty. The statesmen who enacted the Second Amendment, and the entire generation of Americans of which they were a part – and the several generations that followed preceding the 20th Century – viewed the right to arms as essential or fundamental for reasons set out below.

DISCUSSION

1. **18th and 19th Century America saw the right to arms as a sacred “human right,” essential to the premier human right of self-defense.¹**

America’s founding generation, including its intellectual elite, were as ardent gun lovers as Charlton Heston. “One loves to possess arms” Thomas Jefferson wrote in a June 19, 1796 letter to George Washington.² Washington owned 50 or more guns.³ As to Jefferson: “A talented inventor and gunsmith himself, Jefferson maintained a substantial armory of pistols and long guns at Monticello and introduced the concept of parts interchangeability into American firearms manufacture.”⁴ James Madison, though admitting that he was “far from being among the best” shot among his contemporaries, boasted that his skill sufficed to generally hit a target “the bigness of a man's face at the distance of 100

¹ “...before the election of the First Congress, James Monroe included ‘the right to keep and bear arms’ in a list of ‘human rights that he would propose be added to the Constitution.” Don B. Kates, “Handgun Prohibition and the Original Meaning of the Second Amendment”, [hereinafter “Original Meaning”] 82 Mich. L. Rev. 203, 228 (1983).

² 9 Writings of Thomas Jefferson 341 (A.A. Lipscomb ed., 1903).

³ “Original Meaning,” *supra* 82 Mich L. Rev. at 228-29.

⁴ *Id.*

Yards.”⁵

Allied to the Founders’ personal predilections were their philosophical beliefs: 1) that the rights to self-defense, and to be armed for that purpose, were the premier human rights and were beyond government’s authority to forbid;⁶ and 2) that for popular government to survive it is necessary “to place the use of and exercise of arms in the hands of the people, because the commonwealth is theirs who hold the arms....”⁷

The Federalists capitalized on this universal faith in private gun ownership “to claim that no bill of rights was necessary – that is, so long as the people were armed, no government could limit their freedom.”⁸ Thus Madison assured his fellow-countrymen that they need not fear the federal government “because of the advantage of being armed, which the Americans possess over the people of almost

⁵ William T. Hutchinson and William M.E. Rachal, ed., the Papers of James Madison (Chicago: University of Chicago Press, 1962), 1:153.

⁶ Don B. Kates, "The Second Amendment and the Ideology of Self-Protection" 9 Constitutional Commentary 87 (1992) and Randy E. Barnett & Don B. Kates, "Under Fire: The New Consensus on the Second Amendment," 45 Emory L. J. 1139, 1176-79 (1996).

⁷ 3 John Adams, a Defense of the Constitutions of Government of the United States (1787-88) at 471-72.

⁸ Leonard W. Levy, Origins of The Bill of Rights 147 (1999).

every other nation.”⁹ That argument against a Bill of Rights failed not because people rejected its substance but because as a safeguard they demanded an express guarantee of the right to arms.

Of course there were dissenters from these near-universal beliefs, e.g., the Quakers. But they were an isolated minority. The great majority of Americans seem to have felt like Thomas Paine:

I am thus far a Quaker, that I would gladly argue with all the world to lay aside the use of arms, and settle matters by negotiation, but unless the whole will, the matter ends, and I take up my musket and thank heaven He has put it in my power.”¹⁰

2. The right of self-defense remains fundamental to ordinary Americans if not to many in the elite.

“One intellectual historian has summarized the utterances of the Founding Fathers as expressing ‘an almost religious quality about the relationship between men and arms.’”¹¹ Likewise *Heller* summarizes at length the theme that “The inherent right of self-defense has been central to the Second Amendment right.”

128 S.Ct. at 2818.

⁹ Federalist # 46. To the same effect Federalist Noah Webster wrote “Before a standing army can rule the people must be disarmed as they are in almost every kingdom in Europe.” Quoted in Stephen Halbrook, *The Founders’ Second Amendment: Origins of the Right to Bear Arms* (2008) at 177.

