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# AN INTERNATIONAL HUMAN RIGHT TO KEEP AND BEAR ARMS

Christopher J. Schmidt\*

## INTRODUCTION

Have all the rights in the Bill of Rights been translated into international human rights? One right that has not become an international human right is found in the Second Amendment of the United States Constitution. It provides: “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.”<sup>1</sup>

It is curious that no international human rights instrument protects the right to keep and bear arms for two reasons. First, self-defense is the only exception to the use of force set forth in the United Nations Charter in article 51.<sup>2</sup> Second, representative democracy is intrinsic in every international human rights agreement that presupposes the people have the right to rise up and overthrow a non-democratic form of government.

Part I of the Article analyzes the Second Amendment, which secures an individual right to keep and bear arms. This analysis shows the two main purposes of the amendment are to prevent government tyranny and secure the right to individual self-defense. Part II discusses international human rights agreements that support the prevention of government tyranny and that recognize some rights related to the right to individual self-defense. Part III discusses why an international human right to keep and bear arms is necessary. This part shows the international community is implementing more gun control laws, while government tyranny and crime against individuals are still prevalent worldwide, thus, people need arms as a means to protect themselves. Part IV describes what a treaty establishing an international human right to keep and bear arms should provide. This part describes what the purpose of the treaty should be, as well as what specific rights should be secured. Finally, it describes what level of gun regulation would be permissible for states that sign the treaty.

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<sup>1</sup> U.S. CONST. amend. II.

<sup>2</sup> U.N. Charter art. 51.

## I. THE AMERICAN RIGHT TO KEEP AND BEAR ARMS

The Second Amendment must be analyzed to determine if it secures an individual right to keep and bear arms or just a collective right of a militia to keep and bear arms. I analyze the amendment's text, American cases interpreting it, and its historical understanding.

## A. Text

The Second Amendment provides: "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."<sup>3</sup> This text reveals an individual right to keep and bear arms exists.<sup>4</sup> "Rights" in the American Bill of Rights belong to individuals.<sup>5</sup> The government does not have rights,<sup>6</sup> it has "powers" or authorities.<sup>7</sup> Nothing in the text suggests the right pertains solely to the militia; instead, it applies to the people.<sup>8</sup>

The term "the right of the people" appears in the First and Fourth Amendments of the United States Constitution as well.<sup>9</sup> Those rights—free speech, free exercise of religion, assembly, petition, and freedom from unreasonable searches and seizures—unquestionably are individual rights.<sup>10</sup> It would be strange to think the same words constitute an individual right in the First and Fourth Amendments and something different in the Second Amendment.<sup>11</sup> Further, the rights in at least the first nine amendments

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<sup>3</sup> U.S. CONST. amend. II.

<sup>4</sup> William J. Michael, *Questioning the Necessity of Concealed Carry Laws*, 38 AKRON L. REV. 53, 57 (2005).

<sup>5</sup> ANDREW P. NAPOLITANO, CONSTITUTIONAL CHAOS 56 (2004); see also *United States v. Emerson*, 270 F.3d 203, 228 (5th Cir. 2001) (concluding "people" have rights), *cert. denied*, 536 U.S. 907 (2002).

<sup>6</sup> *Emerson*, 270 F.3d at 228.

<sup>7</sup> *Id.*

<sup>8</sup> Anthony Gallia, "Your Weapons, You Will Not Need Them." *Comment on the Supreme Court's Sixty-Year Silence on the Right to Keep and Bear Arms*, 33 AKRON L. REV. 131, 145 (1999).

<sup>9</sup> U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

<sup>10</sup> See NAPOLITANO, *supra* note 5, at 56.

<sup>11</sup> *Id.* A number of sources conclude that "the right of the people" in multiple constitutional amendments proves that the Second Amendment is an individual right. Don B. Kates, Jr., *Gun Control: Separating Reality from Symbolism*, 20 J. CONTEMP. L. 353, 364–65 (1994) [hereinafter Kates, *Gun Control*]; Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 213 (1983) [hereinafter Kates, *Handgun Prohibition*]; David B. Kopel & Richard E. Gardner, *The Sullivan Principles:*

are individual rights.<sup>12</sup> The Tenth Amendment, placed at the end of the Bill of Rights, reserves remaining powers to the states.<sup>13</sup> If the Second Amendment protected a state-militia power it would have been more properly placed at the end of the Bill of Rights after the listing of individual rights and with the Tenth Amendment's reservation of powers to the states.<sup>14</sup> Since the Second Amendment speaks to "the right of the people" in the beginning of the Bill of Rights' listing of individual rights, a natural reading of it leads to the conclusion that it is an individual right.<sup>15</sup>

The use of the word "keep" also shows the Second Amendment secures an individual right. The plain meaning of "keep" arms is individual in nature; there is no indication in the text that the right is limited to keeping arms while engaged in military service or as a militia member.<sup>16</sup> Early colonial and state statutes also used "keep" to describe individual arms possession.<sup>17</sup> If the Second Amendment only provided a collective right for a militia there would seemingly be no need for individuals to "keep" their own arms as the militia would dispense them to individuals when they were called to duty.<sup>18</sup>

The text, while unusually organized to the modern reader, is clear. The right protected is to "keep and bear arms,"<sup>19</sup> which is granted as "the right of the people."<sup>20</sup>

*Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGIS. J. 737, 739–40 (1995); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 653–54 (1989); Michael, *supra* note 4, at 57; L.A. Powe, Jr., *Guns, Words and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1338–39 (1997); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1237–38 (1984); see also Robert Harman, Note and Comment, *The People's Right to Bear Arms—What the Second Amendment Really Protects: An Analysis of the Current Debate Regarding What the Second Amendment Really Protects*, 18 WHITTIER L. REV. 411, 413–14 (1997) (stating that "the people" means an individual right to bear arms).

<sup>12</sup> Kates, *Handgun Prohibition*, *supra* note 11, at 220.

<sup>13</sup> U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

<sup>14</sup> Kates, *Handgun Prohibition*, *supra* note 11, at 220; see also ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 137 n.13 (1997) ("It would also be strange to find in the midst of a catalog of the rights of *individuals* a provision securing to *the states* the right to maintain a designated 'Militia.'").

<sup>15</sup> *United States v. Emerson*, 270 F.3d 203, 227–29 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002); Kates, *Handgun Prohibition*, *supra* note 11, at 213, 218; see also Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1264 (1992) (arguing that the grammar and syntax of the Second Amendment, including the right imbuing to the people as opposed to the states, leads to an individual rights interpretation).

<sup>16</sup> *Emerson*, 270 F.3d at 232; see also Anthony J. Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57, 86 (1995) (concluding "keep" refers to individual possession of arms).

<sup>17</sup> Kates, *Handgun Prohibition*, *supra* note 11, at 219.

<sup>18</sup> See *id.*

<sup>19</sup> U.S. CONST. amend. II.

<sup>20</sup> *Id.*

That right "'shall not be' infringed."<sup>21</sup> Consequently, the Second Amendment's text provides an individual right to keep and bear arms.<sup>22</sup>

The structure of the Second Amendment's text was more commonplace in the founding era. Dozens of individual rights provisions in early state constitutions were structured like the Second Amendment.<sup>23</sup> These provisions established a preamble-like statement in their first clause to explain why the individual right that followed in the second clause was secured.<sup>24</sup> For example, the Rhode Island Constitution of 1842 stated "[t]he liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments on any subject, being responsible for the abuse of that liberty . . . ."<sup>25</sup>

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<sup>21</sup> *Id.*; see also Van Alstyne, *supra* note 11, at 1242.

<sup>22</sup> For a review of other sources arguing that the Second Amendment constitutes an individual right, see STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED, THE EVOLUTION OF A CONSTITUTIONAL RIGHT 1–6 (Independent Institute 1994) (1984); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS 162 (1994); Amar, *supra* note 15, at 1264–65; Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1141 (1996); Brannon P. Denning, *Gun Shy: The Second Amendment as an "Under-enforced Constitutional Norm,"* 21 HARV. J.L. & PUB. POL'Y 719, 728–29 (1998); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 2 (1996); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 475 (1995); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831, 832 (1998). For a review of sources arguing that the Second Amendment constitutes a collective right, see DENNIS A. HENIGAN ET AL., GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA 1–3 (1995); Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 3–4 (2000); Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1367 (1993); Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661, 661 (1989); Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 31 (1984); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 347 (2000); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 30 (1989); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107, 107–10 (1991); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 57–58, 62 (1995); Kenneth Lasson, *Blunderbuss Scholarship: Perverting the Original Intent and Plain Meaning of the Second Amendment*, 32 U. BALT. L. REV. 127, 130 (2003); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 554 (1991); William M. Aukamp, *No "Individual" Gun Right*, NAT'L L.J., June 14, 1999, at A22.

<sup>23</sup> Eugene Volokh, Testimony of Eugene Volokh on the Second Amendment, Senate Subcommittee on the Constitution (Sept. 23, 1998), <http://www1.law.ucla.edu/~volokh/beararms/testimon.htm> [hereinafter Testimony of Eugene Volokh].

<sup>24</sup> *Id.*; Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 814–21 (1998) (listing examples from state constitutions).

<sup>25</sup> Volokh, *supra* note 24, at 814 (alteration in original).

The text of the Second Amendment's preamble, providing that "[a] well regulated Militia, being necessary to the security of a free State,"<sup>26</sup> does not undercut the conclusion that the Second Amendment secures an individual right. No source, to my knowledge, advances a collective rights theory of the Second Amendment in the eighteenth century, including in writings between 1787 and 1791.<sup>27</sup> Further, apparently every known scholarly commentary of the nineteenth century concludes the Second Amendment secured an individual right.<sup>28</sup> A militia was traditionally thought of as comprised of law-abiding, adult males in the citizenry.<sup>29</sup> The members and arms of a militia are thus a collection of individuals and their arms.<sup>30</sup> Since citizens constituted the militia, an individual right to possess arms necessarily follows.<sup>31</sup> A militia is not "a select group of citizen soldiers."<sup>32</sup> As George Mason said, "[it is] the body of the people, trained to arms"<sup>33</sup> that James Madison believed could amount "to near half a million of citizens with arms in their hands" at the time of the founding of the United States.<sup>34</sup> The militia language indicates why the people have arms; it does not affect what "people" means in the amendment.<sup>35</sup> A citizen militia cannot exist unless individual citizens possess arms.<sup>36</sup> Consequently, the Second Amendment secures both an individual right and a state-function to assemble a militia.<sup>37</sup>

A review of past and current militia legislation verifies the Second Amendment's militia language secures an individual right to keep and bear arms. The Militia Act of 1792 required free, able-bodied, white male citizens from ages eighteen to forty-five to enroll in the militia and secure an arm within six months of their registration.<sup>38</sup> Since the Militia Act required individuals to obtain and possess their own arms to ensure a

<sup>26</sup> U.S. CONST. amend. II.

<sup>27</sup> NAPOLITANO, *supra* note 5, at 56.

<sup>28</sup> David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYUL REV. 1359, 1544.

<sup>29</sup> NAPOLITANO, *supra* note 5, at 56–57.

<sup>30</sup> *Id.*; see also Dennis, *supra* note 16, at 82–83 (concluding a militia is a collection of individuals); Van Alstyne, *supra* note 11, at 1243–44 (concluding a well-regulated militia is made up of the ordinary citizenry who have the right to possess arms).

<sup>31</sup> Kates, *Handgun Prohibition*, *supra* note 11, at 217–18. Even if the Second Amendment secures a collective right of the militia, it can only be meaningfully exercised "if each individual has the right to keep and bear arms." Kevin J. Worthen, *The Right to Keep and Bear Arms in Light of Thornton: The People and Essential Attributes of Sovereignty*, 1998 BYU L. REV. 137, 163.

<sup>32</sup> SCALIA, *supra* note 14, at 136 n.13 (quoting MALCOLM, *supra* note 22, at 136).

<sup>33</sup> THE PAPERS OF GEORGE MASON 288 (Robert A. Rutland ed., 1970).

<sup>34</sup> THE FEDERALIST NO. 46, at 321 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>35</sup> Michael, *supra* note 4, at 59.

<sup>36</sup> Kates, *Handgun Prohibition*, *supra* note 11, at 217–218; see NAPOLITANO, *supra* note 5, at 57.

<sup>37</sup> Amar, *supra* note 15, at 1265.