¹⁰ Quoted in A.J. Ayer, *Thomas Paine* 8 (U. Chi. Press, 1988).

¹¹ Original Meaning, *supra*, 82 Mich. L. Rev. at 229 quoting Prof. Asbury.

But the full import of this is obscured to us because so much modern discussion of self-defense is so antagonistic to the views of the 18th Century intellectuals who produced the Second Amendment and their successors who applied that right against the states through the 14th Amendment.

Though most ordinary 21st Century Americans still hold self-defense to be sacrosanct, that view is largely rejected by many in today's intellectual elite: academics, lawyers, judges. To the contrary, the ideas accepted by that elite inspired the challenged ordinance – whose author's stated purpose was eradicating "the gun culture."¹² The same anti-self-defense ideology inspires the gun ban/control movement. See, e.g. the Washington Post's excoriation of gun ownership for self-defense as a barbarism which must be outlawed because it "gives strength and power to the worst instincts in the human character;"¹³ the advice given victims of rape and robbery by a Handgun Control chairman that "the best defense against injury is to put up no defense – give them what they want or run;"¹⁴ the belief of his successor, and of other anti-gun luminaries, that "[t]he

¹² JSUF, ¶ 11.

¹³ Washington Post Editorial: "Guns and the Civilizing Process", Sept. 26, 1972.

¹⁴ Guns Don't Die, People do, by then-Handgun Control, Inc. Chairman Nelson "Pete" Shields at 124-5 (1981).

only reason for guns in civilian hands is for sporting purposes;"¹⁵ and Ramsey Clark's denunciation of defensive gun ownership as "anarchy, not order under law – a jungle where each relies on himself for survival", and an insult to government, for "[a] state in which a citizen needs a gun to protect himself from crime has failed to perform its first purpose."¹⁶ Equally typifying the attitudes of many in the modern elite is the confession of Prof. Deborah Prothrow-Stith of the Harvard School of Public Health: "My own view on gun control is simple. I hate guns and *I cannot imagine why anyone would want to own one*. If I had my way, guns for sport would be registered, and all other guns", i.e. guns for self-defense, "would be banned."¹⁷

One index of the vast gulf between such attitudes and the spirit that inspired the Second and Fourteenth Amendments is the total dissonance in religious thought. In 18th and 19th Century America self-defense was seen "as not just a right

¹⁵ Jackson, "Keeping the Battle Alive" interview with Sarah Brady, Oct. 21, 1993 TAMPA TRIBUNE, emphasis added. Compare the assertion of University of Chicago Professor Robert Replogle, M.D., organizer of his own Chicago gun control group, "The *only legitimate* use of a handgun that I can understand is for target shooting." Emphasis added; Testimony in Handgun Crime Control Hearings, 1975-6 Senate Judiciary Committee [Subcommittee re Juvenile Delinquency] Oversight of the 1968 Gun Control Act, v. II at 1974.

¹⁶ Ramsey Clark, *Crime in America* 88 (1970).

¹⁷ Deborah Prothrow-Stith, *Deadly Consequences* 198 (N.Y., Harpers: 1991) (emphasis added).

but a positive duty: God gives Man both life and the means to defend it; the refusal to do so reviles God's gift; in effect it is a Judeo-Christian form of hubris.”¹⁸ Contrast the views today of the Board of Church and Society of the Methodist Church which is the founder and sponsor of the National Coalition to Ban Handguns (NCBH – now renamed the Coalition Against Gun Violence in token to its opposition to ownership of any firearm for self-defense). That sponsorship reflects the Methodist Board's view that a woman's Christian duty is to submit to rape and a man's duty is to submit to robbery rather than do anything that might imperil their attackers.¹⁹ Another member of the Coalition is the Presbyterian Church USA whose position, attested to before Congress, is "[t]he [Church's] General Assembly has declared in the context of handgun control and in many other contexts, that it is opposed to 'the killing of anyone, anywhere, *for*

¹⁸ "Ideology of Self-Protection," *supra*, 9 Const. Comm. 87 (1992) at 89.

¹⁹ "Is the Robber My Brother" is the question rhetorically posed in the title of an article written by the editor of the Methodist Board's official publication which article has been published and republished by the Board. Its answer to that title-question is "yes" for, "though the burglary victim or the woman accosted in the park by a rapist is [not] likely to consider the violator to be a neighbor whose safety is of immediate concern *** [c]riminals are members of the larger community no less than are others. As such they are our neighbors or, as Jesus put it, our brothers..." Rev. Allen Brockway, "But the Bible Doesn't Mention Pistols", May, 1977 Engage-social Action Forum. The language we have quoted appears at pp. 39-40; the article is republished by the Methodist Board as a separate pamphlet under the title Handguns in the United States.

any reason."²⁰

Other modern elite opinion makers endorse those views on secular grounds: Regarding women buying guns for protection against rape and rape-murder, Betty Friedan reviled this as "a horrifying, obscene perversion of feminism," because "lethal violence even in self-defense only engenders more violence ... gun control should override any personal need for safety."²¹

We have addressed such views at perhaps excessive length to avoid any suggestion of our ignoring a countervailing trend in modern American thought. Yet by contrast they just highlight the continued vitality of the right to self-defense in the hearts and minds of the great majority of Americans. A series of 1985 Gallup Polls showed that opposition to the right of self-defense is limited to a small minority of modern Americans, albeit a disproportionately vocal one. Only 13% of respondents to one of the polls answered negatively the question "If the

²⁰ House Judiciary Committee, Subcommittee on Crime report; v. I at 128 (emphasis added). The Church emphasizes that there is no objection to long (i.e. hunting) guns because they are owned for "sports." Handguns -- "weapons of death" -- are what the Church condemns, making no distinction between their use by criminals and their use by victims in lawful self-defense: for "To be opposed to killing is to be opposed to the instruments that make killing possible, that are designed only for killing." and "There is no other reason to own a handgun (that we have envisioned, at least) than to kill someone with it." Id. at 127 and 128. For the similar views of the Union of American Hebrew Congregations and the Board of Church and Society of the Methodist Church (condemning handgun ownership for self-defense as "vigilantism"), see id. at 121-5.

²¹ Interview by A. Japenga, Health, March/April 1994; p. 54

situation arose, would you use deadly force against another person in self-defense?" Another Gallup Poll surveyed two different sets of respondents about self-defense. Only 23% of one group responded that self-defense was "never" justified; of the other, only 17% gave that response.

Indicative of modern elite attitudes is Gallup's phrasing of the question: "Do you feel that *taking the law into one's own hands, often called vigilantism* is justified by circumstances? [Emphasis added.]" In fact self-defense is called vigilantism only by those who are opposed to it. As phrased, the question was both legally wrong and highly prejudicial; perhaps even prejudicial enough to impugn the polls' results. But the Gallup organization's considered use of it is itself evidence of the disdain felt by many in the modern elite for a right which 18th and 19th Century Americans revered.

Nevertheless, the overall results demonstrated that the vast majority of Americans still revere the right: Respectively, 71% and 80% of the respondents to the latter two Gallup surveys felt that there are circumstances in which self-defense is justified. And 3% and 8% of them (respectively) volunteered the opinion that self-defense is always justified, despite Gallup's failure to offer that

option.²²

In sum, despite the disparagement of many among the elite, the overwhelming majority of modern Americans continues to see the right of self-defense as “fundamental to the American scheme of justice.” *Duncan v. Louisiana*, 391 U.S. 145, 149. That majority appears to include even a number of Ninth Circuit judges.²³

3. Criminological research supports the viability of the right of self-defense.

Besides denouncing the gun culture as morally abhorrent, many in the modern elite assail the right of self-defense as both impractical and dangerous. They endlessly claim that since burglars strike when no one is at home and robbers confront too rapidly for householders to gain access to their guns: "The handgun owner seldom even gets the *chance* to use his gun" in self-defense.²⁴

²² Don B. Kates, "Bigotry, Symbolism, and Ideology in the Battle Over Gun Control," 1992 Public Interest Law Journal 31 at 44.