<sup>38</sup> Pub. L. No. 33, 1 Stat. 271 (1792), *quoted in* Testimony of Eugene Volokh, *supra* note 23, pt. VII.A & n.50.

militia exists, it would be curious to advance an interpretation of the Second Amendment allowing individuals to be prevented from possessing arms. The current Militia Act recognizes both an organized militia of seventeen to forty-five year-old, able-bodied males who are part of the National Guard and an unorganized militia who are able-bodied males that are not part of the National Guard.<sup>39</sup> Women who are members of the National Guard are part of the organized militia.<sup>40</sup> For the unorganized militia to be effective, individuals need a right to possess arms.

### B. Cases

The United States Supreme Court has not specifically addressed the Second Amendment since 1939,<sup>41</sup> when it concluded the amendment did not guarantee a citizen the “right to possess a sawed-off shotgun because” it was not ““ordinary military equipment”” that could ““contribute to the common defense.””<sup>42</sup> In its decision “the Court did not, however, attempt to define, or . . . construe, the substantive right protected by the Second Amendment.”<sup>43</sup>

The Court addressed the amendment three times in the late nineteenth century. In each of those cases, the Court concluded the amendment applied only to the federal government and did not apply to state governments.<sup>44</sup> As of 1998, the Supreme Court had mentioned the Second Amendment only twenty-seven times, and twenty-two of those only passingly mentioned it.<sup>45</sup> Consequently, the Court has not directly addressed what right the Second Amendment secures.

However, the Supreme Court may have an opportunity very soon to directly address what right the Second Amendment secures. The United States Court of Appeals for the District of Columbia Circuit recently determined the Second Amendment protects an individual right to keep and bear arms.<sup>46</sup> The court held certain gun control statutes in the District of Columbia violated the Second Amendment because, in essence, they generally prevented individuals from possessing a functional firearm in

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<sup>39</sup> 10 U.S.C. § 31 (2000).

<sup>40</sup> *Id.*

<sup>41</sup> *Printz v. United States*, 521 U.S. 898, 938 n.1 (1997) (Thomas, J., concurring) (citing *United States v. Miller*, 307 U.S. 174 (1939)); *see also* NAPOLITANO, *supra* note 5, at 50–51 (stating the Supreme Court has not addressed the Second Amendment since *Miller*).

<sup>42</sup> *Printz*, 521 U.S. at 938 n.1 (quoting *Miller*, 307 U.S. at 178).

<sup>43</sup> *Id.*; *see also* Gallia, *supra* note 8, at 145 (noting that *Miller* did not address the substantive right to keep and bear arms).

<sup>44</sup> *Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 253 (1886); *United States v. Cruikshank*, 92 U.S. 542, 542 (1875); *see also* Gallia, *supra* note 8, at 150 (stating that the three cases above have concluded that the Second Amendment applies only to the federal government).

<sup>45</sup> Testimony of Eugene Volokh, *supra* note 23, pt. III.

<sup>46</sup> *Parker v. District of Columbia*, No. 04-7041, 2007 WL 702084, at \*21 (D.C. Cir. 2007).

their home for self defense.<sup>47</sup> The case could give the Supreme Court a chance to clarify the Second Amendment's meaning.

### *C. Historical Understanding*

A historical understanding of the Second Amendment shows it was ratified to serve two purposes. First, the amendment secures the right of the people to resist government tyranny. Second, it provides the means for the people to ensure the right to individual self-defense.

#### 1. Preventing Government Tyranny

The American right to keep and bear arms was formed partially to protect against government tyranny. This purpose, while focusing on a vision for America, relates to how potential government tyranny should be addressed throughout the world. Essentially, the means of preventing government tyranny apply beyond national borders. First, I analyze the colonial American resistance to the power of a standing army. Second, I analyze how the right to keep and bear arms was designed to prevent government tyranny.

The right to keep and bear arms originated from the people's fear of the power of a standing army to oppress them.<sup>48</sup> During the founding of America, "[t]here was a significant . . . sentiment against the mere presence of standing armies, particularly in peacetime."<sup>49</sup> This was expressed in the Declaration of Independence, which contended, "[the King] has kept among us, in times of peace, Standing Armies without the Consent of our legislatures."<sup>50</sup> The Declaration of Independence also stated "[the King] has affected to render the Military independent of and superior to the Civil power."<sup>51</sup> When Americans discussed what the Constitution should entail, the Anti-Federalists thought the potential power for the federal legislature to raise and support armies during peacetime and wartime, and its power to control the militia, would consolidate government and destroy liberty.<sup>52</sup> An Anti-Federalist, "Brutus," argued that since standing armies in peacetime were dangerous to the people's liberty, they should only be raised by the legislature to protect America.<sup>53</sup> "Brutus" further argued that

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<sup>47</sup> *Id.* at \*26.

<sup>48</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1890 (1833); *see also* Brent J. McIntosh, *The Revolutionary Second Amendment*, 51 ALA. L. REV. 673, 683–84 (2000) (describing the right to bear arms as addressing fears of oppression by a standing army).

<sup>49</sup> Christopher J. Schmidt, *Could a CIA or FBI Agent Be Quartered in Your House During a War on Terrorism, Iraq or North Korea?*, 48 ST. LOUIS U. L.J. 587, 651 (2004).

<sup>50</sup> THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776).

<sup>51</sup> *Id.* para. 14.

<sup>52</sup> THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 273 (Ralph Ketchum ed., 1986).

<sup>53</sup> *Id.* at 291.



two-thirds of both the houses of the legislature would have to assent for troops to be raised in peacetime.<sup>54</sup>

Federalists also expressed concern over the power of standing armies. James Madison warned that a standing army was “an object of laudable circumspection and precaution.”<sup>55</sup> He also argued a nation “will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.”<sup>56</sup> Alexander Hamilton, another Federalist, provided cautionary advocacy for the new American government to raise a standing army.<sup>57</sup> He stated:

[T]he people are in no danger of being broken to military subordination. . . . The smallness of the army renders the natural strength of the community an overmatch for it; and the citizens, not habituated to look up to the military power for protection, or to submit to its oppressions, neither love nor fear the soldiery: They view them with a spirit of jealous acquiescence in a necessary evil, and stand ready to resist a power which they suppose may be exerted to the prejudice of their rights. The army under such circumstances, may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection; but it will be unable to enforce encroachments against the united efforts of the great body of the people.<sup>58</sup>

“Six of the original states [also] expressed serious concern about [the power of] standing armies.”<sup>59</sup> The Pennsylvania and New Hampshire constitution barred the keeping of standing armies.<sup>60</sup> New Hampshire, Massachusetts, Delaware, and Maryland’s state constitutions required legislative intervention for prior approval of any standing army.<sup>61</sup>

Ultimately, the United States Constitution allows Congress to raise a standing army in peacetime,<sup>62</sup> but the military’s power is subject to many limitations,<sup>63</sup> specifically

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<sup>54</sup> *Id.*

<sup>55</sup> THE FEDERALIST NO. 41, at 271 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* NO. 8, at 47–48 (Alexander Hamilton).

<sup>58</sup> *Id.*

<sup>59</sup> Schmidt, *supra* note 49, at 651.

<sup>60</sup> PA. CONST. art. I, § 22; N.H. CONST. pt. I, art. 25; *see also* THE FEDERALIST NO. 24, at 153 n.1 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>61</sup> DEL. CONST. pt. I, art. 1, § 19; MASS. CONST. pt. I, art. 27; MD. CONST. pt. I, art. 29; N.H. CONST. pt. I, art. 25.

<sup>62</sup> U.S. CONST. art. I, § 8.

<sup>63</sup> *Id.* (“Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To

“no Appropriation of Money to that Use shall be for a longer Term than two Years.”<sup>64</sup> Alexander Hamilton specifically “believed the clause forbidding ‘the appropriation of money for the support of an army for any longer period than two years [is] a precaution . . . [that] will appear to be a great and real security against the keeping up of troops without evident necessity.’”<sup>65</sup> “[W]hile the federalist position appeared to prevail in the Constitution’s textual grant to Congress to undertake [raising a standing army in peacetime,] even those who supported Congress’s powers in that regard cautioned against the power of a standing army.”<sup>66</sup>

The Founders viewed the right to resist tyranny as a mainstay of organized constitutional government.<sup>67</sup> Because of the fear of a standing army’s power over the people, the possession of arms to counterbalance state power was “viewed as part of the rights of Englishmen by many on both sides of the Atlantic” during the American founding era.<sup>68</sup> Noah Webster, a Federalist, concluded “[b]efore a standing army can rule, the people must [first] be disarmed.”<sup>69</sup> A citizen-formed militia is designed to stop a tyrannical regime<sup>70</sup> that uses a standing army to suppress its people. An armed populace may not have to act, as its mere potential for action deters oppressive governments.<sup>71</sup> The right to keep and bear arms is therefore a “moral check against the usurpation and arbitrary power of rulers.”<sup>72</sup> The armed populace serves this “checking value” by preventing the government from having a monopoly on arms ownership.<sup>73</sup> In order to

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provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”); Schmidt, *supra* note 49, at 653.

<sup>64</sup> U.S. CONST. art. I, § 8.

<sup>65</sup> Schmidt, *supra* note 49, at 653 (alteration in original) (quoting THE FEDERALIST NO. 24, at 153 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

<sup>66</sup> Schmidt, *supra* note 49, at 653.

<sup>67</sup> Daniel D. Polsby & Don B. Kates, Jr., *Of Holocausts and Gun Control*, 75 WASH. U. L.Q. 1237, 1255 (1997).

<sup>68</sup> Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 322 (1991).

<sup>69</sup> Dennis, *supra* note 16, at 83 (citing NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION (1787), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 56 (Paul L. Ford ed., Da Capo Press, 1968) (1888)).

<sup>70</sup> Oskar M. Pérez, *United States v. Emerson: The Decision That Will Potentially Force the Supreme Court to Finally Decide Whether the Second Amendment Protects the State or the People*, 48 LOY. L. REV. 367, 384 (2002); see also Gallia, *supra* note 8, at 147 (stating a reason for the right to keep and bear arms is to prevent tyranny of government).

<sup>71</sup> *State v. Kessler*, 614 P.2d 94, 98 (Or. 1980); see Gallia, *supra* note 8, at 147.

<sup>72</sup> *Kessler*, 614 P.2d at 98.

<sup>73</sup> Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 94 (1992) (“Arms possession for protection of self, family and polity was both the hallmark of the individual’s freedom and one of the two primary factors in . . . developing

ensure tyranny does not ensue, individuals must naturally have the right to possess arms.<sup>74</sup> How can the people prevent an armed tyrant from waging war on them if they are unarmed?<sup>75</sup> Preventing the people from possessing arms plus allowing a standing army creates the possibility that liberty may be destroyed.<sup>76</sup>

The Federalists described how individuals could overpower a tyrannical regime that uses a standing army. Madison described the standing army as not reaching more than 25,000 to 30,000 men.<sup>77</sup> Madison argued a standing army “would be opposed [by] a militia amounting to [nearly 500,000] citizens with arms . . . fighting for their common liberties.”<sup>78</sup> Madison confronted the assertion the people could never defeat an organized army by stating the colonists successfully defeated the British.<sup>79</sup> Madison went on to describe how the Americans have an advantage of being armed, which “Americans possess over the people of almost every other nation.”<sup>80</sup> He described European governments as “afraid to trust the people with arms.”<sup>81</sup>

Hamilton likewise described how the people could defend themselves from government tyranny. He said when the government becomes “usurpers,” the people can take measures for their defense.<sup>82</sup> Hamilton affirmatively stated in these instances “[t]he citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair.”<sup>83</sup> Hamilton later described how the people could fend off a standing army with their arms:

[An] army can never be formidable to the liberties of the people, while there is a large body of citizens little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens. This appears to me

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the independent, self-reliant, responsible character which classical political philosophers deemed necessary to the citizenry of a free state.”); Levinson, *supra* note 11, at 648; Polsby & Kates, *supra* note 67, at 1269–70, 1269 n.103 (“The Founders ‘believed that the perpetuation of a republican spirit and character within their society depended upon the freeman’s possession of arms as well as his ability and willingness to defend both himself and his society.’” (quoting Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 138 (1986))).

<sup>74</sup> United States v. Emerson, 270 F.3d 203, 258 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

<sup>75</sup> Levinson, *supra* note 11, at 648.

<sup>76</sup> *Emerson*, 270 F.3d at 256 (citing 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES 300 (1803)).

<sup>77</sup> THE FEDERALIST NO. 46, at 321 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 322.

<sup>82</sup> *Id.* NO. 28, at 178–79 (Alexander Hamilton).