²³ See, e.g., *United States v. Gomez*, 92 F.3d 770, 774 n.7 (9th Cir. 1996) ("The Second Amendment embodies the right to defend oneself and one's home against physical attack.") and *Silveira v. Lockyer*, 328 F.3d 567, 577 (9th Cir. 2003) (Kleinfeld, C.J., joined by Judges Kozinski, O'Scannlain, & Nelson, dissenting from denial of rehearing en banc, and asserting that under certain circumstances the right to self-defense implies the right to be armed.)

²⁴ Nelson Shields, *Guns Don't Die, People Do* 49 (1981) (emphasis in original) parroting speculations also set out in more academic writings; e.g., George Newton & Franklin Zimring, *Firearms and Violence in American Life* at 68 (1970), M. Yeager and the

Such expressions of unsupported opinion about burglary are refuted by the criminological research finding that “firearms are used over half a million times a year against home invasion burglars; usually the burglar flees as soon as he finds out that the victim is armed, and no shot is ever fired.”²⁵ More generally, criminological research shows that 3-6 times as many victims use handguns to defend against criminals each year as criminals use handguns to commit crimes.²⁶ So armed self-defense does up to six times more good than harm.

Emphasizing the dangers of self-defense, Handgun Control Inc. advises victims of rape, robbery and other violent crimes to make no physical defense of any kind.²⁷ But criminological studies find: “The use of a gun by the victim

Handgun Control Staff of the U.S. Conference of the U.S. Conference of Mayors, *How Well Does the Handgun Protect You and Your Family?* (1976), J. Alviani & W. Drake, *Handgun Control: Issues and Alternatives* 6-8 (publication of the Handgun Control Staff of the U.S. Conference of Mayors, 1975) and Franklin Zimring & Gordon Hawkins, *The Citizen's Guide to Gun Control* (1987) at 31-2.

²⁵ David Kopel, Paul Gallant & Joanne D. Eisen, “The Human Right of Self-Defense,” 22 *BYU Journal of Public Law* 43, 166 (2008), citing Robert M. Ikeda et al., *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 *Violence and Victims* 363 (1997) (reporting results of a study conducted by the vehemently anti-gun CDC).

²⁶ Don B. Kates, “The Limits of Gun Control: A Criminological Perspective” in Timothy Lytton, ed., *Suing the Firearms Industry: a Legal Battle at the Crossroads of Gun Control and Mass Torts* (Ann Arbor, University of Michigan Press, 2005) at 68-69 (collecting studies).

²⁷ *Guns Don't Die*, supra, 124-25; Alviani & Drake supra.

significantly reduces her chance of being injured ..."²⁸ and "Resistance with a gun appears to be the most effective in preventing serious injury [to the victim, and] ... the data strongly indicate that armed resistance is the most effective tactic for preventing property loss ..."²⁹ Multiple earlier studies confirm that victims resisting with a gun are both far less likely to be raped or robbed and far less likely to be injured than those who take Handgun Control's advice never to throw themselves on the mercy of rapists and robbers.³⁰

4. Besides the pragmatic value of being armed for self-defense, 18th and 19th Century Americans saw it as a vital element of the moral character of a free people.

In the philosophy of civic republicanism from which the Second Amendment partly derives, "the bearing of arms is the essential medium through which the individual asserts both his social power and his participation in politics

²⁸ Lawrence Southwick, "Self-Defense with Guns: The Consequences," 28 J. Crim. Justice 351-370 (2000) at 302.

²⁹ Jungyeon Tark & Gary Kleck, "Resisting Crime: The Effects of Victim Actions on the Outcomes of Crimes," 42 Criminology 861-909 (2004) at 902.

³⁰ Kleck & DeLone, "Victim Resistance and Offender Weapon Effects in Robbery", 9 J. Quant. Crimin. 55-81 (1993), Kates, "The Value of Civilian Arms Possession as Deterrent to Crime or Defense Against Crime", 18 American Journal of Criminal Law 113 (1991), G. Kleck, Point Blank: Guns and Violence in America (N.Y., Aldine, 1991), Gary Kleck, "Crime Control Through the Use of Force in the Private Sector", 35 Social Problems 1 (1988).

as a responsible moral being...."³¹ Historians recognize the traditional American view that the very survival of republican government depends on the "civic virtue ... of the armed freeholder: upstanding, courageous, self-reliant, individually able to repulse outlaws and oppressive officials, and collectively able to overthrow domestic tyrants and defeat foreign invaders."³²

To the Founders and their intellectual progenitors, being prepared for self-defense was a **moral** imperative as well as a pragmatic necessity... [¶] In the tradition from which the Second Amendment derives it was not only the unquestioned right, but a crucial element in the **moral** character, of every free man that he be armed and willing to defend his family and the community against crime both individually and by joining with his fellows in hunting criminals down when the hue and cry went up, and in more formal posse, and militia patrol duties, under the control of justices of the peace or

³¹ J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* 386 (Princeton, Princeton U. Press: 1975).

³² Robert Shalhope, *The Armed Citizen in the Early Republic*, 49 *Law & Contemp. Probs.* 125, 128; see also 127 and 138.

sheriffs.³³

Thomas Jefferson expressed this belief that the possession of arms is the foundation of the moral character necessary to a free people in a letter to his 15 year old nephew: "A strong body makes the mind strong. As to the species of exercises, I advise the gun. While this gives a moderate exercise to the body, *it gives boldness, enterprise and independence to the mind.* Games played with the ball, and others of that nature, are too violent for the body and *stamp no character on the mind.* Let your gun therefore be the companion of your walks."³⁴

5. The 14th Amendment was specifically intended to make the right to arms applicable against the states.

Pre-Civil War abolitionist legal theorists Lysander Spooner and Joel Tiffany argued that slavery was unconstitutional in that it deprived the slaves of their constitutional rights, including the right to arms.³⁵ In *Dred Scott* Chief Justice Taney admitted that, if they could be American citizens, blacks would enjoy all the

³³ Ideology, 9 Const. Comm. above at 89 and 94; see generally 94-97 (emphasis in original) citing Thomas Jefferson, Timothy Dwight, Joel Barlow and Francis Place. Compare Robert Shalhope, "The Ideological Origins of the Second Amendment", 69 Journal of American History 599, 603 ("Civic virtue came to be defined as the freeholder bearing arms in defense of his property and his state.").

³⁴ The Jefferson Cyclopedia 318 (Foley ed., reissued 1967) (*italics added*).

³⁵ See discussion in Stephen P. Halbrook, "That Every Man Be Armed": the Evolution of a Constitutional Right (1984) 102-03.

rights of citizens: "the full liberty of speech ... and to keep and carry arms wherever they went;" this was Taney's reason for declaring that blacks, whether slave or free, were not citizens and could never be citizens.³⁶

After the Civil War the Southern states tried to reestablish slavery in all but name by enacting and enforcing the "Black Codes," a scheme of laws against the new freedmen having guns and exercising a host of other rights which were considered those of free men.³⁷ But this reckoned without the indignant Republican Congress. For while there were no blacks in Southern legislatures, so also were there no Southerners in Congress. Secession had left the Republicans in complete control; and after the War they refused to re-admit Southerners on the ground that, though secession had been illegal, its effect had been to dissolve the Southern states. Those states were only readmitted to Congress on condition that they ratify the 14th Amendment and only after doing so.³⁸

³⁶ *Scott v. Sandford*, 60 U.S. 393, 417. See also *id.* at 450: "Nor can Congress deny the [white] people the right to keep and bear arms, the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding."

³⁷ *Heller*, *supra*, 128 S.Ct at 2809-10 "Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms." citing Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (1998).