<sup>83</sup> *Id.* at 179.

the only substitute that can be devised for a standing army; the best possible security against it, if it should exist.<sup>84</sup>

Madison and Hamilton's writings show the Founders feared a standing army and the potential for government tyranny.<sup>85</sup> The Founders viewed an armed citizenry as a protection against such government tyranny.<sup>86</sup>

History shows the militia, not a standing army, was used to defend America. Most of the American fighting in the War of 1812 was left to the militia.<sup>87</sup> While America was successful in retaining its sovereignty in the War of 1812,<sup>88</sup> the militia's performance was described by some as sub-standard.<sup>89</sup> Consequently, America has not used the militia as the primary unit in military conflicts since the War of 1812.<sup>90</sup>

If the right to keep and bear arms is designed to prevent governmental tyranny by serving as a check against the government,<sup>91</sup> the right to keep and bear arms must belong to individuals. A state-run militia would eliminate the checking function of the citizen-formed militia on the State. If the State controls when the militia exists and when it can access arms, the militia would not be a check on the State but an arm of the State. This would contradict the citizen-formed militia's purpose and function. The right to keep and bear arms creates a citizen militia designed to defend against "domestic usurpations of power by rulers."<sup>92</sup> Advancing a theory that grants domestic rulers control of the militia prevents the citizen militia from fulfilling its purpose of preventing potential government tyranny.

## 2. Individual Self-Defense

The Framers of the Second Amendment "unquestionably believed [it] would guarantee an individual's right to self-defense."<sup>93</sup> Self-defense was recognized as

<sup>84</sup> *Id.* NO. 29, at 84–85 (Alexander Hamilton).

<sup>85</sup> Michael, *supra* note 4, at 63.

<sup>86</sup> *Id.* at 63–64.

<sup>87</sup> Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 301 (2003).

<sup>88</sup> *War of 1812*, MSN ENCARTA pt. VIII, [http://www.encyclopedia.msn.com/encyclopedia\\_761571913\\_6/war\\_of\\_1812.html](http://www.encyclopedia.msn.com/encyclopedia_761571913_6/war_of_1812.html) (last visited Jan. 6, 2007).

<sup>89</sup> Dauber, *supra* note 87, at 301; Robert J. Spitzer, *The Second Amendment "Right to Bear Arms" and United States v. Emerson*, 77 ST. JOHN'S L. REV. 1, 5–6 (2003).

<sup>90</sup> Spitzer, *supra* note 89, at 5–6.

<sup>91</sup> Levinson, *supra* note 11, at 649 (citing THOMAS COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 298 (3d ed. 1898)); *see also* McIntosh, *supra* note 48, at 673–74, 679 (citing AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 47 (1998)).

<sup>92</sup> 3 STORY, *supra* note 48, § 1897 (emphasis added).

<sup>93</sup> NAPOLITANO, *supra* note 5, at 56; *see also* SCALIA, *supra* note 14, at 43 (discussing the Second Amendment and noting the Founders believed the right to self defense to be fundamental); *see also* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL*

a privilege in civil and criminal law in England since 1400.<sup>94</sup> The right to keep and bear arms was recognized, to a degree, in the English Bill of Rights of 1689 that provided “protestants may have arms for their defense suitable to their conditions and as allowed by law.”<sup>95</sup>

The Framers likely did not believe they were creating new rights when they ratified the Second Amendment and the rest of the Bill of Rights.<sup>96</sup> They were recognizing rights already part of English constitutional heritage that were derived from natural law.<sup>97</sup> The Framers believed individual self-defense was an inalienable natural right.<sup>98</sup> They saw individuals as self-reliant who defended their family, home, and property.<sup>99</sup> The cornerstone of strength of a republican society was related to an individual’s ability to arm himself against threats to his person, property, or as discussed above, the State.<sup>100</sup>

The right to keep and bear arms was a by-product of the natural right to self-defense and survival.<sup>101</sup> Since the right to self-defense is a natural right, the right to arms for self-defense is hard to question.<sup>102</sup> Consequently, the right to keep and bear arms was also described as a natural right that does not belong to the government but to the individual.<sup>103</sup> In October of 1787 the Boston Chronicle stated “‘it was the law of nature to every man to defend himself, and unlawful for any man to deprive him of those weapons of self-defence.’”<sup>104</sup> William Blackstone concluded there is a right to have and use arms for self-preservation and defense.<sup>105</sup> He described self-defense

REVIEW 94–95 (1980) (mentioning that individual self-protection was referred to more than few times during the creation of the Second Amendment).

<sup>94</sup> State v. Kessler, 614 P.2d 94, 98 (Or. 1980) (citing W. PROSSER, LAW OF TORTS 108 (4th ed. 1971)).

<sup>95</sup> Bill of Rights, 1 W. & M., c.2 (Eng.), reprinted in W.C. COSTIN & J. STEVEN WATSON, THE LAW AND WORKING OF THE CONSTITUTION: FORUMS 1660–1914, at 69 (2d ed., 1969).

<sup>96</sup> Cottrol & Diamond, *supra* note 68, at 320 (citing BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 184–89, 193–94 (1967)).

<sup>97</sup> *Id.*

<sup>98</sup> Kates, *Handgun Prohibition*, *supra* note 11, at 230; see also Polsby & Kates, *supra* note 67, at 1259 (recognizing that self-defense was viewed at the founding as a natural right).

<sup>99</sup> Kates, *Handgun Prohibition*, *supra* note 11, at 232.

<sup>100</sup> *Id.* at 231.

<sup>101</sup> David Thomas Konig, *The Persistence of Resistance: Civic Rights, Natural Rights, and Property Rights in the Historical Debate over “The Right of the People to Keep and Bear Arms,”* 73 FORDHAM L. REV. 539, 544 (2004).

<sup>102</sup> See Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 250 (2004) (stating the right to keep and bear arms is essentially a natural right to self-defense); Dennis, *supra* note 16, at 66 (stating the personal right to carry arms “aids those citizens in exercising the[] natural right [to] self-defense”).

<sup>103</sup> Pérez, *supra* note 70, at 384.

<sup>104</sup> HALBROOK, *supra* note 22, at 221 n.115 (quoting BOSTON INDEP. CHRON., Oct. 25, 1787).

<sup>105</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*140 (1765); see also Donald W. Dowd, *The Relevance of the Second Amendment to Gun Control Legislation*, 58 MONT. L. REV. 79,

as the primary law of nature and possessing arms for individual defense as a natural right.<sup>106</sup> Blackstone viewed “the right to possess arms as one of the five auxiliary rights of English subjects without which . . . primary rights could not be maintained.”<sup>107</sup> He stated “‘arms for their defence, suitable to their condition and degree, and such as are allowed by law’ which made possible ‘the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.’”<sup>108</sup> James Madison described the right to bear arms as an essential and sacred right that each individual reserves to themselves.<sup>109</sup> Thomas Jefferson believed the people have the right and duty to be armed.<sup>110</sup> Even John Adams, a Founder skeptical of an individual right to keep and bear arms, concluded he opposed “arms in the hands of citizens, to be used at individual discretion, *except in private self-defen[s]e*.”<sup>111</sup> He likely made this conclusion because he believed that self-defense was a natural right.<sup>112</sup>

Other founding era statements surrounding the right to keep and bear arms follow a natural rights tone. Story stated the right to bear arms “has justly been considered as the palladium of the liberties of a republic.”<sup>113</sup> Similar language includes “‘to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike . . . how to use them.’”<sup>114</sup>

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100 n.82 (1997) (noting Blackstone’s writing reflected the common law value of self-defense).

<sup>106</sup> Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 154 (1997) (quoting BLACKSTONE, *supra* note 105, at \*143–44); see also Haydn J. Richards, Jr., *Redefining the Second Amendment: The Antebellum Right to Keep and Bear Arms and Its Present Legacy*, 91 KY. L.J. 311, 350 (2002–2003) (noting that the Founders viewed the right to keep and bear arms as a natural right).

<sup>107</sup> Cottrol & Diamond, *supra* note 68, at 322 (citing BLACKSTONE, *supra* note 105, at \*143–45).

<sup>108</sup> Stephen P. Halbrook, *The Freedmen’s Bureau Act and the Conundrum over Whether the Fourteenth Amendment Incorporates the Second Amendment*, 29 N. KY. L. REV. 683, 689 (2002) (quoting BLACKSTONE, *supra* note 105, at \*143–44).

<sup>109</sup> NAPOLITANO, *supra* note 5, at 57.

<sup>110</sup> *Id.*

<sup>111</sup> Michael, *supra* note 4, at 62 n.49 (emphasis added) (quoting 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 197 (Charles F. Adams ed., 1851)); see Kates, *Handgun Prohibition*, *supra* note 11, at 228 (citing 3 JAMES ADAMS, A DEFENSE OF THE CONSTITUTIONS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA 475 (1787–88)).

<sup>112</sup> Dennis, *supra* note 16, at 73 (citing BOSTON GAZETTE, Sept. 5, 1763, *reprinted in* 3 THE WORKS OF JOHN ADAMS, *supra* note 111, at 438) (noting John Adams believed self-defense was a natural right); see also *id.* (noting John Adams viewed the preservation of person as an “indisputable right of nature”).

<sup>113</sup> 2 STORY, *supra* note 48, § 1897.

<sup>114</sup> Levinson, *supra* note 11, at 649 (quoting LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 124 (W. Bennett ed., 1978)).

The Framers understood the Second Amendment to provide for individual self-defense against crimes.<sup>115</sup> When the Constitution was ratified, a professional police force did not exist and did not come into being for about fifty years.<sup>116</sup> Keeping and possessing arms was necessary for self-defense in colonial and frontier America.<sup>117</sup> Guns in colonial America were as necessary as a plow or shelter.<sup>118</sup> Gun possession helps even the playing field between the potentially weak victim and the strong attacker, as scholar Thomas Paine indicated: “‘Arms like laws . . . discourage and keep the invader and plunderer in awe and preserve order in the world . . . Horrid mischief would ensue were [victims] deprived of the use of them . . . the weak will become a prey to the strong.’”<sup>119</sup>

A good way to determine what the American right to keep and bear arms means is to evaluate state law concerning keeping and bearing arms at the founding era.<sup>120</sup> The right was “of paramount importance to state leaders” then.<sup>121</sup> “Five state ratifying conventions recommended” the Constitution include a right to keep and bear arms,<sup>122</sup> and “[m]any early state [constitutions] . . . protected the right to keep and bear arms.”<sup>123</sup> Many of them stated one could keep and bear arms to defend one’s self and the State.<sup>124</sup> The rights in these constitutions protected against state government power; thus, they must belong to individuals.<sup>125</sup> In the nineteenth century the right to keep and bear arms

<sup>115</sup> *Id.* at 646 & n.43.

<sup>116</sup> *Id.* at 646.

<sup>117</sup> Michael, *supra* note 4, at 64 n.55 (citing David Harmer, *Second Amendment Symposium: Securing a Free State: Why the Second Amendment Matters*, 1998 BYU L. REV. 55, 85).

<sup>118</sup> Konig, *supra* note 101, at 544.

<sup>119</sup> Polsby & Kates, *supra* note 67, at 1269 (omissions in original) (quoting 1 WRITINGS OF THOMAS PAINE 56 (M. Conway ed., 1894)).

<sup>120</sup> See generally Robert A. Creamer, Note, *History is Not Enough: Using Contemporary Justifications for the Right to Keep and Bear Arms in Interpreting the Second Amendment*, 45 B.C. L. REV. 905, 938 (2004).

<sup>121</sup> Dennis, *supra* note 16, at 69.

<sup>122</sup> *Id.*

<sup>123</sup> Testimony of Eugene Volokh, *supra* note 23, pt. 2.

<sup>124</sup> CONN. CONST. art. I, § 17 (1818) (“Every citizen has a right to bear arms in defense of himself and the State.”); IND. CONST. art. I, § 20 (1816) (“The people have a right to bear arms for the defence of themselves and the State . . .”); KY. CONST. art. XII, § 23 (1792) (“[T]he right of the citizens to bear arms in defence of themselves and the State shall not be questioned . . .”); MISS. CONST. art. I, § 23 (1817) (“Every citizen has a right to bear arms, in defence of himself and the State.”); MO. CONST. art. XIII, § 3 (1820) (“[The people’s] right to bear arms in defence of themselves and of the State cannot be questioned.”); OHIO CONST. art. VIII, § 20 (1802) (“[T]he people have a right to bear arms for the defence of themselves and the State”); PA. CONST. art. IX, § 21 (1790) (“The right of the citizens to bear arms, in defence of themselves and the state, shall not be questioned.”); VT. CONST. ch. 1, art. 15 (1777) (“[T]he People have a Right to bear Arms for the Defence of themselves and the State.”); Testimony of Eugene Volokh, *supra* note 23, pt. 2 (citing ALA. CONST. art. I, § 23 (1819)) (“That every citizen has a right to bear arms in defence of himself and the state . . .”).

<sup>125</sup> Testimony of Eugene Volokh, *supra* note 23, pt. 2.

was seen as analogous to the Second Amendment,<sup>126</sup> thus, the Second Amendment protects an individual's right to keep and bear arms.

This justification still exists in the twenty-first century. A recent article concluded thirty-seven states currently recognize an individual right to keep and bear arms wherein citizens can carry arms on their person as long as they are concealed.<sup>127</sup> The article found twenty-nine of the fifty states currently conclude self-defense is at least one purpose of the right to keep and bear arms.<sup>128</sup> Many state courts have found self-defense is a vital reason for upholding the right to possess arms.<sup>129</sup> The right to defend one's self has been held by states to include the means to do so.<sup>130</sup>

Recently, twelve states either added the right to keep and bear arms or left a past right untouched,<sup>131</sup> and Ohio recently became the thirty-seventh state to allow for some concealed carry law.<sup>132</sup> The right to keep and bear arms, particularly for individual self-defense, is therefore not an archaic holdover from another era.<sup>133</sup> The modern-day justification for the right to keep and bear arms remains self-defense, as it did in the founding era.<sup>134</sup> Ultimately, the Second Amendment "intends to foster self-defense in all its forms as a human right."<sup>135</sup>

<sup>126</sup> *Id.* (citing Williams, *supra* note 22, at 590).

<sup>127</sup> Michael, *supra* note 4, at 53; *see also* Creamer, *supra* note 120, at 938 (noting thirty-six states recognize an individual right to keep and bear arms).

<sup>128</sup> Creamer, *supra* note 120, at 938 & n.320; *see also* Schubert v. DeBard, 398 N.E.2d 1339, 1341 (Ind. Ct. App. 1980) (concluding the Indiana Constitution's right to keep and bear arms is for individual protection).

<sup>129</sup> Creamer, *supra* note 120, at 925 & n.185; *see also* Arnold v. City of Cleveland, 616 N.E.2d 163, 169 (Ohio 1993) (noting self-defense is a significant right); Feliciano v. 7-Eleven, Inc., 559 S.E.2d 713, 719–23 (W.Va. 2001) (holding a deadly weapon can be used in self-defense when one's life is in danger); State v. Hamdan, 665 N.W.2d 785, 790 (Wis. 2003) (holding a store owner can keep a concealed handgun in store to protect himself and others).

<sup>130</sup> Creamer, *supra* note 120, at 925 (citing State v. Kessler, 614 P.2d 94, 99 (Or. 1980)); *see also* Carlton v. State, 58 So. 486, 488 (Fla. 1912) (concluding the Florida Constitution is "intended to give the people the means of protecting themselves against oppression and public outrage").

<sup>131</sup> Creamer, *supra* note 120, at 938.

<sup>132</sup> Michael, *supra* note 4, at 53.

<sup>133</sup> Creamer, *supra* note 120, at 938.

<sup>134</sup> *Id.* at 937.

<sup>135</sup> Joseph Bruce Alonso, *International Law and the United States Constitution in Conflict: A Case Study on the Second Amendment*, 26 HOU. J. INT'L L. 1, 4 (2003); *see also* NAPOLITANO, *supra* note 5, at 64 (noting there is a basic human right to self-defense); Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 532 n.67 (1995) (noting the Founders described the right to keep and bear arms as a human right); Kates, *Gun Control*, *supra* note 11, at 363 (noting the Founders saw the right to keep and bear arms as an essential and sacred human right); Harold Hongju Koh, *A World Drowning in Guns*, 71 FORDHAM L. REV. 2333, 2339 & n.28 (2003) (listing some human rights groups that say that self-defense is a human right).



## II. INTERNATIONAL LAW AIMED AT GOVERNMENT TYRANNY AND INDIVIDUAL SELF-DEFENSE

Much of international human rights law is aimed, directly or indirectly, at preventing government tyranny. An individual right to keep and bear arms is partially designed to be the means to stop government tyranny. It is also designed to be the means for individual self-defense against criminals.

### *A. International Law Aimed at Preventing Government Tyranny*

International human rights agreements provide protection against government tyranny. The Universal Declaration of Human Rights (UDHR) provides direct support; indirect support is found in the type and purposes of many other international human rights agreements. Finally, the UDHR and subsequent international human rights agreements recognize that people should be able to live with “freedom from fear,” which necessarily includes freedom from fear of government tyranny.

#### 1. Direct Support

The UDHR directly supports preventing government tyranny. The UDHR’s preamble provides: “[w]hereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”<sup>136</sup> Thus, the UDHR recognizes that human rights must be protected in order to prevent government tyranny, and human rights must be protected under law so that individuals do not have to turn to rebellion against their oppressive governments to secure their rights.

The language of the UDHR’s articles speaks less to a specific right against government tyranny. No provision of the UDHR provides a right against government tyranny. This, however, is unnecessary because that is articulated as one of the purposes of the agreement itself. The UDHR establishes the prevention of government tyranny as a goal of the agreement, and all its specific articles are enunciated to achieve that goal. All of the articles can therefore be viewed as supporting the theory of preventing government tyranny. Since the right to keep and bear arms is designed to prevent government tyranny, some scholars have noted that calling for people to surrender their arms is incompatible with the UDHR.<sup>137</sup>

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<sup>136</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 71 pmb. para. 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

<sup>137</sup> David P. Kopel et al., *Global Deaths from Firearms: Searching for Plausible Estimates*, 8 TEX. REV. L. & POL. 113, 127 (2003).

## 2. Indirect Support

Many other international human rights agreements contain an underlying purpose of preventing government tyranny. Specifically, multiple agreements prevent slavery,<sup>138</sup> ensure individual self-determination,<sup>139</sup> prevent torture,<sup>140</sup> prevent arbitrary arrest and provide some due process oriented rights.<sup>141</sup> The similarity in many of these agreements provisions, which focus on increasing individual rights and decreasing government power, support a reading of the agreements' purposes as to prevent government tyranny.

Indirect support for the ideal of preventing government tyranny is "the right of self-determination"—the first right announced in the ICCPR and the ICESCR.<sup>142</sup> The right of self-determination should be viewed as a foundation for the type of rights we should expect to see following it. The text following the right to self-determination is the same in the ICCPR and the ICESCR; it proclaims the right means all peoples "freely determine their political status and freely pursue their . . . development."<sup>143</sup> A tyrannical government installs a government and system of societal development the people of the State have not had a say in forming would violate the right of those people to determine what type of government and society they wish to establish. Essentially, any form of government tyranny prevents people from determining for themselves how they want to live; thus, "the right of self-determination" is aimed at preventing government tyranny.

Further indirect support for the ideal of preventing government tyranny is the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG).<sup>144</sup> The CPPCG notes the General Assembly of the United Nations issued a resolution making genocide a crime<sup>145</sup> and that it recognizes that genocide has inflicted great losses on humanity. It then provides the contracting parties are "convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required."<sup>146</sup> The agreement criminalizes genocide done by private actors as well as

<sup>138</sup> International Covenant on Civil and Political Rights pt. 3, art. 8, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; UDHR, *supra* note 136, art. 4.

<sup>139</sup> ICCPR, *supra* note 138, art. 8; International Covenant on Economic, Social and Cultural Rights pt. 1, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>140</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pt. 1, art. 2, Dec. 10, 1984, 1465 U.N.T.S. 113 [hereinafter CAT]; ICCPR, *supra* note 138, art. 7; UDHR, *supra* note 136, art. 5.

<sup>141</sup> ICCPR, *supra* note 138, pt. 3, art. 9; UDHR, *supra* note 136, art. 9–10.

<sup>142</sup> ICCPR, *supra* note 138, pt. 1, art. 1; ICESCR, *supra* note 139, pt. 1, art. 1.

<sup>143</sup> ICCPR, *supra* note 138, pt. 1, art. 1; ICESCR, *supra* note 139, pt. 1, art. 1.

<sup>144</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

“constitutionally responsible rulers” and “public officials.”<sup>147</sup> Nothing fits the meaning of government tyranny more than a government committing genocide. International law criminalizes and condemns such tyrannical government action.

A treaty related to the criminalization of genocide is the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>148</sup> The CERD is premised on the consideration “that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith.”<sup>149</sup> The ratifiers were alarmed that racial discrimination existed through “government policies based on racial superiority or hatred, such as policies of *apartheid*, segregation or separation.”<sup>150</sup> The CERD pushes the equality principle of the CPPCG further so that government-backed racial *apartheid*, segregation, and separation are unlawful. The CERD establishes another shield against tyrannical government action.

The equality ideal and its relation to government tyranny are pushed further in the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).<sup>151</sup> CEDAW emphasized “the eradication of *apartheid* . . . racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination” as part of the full enjoyment of the rights of men and women.<sup>152</sup> Therefore, providing gender equality was another form of international human rights law acting as protection against government tyranny.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is also aimed at preventing government tyranny. Even though no direct statement is made in CAT that its purpose is to prevent government tyranny, not much discussion is needed to conclude CAT’s prevention of state torture is aimed at preventing government tyranny.<sup>153</sup>

### 3. Freedom from Fear

Three international human rights agreements provide that one of their purposes is to protect against the “freedom from fear.” The UDHR apparently originated this phrase; its preamble provides:

“[w]hereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall

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<sup>147</sup> *Id.* art. 4.

<sup>148</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

<sup>149</sup> *Id.* pmb. para. 4.

<sup>150</sup> *Id.* pmb. para. 9.

<sup>151</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>152</sup> *Id.* annex para. 10 (emphasis omitted).

<sup>153</sup> CAT, *supra* note 140, pt. 1, art. 2.

enjoy freedom of speech and belief and *freedom from fear* and want has been proclaimed as the highest aspiration of the common people.”<sup>154</sup>

This supports preventing government tyranny since people should be free from fear of barbarous government acts. This interpretation is buttressed because the next paragraph is the paragraph discussed above that speaks to preventing government tyranny under law. Enacting human rights law that prevents government tyranny is the means to achieve the end of creating freedom from fear. Both the ICCPR and the ICESCR, each entered into force twenty-eight years after the UDHR’s inception in 1948, recognize the ideal of the UDHR that free human beings enjoy “freedom from fear.”<sup>155</sup> The “freedom from fear” is a core purpose of international human rights law, which can never be achieved if the chance for government tyranny exists.

### *B. Keeping and Bearing Arms Secures a Right to Individual Self-Defense*

Many sources of international human rights support an individual right to self-defense. An individual right to keep and bear arms is partially designed to be the means to secure individual self-defense.

#### 1. International Law Aimed at a Right to Individual Self-Defense

The preambles and text of multiple international human agreements provide support for an individual right to self-defense. The Charter of the United Nations allows for individual or collective self-defense of member nations.<sup>156</sup> The “freedom from fear” language of the preambles discussed above not only applies to preventing fear of government tyranny, but it also applies to individual freedom from fear of having one’s life jeopardized by private actors.

##### *a. Article 51 of the United Nations Charter*

Article 51 recognizes a right to self-defense for nations. It provides: “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.”<sup>157</sup> Article 51 does not recognize an individual person’s right to self-defense. There are, however, two principles in Article 51 that support the recognition of an individual’s right to self-defense.

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<sup>154</sup> UDHR, *supra* note 136, pmbl. para. 2 (second emphasis added).

<sup>155</sup> ICCPR, *supra* note 138, pmbl. para. 3; ICESCR, *supra* note 139, pmbl. para. 3.

<sup>156</sup> U.N. Charter art. 51.

<sup>157</sup> *Id.*

First, Article 51 recognizes a member State has a right to self-defense regardless of who initiated the attack. The International Court of Justice (ICJ), however, concluded that Article 51 only “recognizes the existence of an inherent right [to] self-defense in the case of an armed attack by one State against another State.”<sup>158</sup> Some international law judges disagreed with this conclusion and concluded restricting the right to self-defense under Article 51 to attacks by member states is unwarranted on the basis of the text of Article 51 describes the ability to defend against “an armed attack” not “an armed attack by a Member State.”<sup>159</sup> Similarly, scholars have concluded that the text of Article 51 “does not link the right to self-defense to the particular legal personality of the attacker.”<sup>160</sup> State practice under Article 51 supports the “permissibility of responding in self-defense to an attack by a nonstate actor.”<sup>161</sup> The ICJ’s conclusion also seems “illogical . . . when the worldwide terrorist threats stem primarily from nonstate actors.”<sup>162</sup> The ICJ’s conclusion is, in fact, inconsistent with the United Nation Security Council’s endorsement of the United States’ right to self-defense against the terrorists who attacked the United States on September 11, 2001.<sup>163</sup> Ultimately, “[it] would . . . be peculiar if states were legally unable to protect [themselves] against repeated acts of terrorism, when they can use force against conventional armies attacking conventional targets.”<sup>164</sup>

The ability of a State to defend itself against any attacks is a broad protection focused on the security of the nation attacked. We can draw from that principle the right to self-defense is not focused on whom commits the attack, but on providing the attacked with the ability to defend themselves. Consequently, international law allowing for self-defense of nations is analogous to an individual person’s right to self-defense: the individual person’s right to self-defense is similarly focused on the person’s right to defend himself, not on who attacked him. International law in this regard can therefore be viewed as supporting an international right to self-defense.