³⁸ Reconstruction Acts of 1867: 14 Stat. 428, 15 Stat. 2, 14. 25. Cf. *United States v. Price*, 383 U.S. 787, 803-05 (1966).

Faced with Southern Black Codes and Klu Klux Klan (“KKK”) outrages, the Republican-dominated Congress of 1866 enacted the Fourteenth Amendment to (a) reverse *Dred Scott* by declaring all those born in the country citizens; and (b) prevent the disarmament of victims of KKK violence. Senator Howard introduced the Fourteenth Amendment in the Senate explaining that it would protect against state oppression:

The personal rights guaranteed and secured by the first eight amendments of the Constitution; *such as . . . 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*.³⁹

Reviewing this history *Heller* concludes: “It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense.”⁴⁰

Note that this understanding implied the existence of a right to arms against the states for it was they and not the federal government who were depriving blacks of arms.

³⁹ Emphasis added; quoted by Justice Black concurring in *Duncan*, supra, 391 U.S. at 166-67. As the historian of the 14th Amendment writes “the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States [included] the right... to bear arms.” Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 104 (Duke, 1986). See pp. 52, 53, 56, 72, 88, 140-1 and 164 for debate extolling the right to arms expressly.

⁴⁰ *Heller*, supra, 128 S.Ct. at 2811.

CONCLUSION

In sum, the generations which produced both the Second Amendment and the Fourteenth saw self-defense and the right to be armed for that purpose as “great fundamental” rights; indeed as the central “human rights.” That is closely assimilable to the standards for Due Process incorporation of a right against the states – that the right is either “fundamental to the American scheme of justice,” or “necessary to an Anglo-American regime of ordered liberty,” *Duncan* supra, 391 U.S. at 149 and 150, n.14.

Date: September 30, 2008

Law Offices of Vanessa A. Zecher

A handwritten signature in black ink, appearing to read 'Vanessa A. Zecher', written over a horizontal line.

Vanessa A. Zecher
Attorney for Amici

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached *amici curiae* brief is proportionately spaced, has a typeface of 14 points and contains 4232 words.

Date: September 30, 2008

Law Offices of Vanessa A. Zecher

A handwritten signature in black ink, appearing to read 'Vanessa A. Zecher', written over a horizontal line.

Vanessa A. Zecher
Attorney for Amici

CERTIFICATE OF SERVICE

I, Claudia Ayala, declare that I am employed in the City of Long Beach, County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action; my business address is: 180 East Ocean Blvd., Suite 200, Long Beach, CA 95125.

On October 2, 2008, I served two copies of the following documents:
**AMICUS CURIAE BRIEF (ON SECOND AMENDMENT ISSUES ONLY)
 OF PROFESSORS OF LAW, HISTORY, POLITICAL SCIENCE
 OR PHILOSOPHY IN SUPPORT OF THE APPELLANTS
 AND IN SUPPORT OF REVERSAL**

on the following interested party(s) in this action:

Donald E. J. Kilmer, Jr. Attorney at Law Law Offices of Donald Kilmer, A.P.C. 1645 Willow Street, Suite 150 San Jose, California 95125	T. Peter Pierce Richards Watson & Gershon Number One Civic Center Circle 355 South Grand Ave., 40 th Floor Los Angeles, CA 90071-3101
Richard Winnie, Esq. Alameda County Counsel 1221 Oak Street, Suite 463 Oakland, California 94612-4296	

VIA: FEDERAL EXPRESS

[XX] By contracting with a commercial carrier for delivery to the address listed above within in accordance with Federal Rule of Appellate Procedure 25 (a)(2)(B)(i), (ii). Said documents were also dispatched for filing with the Clerk of the Court for delivery by a third party commercial carrier pursuant to FRAP 25(a)(2)(B)(i),(ii). This was done by placing the orders for shipment, making all payments, and delivering the documents to a FedEx/Kinko's before midnight on October 2, 2008.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 2, 2008, at San Jose, California.



 Claudia Ayala