Second, Article 51 recognizes an “inherent right of . . . self-defence.”<sup>165</sup> In other words, the right to self-defense for member States is an essential characteristic of

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<sup>158</sup> Legal Consequences of the Construction of a Wall in the Occupied Territory, Advisory Opinion, 43 I.L.M. 1009, 1049 (June 9, 2004).

<sup>159</sup> *Id.* at 1078 (Buerghenthal, J., dissenting); *id.* at 1063 (Higgins, J., concurring); see also Michla Pomerance, *The ICJ’s Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AM. J. INT’LL. 26, 26 (2005).

<sup>160</sup> Ruth Wedgwood, *The ICJ Advisory Opinion on the Israel Security Fence and the Limits of Self-Defense*, 99 AM. J. INT’LL. 52, 58 (2005); see also Sean D. Murphy, *Self-Defense and the Israel Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT’LL. 62, 64 (2005).

<sup>161</sup> Murphy, *supra* note 160, at 67.

<sup>162</sup> Pomerance, *supra* note 159, at 26.

<sup>163</sup> Wedgwood, *supra* note 160, at 58 (citing S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001)); see also S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>164</sup> Wedgwood, *supra* note 160, at 58.

<sup>165</sup> U.N. Charter art. 51.

their existence. This rationale follows the natural law notion in the American Second Amendment that recognizes an individual's natural right to self-defense; it does not create the right.

*b. Freedom from fear*

As indicated above, the UDHR's preamble provides a goal in international human rights law: people should be free from fear. Earlier this Article argued the preamble's aspirational principle supported the notion of preventing government tyranny in that people should be free from fear of barbarous government acts. That interpretation of the purpose or meaning of being free from fear alone, however, would undercut the aspirational principle of the UDHR. If people were without fear from government tyranny but were fearful of actions from private actors, that would undermine the aspiration that people be free from fear. One way to eliminate fear is to provide individuals with a right to defend themselves. If one knew of a lawfully protected right to defend one's self, it would eliminate some fear from threatening situations. A person with knowledge that he can act to defend himself will likely have less fear than a person without knowledge that he could defend himself.

Individual arms possession provides a freedom from fear. Gun ownership "often confers a sense of security" upon people who possess them.<sup>166</sup> Many gun owners know they have the means to effectuate self-defense, and this leads them to have more peace of mind in life.<sup>167</sup> Gun ownership is therefore part of the means that the international community should use to achieve the "freedom from fear" mandate. Conversely, to restrict gun ownership would seem to increase the level of insecurity of individuals. This leads to individuals potentially living with less peace of mind and without "freedom from fear."

*c. Support in existing international human rights law*

Multiple international human rights agreements provide support for an international human right to individual self-defense. Article 3 of the UDHR provides that "[e]veryone has the right to life, liberty and the security of person."<sup>168</sup> Similarly, the Declaration on the Elimination of Violence Against Women (DEVAW) provides that women have "[t]he right to life" and "[t]he right to liberty and security of person."<sup>169</sup> If every person has a right to life, then self-defense can be the means to foster this right.

The guarantee of a right to security of person in the UDHR and the DEVAW further support a right to individual self-defense. Security of one's person means two

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<sup>166</sup> Philip J. Cook & Jens Ludwig, *Principles for Effective Gun Policy*, 73 *FORDHAM L. REV.* 589, 596 (2004).

<sup>167</sup> *Id.* at 603.

<sup>168</sup> UDHR, *supra* note 136, art. 3.

<sup>169</sup> Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 3(a), 3(c), U.N. Doc. A/Res/48/104 (Feb. 23, 1994).

main things. First, it builds upon the concept of “freedom from fear,” as the word security itself means “freedom from fear.”<sup>170</sup> Establishing that individuals have a right to the security of person therefore means “freedom from fear” is not only an aspirational principle, but it is essentially an individual international human right. This right cannot apply only to freedom from fear of government oppression; the goal would never be complete, as fear could exist from private acts of violence. The CERD addressed this loophole when it prevented non-governmental groups and institutions from depriving the right to security of person.<sup>171</sup> Second, security can be thought of as “something that secures.”<sup>172</sup> Security, in this sense, is a form of “protection.”<sup>173</sup> When the UDHR and the DEVAW speak to the security of person, we can read this to mean “something that secures the person” or “the protection of person.” Security of person not only establishes a state or feeling of security, but a right to protect one’s person. This is individual self-defense.

Some may argue the “right to life” and “the right to security of person” in other international human rights agreements shows there is only a right to be secure from government or non-government action, and, thus, these rights do not support a human right to individual self-defense. This argument is plausible under the ICCPR and the CERD. Article 6 of the ICCPR begins: “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>174</sup> Article 9 of the ICCPR starts by stating: “[e]veryone has the right to liberty and security of person.”<sup>175</sup> The remainder of articles 6 and 9 speak to eliminating the death penalty and preventing arbitrary and unlawful government arrests. The “inherent right to life” and the right to the “security of person” likely only apply to being secure from unlawful government action. Article 5 of the CERD secures: “[t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.”<sup>176</sup> Here, not only is government tyranny targeted, but any group or institutional tyranny is targeted. The right of security of person is extended but not to where individual violence against another individual is specifically targeted. Finally, the article specifically calls for State protection of individuals as opposed to individual protection of one’s self.

These concessions—that the ICCPR and the CERD do not establish a right to individual self-defense—do not undercut the goal of establishing an international human right to keep and bear arms to further individual self-defense for two reasons. First, the recognition there is an inherent right to life and a right to security of person against government action directly furthers the goal of preventing government tyranny.

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<sup>170</sup> WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 780 (1971).

<sup>171</sup> CERD, *supra* note 148, art. 5.

<sup>172</sup> WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY, *supra* note 170, at 780.

<sup>173</sup> *Id.*

<sup>174</sup> ICCPR, *supra* note 138, pt. 3, art. 6, ¶ 1.

<sup>175</sup> *Id.* pt. 3, art. 9, ¶ 1.

<sup>176</sup> CERD, *supra* note 148, art. 5.

Since individual arms possession undercuts government tyranny, an interpretation of articles 6 and 9 of the ICCPR and article 5 of the CERD based on preventing government tyranny furthers the goal of creating an international human right to keep and bear arms. Second, this Article argues for the adoption of an international human right to keep and bear arms. Any sources furthering the recognition of an individual right to self-defense also furthers this Article's goal.

### III. WHY AN INTERNATIONAL HUMAN RIGHT IS NEEDED

An international human right to keep and bear arms is needed for three reasons. First, the international community is moving towards heavy gun control. Second, government tyranny continues, and evidence suggests that armed populations can fend off such tyranny. Third, violent criminal attacks continue, and people can use arms to protect themselves.

#### A. *International Gun Control*

Outside of the United States and Switzerland, gun control is popular worldwide.<sup>177</sup> The most recent United Nations International Study on Firearm Regulation (U.N. Study) shows that nine of sixty-six responding countries ban all handgun possession.<sup>178</sup> Twenty of sixty-seven responding countries do not permit handgun possession for private security.<sup>179</sup>

In 2001, the United Nations held a conference on Illicit Trade of Small Arms and Light Weapons in All Its Aspects (U.N. Arms Conference) to eliminate illicit possession, manufacturing, transfer, and circulation of small arms and light weapons.<sup>180</sup> The conference was to minimize gun accidents and regulate weapons possession of criminals.<sup>181</sup> It recognized the promotion of "inherent rights to individual or collective self-defense"<sup>182</sup> and the reaffirmance of "the right of self-determination of all peoples."<sup>183</sup>

The result of the conference, however, may make it easier to commit genocide.<sup>184</sup> A tyrannical government could use the conference as a means to heavily restrict arms possession.<sup>185</sup> Further, such a government could use the conference as a legal basis to

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<sup>177</sup> Bobby L. Scott, *The U.N. Conference on the Illicit Trade of Small Arms and Light Weapons: An Exercise in Futility*, 31 GA. J. INT'L & COMP. L. 681, 704 (2003).

<sup>178</sup> UNITED NATIONS INTERNATIONAL STUDY ON FIREARM REGULATION 10 (1998).

<sup>179</sup> *Id.* at 33.

<sup>180</sup> Scott, *supra* note 177, at 681 (citing United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, July 9–20, 2001, *Final Report*, U.N. Doc. A/CONF.192/15 [hereinafter *Final Report*]).

<sup>181</sup> Scott, *supra* note 177, at 708.

<sup>182</sup> *Final Report*, *supra* note 180, pmb. ¶ 9.

<sup>183</sup> *Id.* ¶ 11.

<sup>184</sup> Scott, *supra* note 177, at 706.

<sup>185</sup> *Id.* at 703.



disarm its people.<sup>186</sup> Once these things occur, the tyrannical government could attempt to exterminate a portion of its population. The tyrannical regime could also use the conference to prevent transfers of weapons to oppressed groups within the country.<sup>187</sup>

Some argue that increased firearm possession leads to more violence. They claim increased gun control decreases violence in society, particularly in America.<sup>188</sup>

High firearm regulation, however, does not necessarily lead to a low number of gun-related deaths. The U.N. Study showed Colombia had the highest number of gun-related deaths of nations responding to the study.<sup>189</sup> Colombia, however, has restrictions on who may possess a firearm, where firearms may be stored, where unloaded or loaded firearms and ammunition may be stored, how firearms may be transported, and where firearms may be carried.<sup>190</sup> The number of firearms in Colombia and their regulation are not likely the cause of the level of gun-related homicides in Colombia. The high number of homicides is likely related to Colombia's large illegal drug trade.

Possession of firearms does not necessarily lead to a high number of gun-related deaths. Switzerland has one of the highest rates of gun ownership in the world and "virtually no gun crime."<sup>191</sup> Switzerland requires "[e]very male citizen . . . to perform military service, and [receives] a . . . rifle for that purpose,"<sup>192</sup> which he keeps at home.<sup>193</sup> Similar to the American militia model, the Swiss men serve until they are fifty years old and receive ownership of their rifle at retirement.<sup>194</sup> Switzerland allows possession of handguns and long guns for non-military purposes.<sup>195</sup> The Swiss

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 706.

<sup>188</sup> PHILIP J. COOK & JENS LUDWIG, *GUN VIOLENCE: THE REAL COSTS* (2000) (finding gun control reduces violence); *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* (Jens Ludwig & Philip J. Cook eds., 2003); Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193 (2003) (refuting argument that shall-issue laws reduce crime). *But see* JOHN R. LOTT, JR., *THE BIAS AGAINST GUNS: WHY ALMOST EVERYTHING YOU'VE HEARD ABOUT GUN CONTROL IS WRONG* (2003); JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* (1998); John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997) (arguing concealed handgun laws deter crime); Florenz Plassmann & John Whitley, *Confirming "More Guns, Less Crimes,"* 55 STAN. L. REV. 1313 (2003).

<sup>189</sup> UNITED NATIONS INTERNATIONAL STUDY ON FIREARM REGULATION, *supra* note 178, at 104.

<sup>190</sup> *Id.* at 60.

<sup>191</sup> Gallia, *supra* note 8, at 155 (citing DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY* 13 (1992)).

<sup>192</sup> Jesse Matthew Ruhl et al., *Gun Control: Targeting Rationality in a Loaded Debate*, 13 KAN. J.L. & PUB. POL'Y 413, 451 (2004) (citing KOPEL, *supra* note 191, at 171).

<sup>193</sup> Stephen P. Halbrook, *Citizens in Arms: The Swiss Experience*, 8 TEX. REV. L. & POL. 141, 154–55 (2003).

<sup>194</sup> Ruhl et al., *supra* note 192, at 451 (citing KOPEL, *supra* note 191, at 282).

<sup>195</sup> UNITED NATIONS INTERNATIONAL STUDY ON FIREARM REGULATION, *supra* note 178, at 17.

government even sells anti-aircraft guns, machine guns, mortars, and cannons.<sup>196</sup> The government also supports the use of guns for sporting purposes and there are 3,000 shooting ranges in Switzerland where the government sells ammunition.<sup>197</sup> Guns are so commonplace in Switzerland that people carry their guns on trains, buses, bicycles, and on foot.<sup>198</sup> Guns are hung on hat racks in restaurants and carried on people's shoulders in the street.<sup>199</sup> The homicide rate in Switzerland, according to the U.N. Study, was a mere 2.47 per 100,000 persons.<sup>200</sup> Further, even though Switzerland is flooded with guns, crime in general is low.<sup>201</sup> Clearly then, the ability to possess arms and the Swiss citizenry's decision to possess lots of them does not lead to more violence in their society.

America, where recent statistics showed forty-one percent of households own at least one firearm,<sup>202</sup> is not an exceptionally violent nation.<sup>203</sup> The aggregate firearm death rate is about 14 out of every 100,000 persons.<sup>204</sup> Robbery and assault rates are comparable with other countries.<sup>205</sup> If gun possession alone determined the aggregate firearm death rate, we would expect America's death rate to be much higher. These statistics do not show "that more stringent gun control laws [in America] would reduce gun violence" or that tough gun control laws abroad prevent gun deaths in Europe.<sup>206</sup>

Canadians also own a lot of firearms; twenty-two percent of Canadian households contain at least one firearm.<sup>207</sup> The Canadian crime rate is lower than America's even though Canadians like to possess firearms.<sup>208</sup>

Recently, Great Britain and Australia severely restricted gun possession. In 1996, Australia banned sixty percent of firearms; by 1998 crime had risen and armed robbery was up forty-four percent.<sup>209</sup> In the first six years since the Australian policy was

<sup>196</sup> Ruhl et al., *supra* note 192, at 451 (citing KOPEL, *supra* note 191, at 283).

<sup>197</sup> *Id.*

<sup>198</sup> Halbrook, *supra* note 193, at 144.

<sup>199</sup> *Id.*

<sup>200</sup> UNITED NATIONS INTERNATIONAL STUDY ON FIREARM REGULATION, *supra* note 178, at 129.

<sup>201</sup> Ruhl et al., *supra* note 192, at 451.

<sup>202</sup> Ed Cohen, *Public Enemy No. 1*, NOTRE DAME MAG., Winter 1999-2000, available at <http://www.nd.edu/~ndmag/gunsw99.htm>.

<sup>203</sup> Cook & Ludwig, *supra* note 166, at 590-91 (citing DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 2 (2004)).

<sup>204</sup> UNITED NATIONS INTERNATIONAL STUDY ON FIREARM REGULATION, *supra* note 178, at 109; Jonathan B. Wiener, *Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems*, 13 DUKE J. COMP. INT'L L. 207, 233 (Summer 2003).

<sup>205</sup> Cook & Ludwig, *supra* note 166, at 590-91 (citing HEMENWAY, *supra* note 203, at 2).

<sup>206</sup> Wiener, *supra* note 204, at 233.

<sup>207</sup> RICHARD BLOCK, FIREARMS IN CANADA AND EIGHT OTHER WESTERN COUNTRIES (1998), <http://canada-justice.ca/en/ps/rs/rep/1997/wd97-3a.html>.

<sup>208</sup> Cook & Ludwig, *supra* note 166, at 592.

<sup>209</sup> Phyllis Schlafly, *The Lessons of History—The Founding Fathers on Right to Bear Arms* (June 2000), <http://www.rense.com/general2/right.htm> (last visited Oct. 25, 2006).

implemented, violent crime increased thirty-two percent over what it was before the policy was adopted.<sup>210</sup> Great Britain essentially banned handguns in 1997 and violent crime has increased by sixty-nine percent, robbery by forty-five percent, and murders by fifty-four percent.<sup>211</sup> Before the British ban, robberies fell “fifty percent from 1993 to 1997.”<sup>212</sup>

The relationship between guns and violence is not straightforward.<sup>213</sup> One cannot simply say the presence of guns in society leads to violence.<sup>214</sup> Thus, the ability to possess arms and their subsequent possession is not necessarily a direct causal link to a greater homicide or violent crime rate. Actually, the trend of violence in nations that recently restricted gun possession indicates that policy may likely lead to more crime and violence.

### *B. Government Tyranny*

An international human right to keep and bear arms would further the ideal of preventing government tyranny. Historically, tyrannical governments have used their power to overwhelm the citizenry. Tyranny was often preceded by laws preventing the citizenry from possessing arms or requiring that such arms be given to the government. The tyrannical governments recognized an unarmed citizenry was easier to overtake than an armed one. When citizens have remained armed, they have been successful in thwarting such governmental tyranny.

#### 1. Disarmament and Oppression

Controlling what, if any, arms African Americans could possess in colonial and early America furthered slavery. In the seventeenth century, state laws varied concerning the rights of African Americans to keep and bear arms, but the laws were aimed at preventing African Americans from gaining full equality.<sup>215</sup> In the eighteenth century, laws continued to vary, with some states making African Americans a part of the militia to help protect against invasions, and some states preventing slaves from possessing arms.<sup>216</sup> Most laws were aimed at freed African Americans rather than slaves to ensure that slave masters could prevent their slaves from possessing arms.<sup>217</sup> Some disarmament statutes, however, existed where slave masters could search and

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<sup>210</sup> John R. Lott, Jr., *Banning Guns in the U.K. Has Backfired*, <http://johnrlott.tripod.com/op-eds/BritainToyGunsWSJE.html> (last visited Oct. 25, 2006).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Ruhl et al., *supra* note 192, at 450.

<sup>214</sup> *Id.*

<sup>215</sup> Cottrol & Diamond, *supra* note 68, at 325.

<sup>216</sup> *Id.* at 332.

<sup>217</sup> *Id.* at 336.

disarm slaves.<sup>218</sup> Southern states passed these laws and limited gun possession rights of slaves and freed African Americans to prevent rebellion.<sup>219</sup>

This system of law provided what the South wanted—the ability to continue its reign of tyranny over slaves with little fear that slaves could rise against it. Disarmament served as a means to the end of enslavement.<sup>220</sup> Disarmament can thus be thought of as tantamount to slavery, as the disarmed are essentially left with no way to effectively resist the control of the one disarming them.<sup>221</sup> In *Dred Scott v. Sandford*,<sup>222</sup> the United States Supreme Court proclaimed if African Americans were considered citizens then they would have a right to keep and carry arms whenever they wanted.<sup>223</sup> The underlying concern was clear: if slaves were considered citizens, they could be armed, but since the Court viewed them as an inferior people they could not.

Even after slavery ended, southern states adopted Black Codes prohibiting African Americans from owning and bearing arms.<sup>224</sup> The Ku Klux Klan influenced southern states to enact firearm licensing programs that fostered the prohibition of African Americans from possessing handguns.<sup>225</sup> The Klan's influence reached into the North, and twenty-six states enacted firearms licensing requirements by 1917 allowing the police to grant or deny firearms licenses in its discretion.<sup>226</sup> Similarly, New York had a handgun prohibition designed to disarm African Americans, Italians, Jews, and other immigrants.<sup>227</sup> Beyond the Klan's influence, legal scholarship advocated Negro gun control laws.<sup>228</sup> One Tennessee senator argued that cheap handguns should be banned in order to allow the "'dominant race' to prevent . . . 'colored people'" from carrying pistols.<sup>229</sup>

Those attempting to end racial discrimination opposed the Black Codes that prevented African-American arms possession.<sup>230</sup> The Black Codes alarmed Republicans

<sup>218</sup> NAPOLITANO, *supra* note 5, at 54.

<sup>219</sup> Cottrol & Diamond, *supra* note 68, at 336.

<sup>220</sup> Levinson, *supra* note 11, at 650 (citing T. SCHROEDER, *FREE SPEECH FOR RADICALS* 104 (reprint ed. 1969)).

<sup>221</sup> Kates, *Handgun Prohibition*, *supra* note 11, at 232.

<sup>222</sup> 60 U.S. 393 (1856).

<sup>223</sup> *Id.* at 417; *see also* Levinson, *supra* note 11, at 651.

<sup>224</sup> NAPOLITANO, *supra* note 5, at 54; Cottrol & Diamond, *supra* note 68, at 344–45.

<sup>225</sup> NAPOLITANO, *supra* note 5, at 55.

<sup>226</sup> Polsby & Kates, *supra* note 67, at 1267.

<sup>227</sup> NAPOLITANO, *supra* note 5, at 55; *see also* Polsby & Kates, *supra* note 67, at 1265 (citing LEE KENNETT & JAMES LAVERNE ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA* 165–86 (1975); Don B. Kates, Jr., *The Battle over Gun Control*, 84 *PUB. INTEREST* 42, 43–44 (1986)).

<sup>228</sup> Polsby & Kates, *supra* note 67, at 1267 (citing Comment, *Carrying Concealed Weapons*, 15 *VA. L. REG.* 391, 391–92 (1909) (arguing a negro with a gun is likely to commit violent crime)).

<sup>229</sup> *Id.* (citing 65 *CONG. REC.* 3945, 3946 (daily ed. Mar. 11, 1924) (statement of Sen. Shields)).

<sup>230</sup> Cottrol & Diamond, *supra* note 68, at 345.

because the Codes “preserved the right to keep and bear arms for . . . Confederates” but not African Americans.<sup>231</sup> Gun rights advocates also pushed for legislation to repeal or defeat these laws.<sup>232</sup>

African-American resistance during slavery and the Black Codes era was at least partially successful. In 1841, in Cincinnati, Ohio, white mobs descended on an African-American neighborhood.<sup>233</sup> African Americans fought back, and two whites and two African Americans were killed and twelve were injured.<sup>234</sup> The next day, African Americans were disarmed, and white rioters continued their actions thereafter.<sup>235</sup> In the South, African Americans did not have the means to protect themselves and thus *could not* protect themselves.<sup>236</sup> In the North, however, African Americans sometimes bore arms to protect themselves.<sup>237</sup>

Some scholars argued that armed resistance of African Americans produced three societal reactions that aided in ending discrimination against African Americans. First, armed defense presented a situation where martyrdom was possible for African Americans; thus, it forced police to intervene and restore order.<sup>238</sup> Second, armed resistance was initially successful against some Klan attacks.<sup>239</sup> When African Americans asserted their rights against the Klan, others who supported that action came “to their aid.”<sup>240</sup> Third, African-American arms use was a way to speak and garner political support for their cause.<sup>241</sup>

Ultimately, freed African Americans could not defend against the Klan and other racists<sup>242</sup>: “[I]ndividual efforts of [African Americans] to halt violence [against themselves] were largely unsuccessful.”<sup>243</sup> The fact that African Americans were willing to use firearms to protect their rights, lives, and property renders gun control laws “worthy of condemnation.”<sup>244</sup> In light of African-American history, the Second Amendment teaches us “that it is unwise to place the means of protection totally in the hands of the state, and that self-defense is also a civil right.”<sup>245</sup> In sum, for “two centuries . . . gun control laws played an indispensable part” in controlling slaves and freed African Americans.<sup>246</sup>

<sup>231</sup> *Id.*

<sup>232</sup> Pilsby & Kates, *supra* note 67, at 1267–68 & n.94.

<sup>233</sup> Cottrol & Diamond, *supra* note 68, at 342.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Pilsby & Kates, *supra* note 67, at 1268.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 1268–69.

<sup>241</sup> *Id.* at 1269.

<sup>242</sup> NAPOLITANO, *supra* note 5, at 54–55.

<sup>243</sup> Cottrol & Diamond, *supra* note 68, at 354.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 361.

<sup>246</sup> Pilsby & Kates, *supra* note 67, at 1265 (citing *Watson v. Stone*, 4 So. 2d 700, 703

The international community should develop international human rights law that opposes the favored measures of racist tyranny. One important measure would be to secure the individual right to keep and bear arms, a right that the racist tyrants did not want. Providing individuals with a right to keep and bear arms is a means to further current international law against slavery and to ensure that a similar atrocity never occurs again.

The twentieth century has been “referred to as the ‘age of genocide.’”<sup>247</sup> Genocides killed four times as many persons as war and revolutions did in the twentieth century.<sup>248</sup> Between 1900 and 1988, 170 million people were killed in government-related genocides.<sup>249</sup>

Many tyrannical governments in the twentieth century disarmed their populations before committing genocide. When people fought back with any arms available, they were sometimes successful in fending off tyranny. For example, “[t]he Turks systematically disarmed the Armenians” over twenty-five years in the 1900s and then “kill[ed] at least one million [Armenians].”<sup>250</sup> Small groups of Armenians who kept guns were able to defeat the Turks and reach sea to evacuate.<sup>251</sup> In the 1970s, the Khmer Rouge collected the people’s guns and then began a massacre that led to the slaughter of 2,000,000 people.<sup>252</sup> Also in the 1970s, Uganda’s 25,000-member army killed 500,000 people.<sup>253</sup> A small army of that nature could have had serious trouble in defeating an armed populace.<sup>254</sup> In Indonesia, 500,000 “suspected Communists were slaughtered.”<sup>255</sup> If the people had more arms, they could have repelled a portion of the slaughter.<sup>256</sup> Genocides have also occurred in the former Soviet Union, China, Rwanda, Iran, Iraq, and the Sudan.<sup>257</sup> If the Chinese citizenry kept arms, their rulers’ ability to overpower and kill them in Tiananmen Square would have at least been curtailed.<sup>258</sup>

The worst atrocity of government tyranny in the twentieth century occurred in Nazi Germany. The Nazis used search and seizure laws to disarm political opponents,<sup>259</sup> then

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(Fla. 1941) (Buford, J., concurring) (stating that a state law was passed to disarm “negro laborers” and not intended to apply to whites)).

<sup>247</sup> Scott, *supra* note 177, at 703 (quoting ALEX ALVAREZ, *GOVERNMENTS, CITIZENS AND GENOCIDE: A COMPARATIVE AND INTERDISCIPLINARY APPROACH* 10 (2001)).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 703–04 (citing R.J. RUMMEL, *DEATH BY GOVERNMENT* 9 (1994)); *see also* Polsby & Kates, *supra* note 67, at 1270.

<sup>250</sup> NAPOLITANO, *supra* note 5, at 53–54; Polsby & Kates, *supra* note 67, at 1272.

<sup>251</sup> Polsby & Kates, *supra* note 67, at 1272 (citing JAY SIMKIN ET AL., *LETHAL LAWS* 82–83 (1995)).

<sup>252</sup> *Id.* at 1271–72.

<sup>253</sup> *Id.* at 1272.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 1272–73.

<sup>256</sup> *Id.* at 1273.

<sup>257</sup> NAPOLITANO, *supra* note 5, at 54.

<sup>258</sup> Levinson, *supra* note 11, at 657 & n.95.

<sup>259</sup> Schlafly, *supra* note 209.

the Nazis killed 6,000,000 Jews in the Holocaust.<sup>260</sup> The Nazis took steps to disarm the Jews to effectuate the Holocaust. The Nazis passed a “Weapons Law” that prohibited Jews from operating businesses that made guns.<sup>261</sup> The Nazis also passed a law that gave the government the discretion to determine who could possess guns.<sup>262</sup> The Nazis exempted themselves from that law—they could possess arms without a government veto.<sup>263</sup> The Nazis, in their occupation of Europe from 1939 to 1941, also proclaimed any person would receive the death penalty if he failed to surrender all his guns.<sup>264</sup>

Much like the African-American experience during American slavery, the Jews had some success in fending off the Nazis, but their lack of arms made it impossible for them to defend themselves effectively. In one documented instance, a small group of Jews with ten pistols caused a group of Nazis to retreat.<sup>265</sup> The Nazis never returned to the area the small group of Jews controlled.<sup>266</sup> If all the Jews were armed, some could have prevented their capture, and the overall process of capturing the Jews would have been more difficult for the Nazis.<sup>267</sup> Further, there is no doubt that an armed Jewish population “would have imposed rankling losses on [the Nazis].”<sup>268</sup> An armed Jewish populace would have caused another front the Nazis would have had to fight and the arms could have saved Jewish and Allied lives.<sup>269</sup> One better-known example of this argument is Oscar Schindler’s giving Jews guns to fight the Nazis.<sup>270</sup>

Nazi Germany would have welcomed international law disarming the citizenry. It would have legally prevented any resistance from the Jews. Therefore, it seems nonsensical to advance an international law policy against individual arms possession that would have been in keeping with the Nazis’ policy.

The history of tyrannical regimes disarming its own people to allow for their oppression shows why the right to keep and bear arms is a fundamental human right.<sup>271</sup> The right to keep and bear arms is designed to protect minorities from oppressive and tyrannical regimes.<sup>272</sup> If the international community outlaws arms, then only governments will legally possess arms. The American Founders, including James Madison,

<sup>260</sup> Scott, *supra* note 177, at 705 (citing RUMMEL, *supra* note 249, at 112).

<sup>261</sup> *Id.* at 704.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 704–05.

<sup>264</sup> Schlafly, *supra* note 209.

<sup>265</sup> Polsby & Kates, *supra* note 67, at 1271 n.108 (citing DAVID I. CAPLAN, *Weapons Control Laws: Gateways to Victim Oppression and Genocide*, in *TO BE A VICTIM: ENCOUNTERS WITH CRIME AND INJUSTICE* 295, 310 (1991)).

<sup>266</sup> *Id.*

<sup>267</sup> NAPOLITANO, *supra* note 5, at 53.

<sup>268</sup> Polsby & Kates, *supra* note 67, at 1271.

<sup>269</sup> See NAPOLITANO, *supra* note 5, at 53.

<sup>270</sup> Polsby & Kates, *supra* note 67, at 1247 (citing William R. Touso & David B. Kopel, *Gun Bans and “Schindler’s List,”* INDEPENDENCE INSTITUTE, Aug. 24, 1994, available at <http://www.davekopel.org/2A/OpEds/Gun-Bans-and-Schindlers-List.htm>).

<sup>271</sup> NAPOLITANO, *supra* note 5, at 54.

<sup>272</sup> *Id.* at 55.

warned the most dangerous monopoly is for the State to be the only one armed.<sup>273</sup> If the international community does not heed Madison's warning, it will help add an ingredient to a recipe for government tyranny.

## 2. Armed Populations Deter Tyranny

When citizens are armed, government tyranny has been thwarted. In the American Revolution, the colonists faced the British military, the finest armed force in the world. The colonists had no trained forces, no established central government, and no financial or industrial backing.<sup>274</sup> The colonists' militias were loosely affiliated with a town or county and occasionally met to drill.<sup>275</sup> Since the colonists did not have a manufacturing system to make guns, they obtained them in myriad ways.<sup>276</sup> Gunsmiths made guns, the colonists raided British supplies, and the colonists imported many guns from Europe and other states that made guns.<sup>277</sup> The colonists stored their guns in their homes.<sup>278</sup> This rather unorganized band of amateur soldiers, armed with guns they obtained anywhere they could, defeated the finest military in the world.

None of the genocides that occurred in the twentieth century occurred against an armed population.<sup>279</sup> Also, the majority of cases in the twentieth century show that "when oppressive regimes . . . are confronted [with] popular insurgenc[y]," the suppressed people usually rise up and defeat their oppressors.<sup>280</sup> Some scholars have thus made the natural conclusion that there is a connection between the restrictiveness of a State's gun policy and its ability to commit genocide.<sup>281</sup>

The historical evidence of this conclusion seems clear. There is reason to distrust the State and to fear the potential for genocide.<sup>282</sup> It is harder to exterminate an armed population than a disarmed one.<sup>283</sup> An armed populace poses a credible threat to tyrannical governments; thus, "[w]hen victims have guns, [an] overwhelming advantage [of superiority of government] aggressors is diminished."<sup>284</sup> Governments must then question the high cost of attempting a genocide or tyrannical regime.<sup>285</sup> Decreasing

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<sup>273</sup> Polsby & Kates, *supra* note 67, at 1275.

<sup>274</sup> George C. Neumann, *American-Made Muskets in the Revolutionary War*, AM. RIFLEMAN, Oct. 2003, <http://www.jaegerkorps.org/neumanNRA.html>.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> Polsby & Kates, *supra* note 67, at 1238.

<sup>280</sup> Perez, *supra* note 70, at 384–85 & n.120.

<sup>281</sup> Polsby & Kates, *supra* note 67, at 1237.

<sup>282</sup> *Id.* at 1270.

<sup>283</sup> *Id.* at 1238.

<sup>284</sup> *Id.* at 1241.

<sup>285</sup> *Id.* at 1271.



the number of guns the people possess weakens them and increases governmental power.<sup>286</sup> Some scholars go as far to say disarmament is a “cause” of genocide.<sup>287</sup>

### *C. Keeping and Bearing Arms Secures a Right to Individual Self-Defense*

An international human right to keep and bear arms would further a right to individual self-defense. The second of the two purposes of an individual right to keep and bear arms is to secure individual self-defense.

The Second Amendment helps to provide for individual self-defense against crimes.<sup>288</sup> A professional police force did not exist when the Constitution was ratified and did not come into being for about fifty years.<sup>289</sup> Keeping arms was almost necessary for self-defense in colonial and frontier America where government law enforcement did not exist.<sup>290</sup>

Some may argue those days are over, and, thus, there is no need to secure an individual right to keep and bear arms. Many underdeveloped countries do not have a police force on a scale necessary to secure protection of its citizenry at every turn. Other countries where tyrannical regimes reign may not provide an organized police force, or the police provided may not be legitimate.

The Taliban’s recent, nearly five-year rule of Afghanistan and the current state of the Afghanistan-Pakistan border is a perfect example. The Taliban did not provide basic government services during its rule over about ninety percent of Afghanistan from 1996 to 2001.<sup>291</sup> Certainly, any police protection the Taliban provided was not the kind the modern world would consider adequate. Further, because the police were working for the tyrannical Taliban, as opposed to enforcing the people’s laws, it is unlikely the police were a true source of protection for the people. About ten percent of Afghanistan was controlled by the Northern Alliance.<sup>292</sup> This area was not demarcated, and any police protection certainly would have fallen below what modern countries expect from a police force.

Even now, with Afghanistan under the control of a democratically elected government that America and other world leaders support, fighting still occurs on the Afghanistan-Pakistan border between America and its allies versus al-Qaeda, the

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<sup>286</sup> *Id.* at 1241.

<sup>287</sup> *Id.*

<sup>288</sup> Levinson, *supra* note 11, at 646 & n.43.

<sup>289</sup> *Id.* at 646.

<sup>290</sup> Michael, *supra* note 4, at 64 n.55.

<sup>291</sup> KENNETH KATZMAN, REPORT FOR CONGRESS: AFGHANISTAN: CURRENT ISSUES AND U.S. POLICY 2 (2002), <http://www.fpc.state.gov/documents/organization/14834.pdf>.

<sup>292</sup> See Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Department of Defense 19 (Jan. 9, 2002), available at <http://www.msnbc.com/id/5025042/site/newsweek>.

remaining Taliban, and their sympathizers. Any person in the area of the Afghanistan-Pakistan border likely cannot rely on police protection and would have to defend himself if he encountered Taliban or al-Qaeda forces.

Afghanistan is not the only example of where a modern government could not ensure police protection for its people. The recent fighting and chaos in Darfur has led to warlords exerting significant influence, while the government police force lacks number and influence.<sup>293</sup> A genocide occurred in Rwanda in 1994, and hundreds of police officers were complicit in the genocide as they and other government officials “passively acquiesced [to] the violence.”<sup>294</sup> “A significant number of police officers were [also] directly and indirectly responsible for war crimes . . . during the wars in the former Yugoslavia.”<sup>295</sup> Infamous dictators, such as Fidel Castro, continue to rule nations across the world. People subject to rule by such tyrannical dictators likely do not trust the dictator-controlled police, which serves as the dictator’s strong-arm and does not provide adequate and neutral police protection.

Next, even in the most advanced countries, many citizens cannot “rely on the police for protection.”<sup>296</sup> The police may be undermanned or too busy to protect the citizenry at every turn, particularly in densely populated urban areas. Even with a large police force, it usually responds to reports of suspicious activity or crime. If a burglar, carjacker, kidnapper, murderer, rapist, or robber approaches an individual, it will often be impossible for the victim to contact police and have them respond in time to prevent the vicious crime. The victim is usually alone to defend himself.

Law-abiding individuals in today’s world still have to defend themselves, and they have a right to do so.<sup>297</sup> If individuals cannot keep and bear arms, then the ability of the people to defend themselves is hampered.<sup>298</sup> If guns are outlawed, criminals will likely still find ways to possess arms while law-abiding individuals will not have the means to defend themselves.<sup>299</sup>

Statistics show that firearms are useful in self-defense, especially in the United States. One study shows there are 100,000 instances a year in the United States “in which [a person] uses a gun to defend against an assault or break-in.”<sup>300</sup> The Federal Bureau of Investigation reported that about 170 criminals were killed in 2002 through

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<sup>293</sup> Judy Aita, *Darfur Sinking into Anarchy*, *U.N. Envoy Warns*, Nov. 4, 2004, <http://www.usembassy.org.uk/forpo589.htm>.

<sup>294</sup> W. Bradley Wendel, *The Banality of Evil and the First Amendment*, 102 MICH. L. REV. 1404, 1415 (2004).

<sup>295</sup> Mark S. Ellis, *Coming to Terms with Its Past—Serbia’s New Court for the Prosecution of War Crimes*, 22 BERKELEY J. INT’L L. 165, 182 (2004).

<sup>296</sup> Levinson, *supra* note 11, at 656.

<sup>297</sup> NAPOLITANO, *supra* note 5, at 61.

<sup>298</sup> *Arnold v. City of Cleveland*, 616 N.E.2d 163, 169–70 (Ohio 1993); *State v. Kessler*, 614 P.2d 94, 98–100 (Or. 1980).

<sup>299</sup> NAPOLITANO, *supra* note 5, at 59.

<sup>300</sup> Cook & Ludwig, *supra* note 166, at 596 (referring to the National Crime Victimization Survey).

justifiable homicide by private individuals.<sup>301</sup> With crime a problem in inner-cities in America,<sup>302</sup> the largest group to benefit from self-defense with guns is likely “poor, inner-city women.”<sup>303</sup> These are the very type of vulnerable people international human rights law is designed to protect.

#### IV. A PROPOSED INTERNATIONAL HUMAN RIGHT TO KEEP AND BEAR ARMS

An international human right to keep and bear arms should take form in a treaty. First, I explain what the purpose of the treaty should be. Second, I explain what rights are protected. Third, I explain what level of arms regulation should be permissible.

##### A. Purpose of the Treaty and Rights Protected

The preamble of the treaty should articulate the purpose of the treaty is to prevent government tyranny, secure the right to individual self-defense, and secure the right to keep and bear arms.

The treaty should articulate these purposes into specific rights: the *right* to prevent government tyranny, the *right* to individual self-defense, and the *right* to keep and bear arms.

##### 1. Preventing Government Tyranny

Some radical groups will always think the government they live under is tyrannical.<sup>304</sup> The United States experienced severe domestic attacks from radical leftist groups in the 1970s and racial supremacists as well as Timothy McVeigh and Terry Nichols’s attack on a federal building in Oklahoma City.<sup>305</sup> The rights of all people, however, cannot be determined by the actions of a few radicals.<sup>306</sup> The actions of modern radicals “whose idea of political dialogue consists of bombing government buildings and indiscriminately taking and jeopardizing innocents’ lives without warning

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<sup>301</sup> John J. Donohue, *Guns, Crime, and the Impact of State Right-to-Carry Laws*, 73 *FORDHAM L. REV.* 623, 624 & n.7 (2004) (citing FBI, *CRIME IN THE UNITED STATES 2002: UNIFORM CRIME REPORTS* 28 (2003)).

<sup>302</sup> Cottrol & Diamond, *supra* note 68, at 319.

<sup>303</sup> Robert Weisberg, *Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime*, 39 *HOUS. L. REV.* 1, 40 (2002–2003) (citing Mary Zeiss Stange, *Arms and the Woman: A Feminist Reappraisal*, in *GUNS: WHO SHOULD HAVE THEM?* 15, 41 (David B. Kopel ed., 1995)).

<sup>304</sup> Polsby & Kates, *supra* note 67, at 1253–54.

<sup>305</sup> *Id.*; see also David A. Klingler & Lt. Col. Dave Grossman, *Who Should Deal with Foreign Terrorists on U.S. Soil?: Socio-Legal Consequences of September 11 and the Ongoing Threat of Terrorist Attacks in America*, 25 *HARV. J.L. & PUB. POL’Y* 815, 819–22 (2002) (discussing other domestic attacks by “active shooters”).

<sup>306</sup> Polsby & Kates, *supra* note 67, at 1253–54.

or remorse” cannot be compared to the actions of America’s Founders.<sup>307</sup> The international community is sophisticated enough to create a middle ground wherein an armed population can exist to resist government “tyranny without tacitly shaking hands with domestic [or foreign] terrorists.”<sup>308</sup>

The treaty should follow John Locke’s outline describing when revolution is not barbarism.<sup>309</sup> First, “[a] lawful revolution involves decent respect for the opinions of mankind.”<sup>310</sup> Second, a revolution is a right of the people.<sup>311</sup> Third, a lawful revolution is “justified by reasoning.”<sup>312</sup> Fourth, a lawful revolution is based on “a long train of abuses, and usurpations” by the government.<sup>313</sup> Fifth, “adequate notice and opportunity” for the government to cease its actions should exist, and the people should exhaust “non-revolutionary means [for] redressing grievances” before turning to revolution.<sup>314</sup> A revolution should also be a defense against government tyranny, not a form of changing law that one wants changed.<sup>315</sup> The democratic process is the outlet for changing the law when possible. When a lawful revolution defends against tyranny it aims its resistance against its “original attackers,” the government, while radical terrorists do not act against any attackers but innocent civilians.<sup>316</sup>

The treaty, however, probably cannot specifically state when resistance to government tyranny is acceptable. This would run in direct contradiction to the idea of preventing government tyranny. If the states determine when resistance to them is lawful, then they could use a treaty designed to prevent tyranny as a means to ensure tyranny. The states could sign a treaty making resistance to government tyranny essentially never “necessary,” thus, eliminating the right to resist tyranny and giving nations a green light to commit tyranny. The treaty could state the people have the final right to determine if they must rise up against their government.

## 2. Right to Individual Self-Defense

The present state of “domestic and international law require that [self-defense] be necessary.”<sup>317</sup> The requirement of “necessity . . . has two parts under domestic law: the actor may only act *when* necessary and *to the extent* necessary.”<sup>318</sup>

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<sup>307</sup> *Id.* at 1261.

<sup>308</sup> *Id.* at 1254.

<sup>309</sup> *See id.* at 1258.

<sup>310</sup> *Id.*

<sup>311</sup> *See id.* at 1259.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 1260.

<sup>314</sup> *Id.*

<sup>315</sup> *See id.* at 1261.

<sup>316</sup> *See* Christopher L. Blakesley, *Ruminations on Terrorism & Anti-Terrorism Law & Literature*, 57 U. MIAMI L. REV. 1041, 1099 (2003).

<sup>317</sup> Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 222 (2004) (stating deadly force may be employed in self-defense against threats of death, grievous bodily harm, rape, and kidnapping under domestic law).

<sup>318</sup> *Id.* (emphasis in original); *see also id.* at 223–24 (considering immediacy requirement

The law allows “the right of an innocent to defend himself or others with force, lethal if necessary, even against officers of the state.”<sup>319</sup> “[I]f one kills, reasonably believing he is killing a deadly attacker, he acts in self-defense.”<sup>320</sup> “If he has no such reasonable belief, he is not justified or excused.”<sup>321</sup> A homicide is justified if it is committed against a person attacking the killer with deadly force, but the killing will be murder if one intentionally or knowingly kills an innocent.<sup>322</sup>

It is not difficult to determine the validity of a self-defense claim.<sup>323</sup> It is not self-defense to attack an innocent who is not attacking the person raising the defense, even if killing the innocent will preserve the life of the person raising the defense.<sup>324</sup> Self-defense does not apply unless the attacker forced a choice on a person to kill the attacker or be killed, for example.<sup>325</sup>

How much force can be used in self-defense is a question of proportionality.<sup>326</sup> A reasonable amount of force may be used.<sup>327</sup> Deadly force can be used only when a person may be killed or subject to a forcible felony.<sup>328</sup> “Most [American] jurisdictions do not require [a person to] retreat before the use of deadly force, and no jurisdiction requires retreat before the use of non-deadly force.”<sup>329</sup>

### 3. Right to Keep and Bear Arms

The treaty must be clear that the right of individuals to possess arms is a fundamental human right. The question of what “arms” individuals should possess should follow the type of arms the Second Amendment protects. The amendment does not provide an unlimited right to keep and bear arms.<sup>330</sup> It protects “arms” that were used in the colonial era and can be used today as objects for defense against both a tyrannical government and individual attackers.<sup>331</sup> It therefore allows for individual possession of handguns,<sup>332</sup> as well as knives, swords, billy clubs, and hatchets, for example.<sup>333</sup> Large-scale modern weapons only used by the military are not “arms” that

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under international law).

<sup>319</sup> Polsby & Kates, *supra* note 67, at 1255.

<sup>320</sup> Blakesley, *supra* note 316, at 1100.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *See id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> Ferzan, *supra* note 317, at 222.

<sup>327</sup> Polsby & Kates, *supra* note 67, at 1255.

<sup>328</sup> *Id.*; *see also* Ferzan, *supra* note 317, at 222 (stating deadly force may be employed “in self-defense against threats of death, grievous bodily harm, rape, and kidnapping”).

<sup>329</sup> Ferzan, *supra* note 317, at 223 n.50.

<sup>330</sup> Van Alstyne, *supra* note 11, at 1253.

<sup>331</sup> *State v. Kessler*, 614 P.2d 94, 98 (Or. 1980).

<sup>332</sup> Van Alstyne, *supra* note 11, at 1254 n.56.

<sup>333</sup> *See, e.g., Kessler*, 614 P.2d at 98, 100.

individuals possess for defense.<sup>334</sup> An individual does not have a right to possess a weapon of mass destruction, such as a nuclear weapon.

### *B. Permissible Arms Regulation*

Under the treaty, gun regulation should be a flexible construct in order to gain as many signatories to the treaty as possible. The treaty should be drafted to allow states to have regulatory schemes for gun possession, while recognizing the right of individuals to keep and bear arms.<sup>335</sup> Under the treaty, signatories should be able to restrict arms possession for criminals, those indicted for crimes,<sup>336</sup> and those who are mentally ill. Signatories could also ban arms possession for persons under twenty-one.<sup>337</sup> Signatories could also regulate the purchasing and possession of guns through criminal history checks<sup>338</sup> and licensing regulations.

## CONCLUSION

International gun control is prevalent, and little sentiment exists in the international human rights community to stifle such regulation through an international right to keep and bear arms. In a worst-case scenario, international gun control could become so common and restrictive that some may argue it rises to the level of customary international law. If customary international law were to apply, then international law could require all states to ban gun possession.

This would conflict with the right to keep and bear arms. The majority of historians<sup>339</sup> and most constitutional law scholars<sup>340</sup> view the Second Amendment as securing an individual right. As of 2000, eighty-eight law review articles published since 1912 concluded the Second Amendment secures an individual right, while seventy-six law review articles published in the same time concluded the amendment secures a collective right.<sup>341</sup> Since 1990, the trend has been to recognize the amendment secures an individual right, as about sixty law review articles sided with the individual rights view, and about thirty sided with the collective rights view.<sup>342</sup>

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<sup>334</sup> *Id.* at 99.

<sup>335</sup> See Saul Cornell & Nathan DeNino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 528 (2004).

<sup>336</sup> Cook & Ludwig, *supra* note 166, at 595 (referencing United States law as an example).

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 *CHI.-KENT. L. REV.* 349, 356 (2000) (citing Daniel Lazare, *Your Constitution Is Killing You*, *HARPER'S MAG.*, Oct. 1999, at 58).

<sup>340</sup> *Id.* (citing Walter Shapiro, *It's High Time to Gun Down the 2nd Amendment*, *USA TODAY*, Sept. 17, 1999, at A14).

<sup>341</sup> *Id.* at 384.

<sup>342</sup> *Id.*

The right to keep and bear arms serves two purposes that transcend national boundaries: preventing government tyranny and providing people with the means to defend themselves. The purposes therefore show that “[t]he right to possess arms is a fundamental *human* right.”<sup>343</sup> The Second Amendment serves to secure this fundamental human right.<sup>344</sup> It is time for international human rights law to secure this fundamental right. Until that occurs, all people will not have the means to prevent government tyranny and provide for their individual self-defense. Consequently, James Madison’s words from over 200 years ago, referring to America’s “advantage of being armed, which the Americans possess over the people of almost every other nation,”<sup>345</sup> still ring true today.

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<sup>343</sup> NAPOLITANO, *supra* note 5, at 50 (emphasis added).

<sup>344</sup> *Id.*

<sup>345</sup> THE FEDERALIST NO. 46, at 321 (James Madison) (Jacob E. Cooke ed., 1961).