No. 07-290

IN THE
Supreme Court of the United States

DISTRICT OF COLUMBIA AND
ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* CONGRESS OF RACIAL EQUALITY IN SUPPORT OF RESPONDENT

Stefan Bijan Tahmassebi
*Counsel of Record
3117 Woodland Lane
Alexandria, VA. 22309
(703) 267-1259

Prof. Robert Cottrol
George Washington
University Law School
2000 H Street, N.W.
Washington., D.C. 20052
(202) 994-5023

Prof. Raymond T. Diamond
Tulane University School of Law
6329 Freret Street
New Orleans, LA. 70118
(504) 865-5962

Attorneys for Amicus Curiae

QUESTION PRESENTED

Whether the following provisions, D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02, violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

STATUTES

LEGISLATIVE MATERIALS

LAW REVIEW ARTICLES

BOOKS

Hardy and Chotiner, "The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibitions" in *Restricting Handguns: The Liberal Skeptics Speak Out* (D. Kates ed. 1979). 25

A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process, The Colonial Period* (1978) 6

H. Hyman, *The Radical Republicans and Reconstruction* (1967) 10

W. Jordan, *White over Black: American Attitudes Toward the Negro, 1550-1812* (1968) 4

Don B. Kates, Jr., "Toward A History of Handgun Prohibition in the United States" in *Restricting Handguns: The Liberal Skeptics Speak Out* (D. Kates ed. 1979) 17

Lee B. Kennett and James LaVerne Anderson, *The Gun in America: The Origins of a National Dilemma* (1975) 4

Norville Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (1970) 31

Robert Sherrill, *The Saturday Night Special* (1972). 24

MISCELLANEOUS AUTHORITIES

State/RunCrimeStatebyState.cfm
(select "United States - Total," "Violent Crime Rates," and years "From: 1960 To: 2004")

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Detroit Free Press, Jan. 26, 1977 31

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Congress of Racial Equality, Inc. ("CORE") is a New York not-for-profit corporation founded in 1942, with national headquarters in Harlem, New York City. CORE is a nationwide civil rights organization, with consultative status at the United Nations, which is primarily interested in the welfare of the black community, and the protection of the civil rights of all citizens.

Judgment below should be upheld.

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[1] No counsel for any party authored this brief in whole or in part. No counsel for a party or party made a financial contribution for the preparation or submission of this brief. Funding for printing and submission of this brief was provided by NRA Civil Rights Defense Fund. This brief is filed with the written consent of all parties, reflected in letters filed by the parties with the clerk. Amicus complied with the conditions of those consents by providing advance notice of its intention to file this brief.

SUMMARY OF ARGUMENT

The history of gun control in America has been one of discrimination, disenfranchisement and oppression of racial and ethnic minorities, immigrants, and other "undesirable" groups. Robert Cottrol and Raymond Diamond, *Never Intended to be Applied to the White Population: Firearms Regulation and Racial Disparity--The Redeemed South's Legacy to a National Jurisprudence?*, 70 Chi. Kent L. Rev. 1307-1335 (1995); Robert Cottrol and Raymond Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Georgetown L.J. 309-361 (1991); Raymond Kessler, *Gun Control and Political Power*, 5 Law & Pol'y Q. 381 (1983); Stefan Tahmassebi, *Gun Control and Racism*, 2 Geo. Mason U. Civ. Rts. L.J. 67. Gun control laws were often specifically enacted to disarm and facilitate repressive action against these groups. Id.

More recently, facially neutral gun control laws have been enacted for the alleged purpose of controlling crime. Often, however, the actual purpose or the actual effect of such laws has been to discriminate or oppress certain groups. Id.; *Ex Parte Lavinder*, 88 W.Va. 713, 108 S.E. 428 (1921) (striking down martial law regulation inhibiting possession and carrying of arms). As Justice Buford of the Florida Supreme Court noted in his concurring opinion narrowly construing a Florida gun control statute:

> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers

> in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers ... . The statute was never intended to be applied to the white population and in practice has never been so applied ... . [T]here has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and nonenforceable if contested.

Watson v. Stone, 148 Fla. 516, 524, 4 So.2d 700, 703 (1941) (Buford, J., concurring).

The worst abuses at present occur under the mantle of facially neutral laws that are, however, enforced in a discriminatory manner. Even those laws that are passed with the intent that they be applied to all, are often enforced in a discriminatory fashion and have a disparate impact upon blacks, the poor and other minorities. Present day enforcement of gun laws frequently targets minorities and the poor, and often results in illegal searches and seizures.

ARGUMENT

I. GUN CONTROL MEASURES HAVE BEEN AND ARE USED TO DISARM AND OPPRESS BLACKS AND OTHER MINORITIES

A. Gun Control in the Slave Codes

The development of racially-based slavery in the seventeenth century American colonies was accompanied by the creation of laws meting out separate treatment and granting separate rights on the basis of race. An early sign of such emerging restrictions, and one of the most important legal distinctions, was the passing of laws denying free blacks the right to keep arms. "In 1640, the first recorded restrictive legislation passed concerning blacks in Virginia excluded them from owning a gun." Lee Kennett and James LaVerne Anderson, *The Gun in America: The Origins of a National Dilemma* 50 (1975). "Virginia law set Negroes apart from all other groups ... by denying them the important right and obligation to bear arms. Few restraints could indicate more clearly the denial to Negroes of membership in the White community." W. Jordan, *White over Black: American Attitudes Toward the Negro, 1550-1812* 78 (1968).

In the later part of the 17th Century, fear of slave uprisings in the South accelerated the passage of laws dealing with firearms possession by blacks. In 1712, for instance, South Carolina passed "An act for the better ordering and governing of Negroes and Slaves" which included two articles particularly

relating to firearms ownership and blacks. 7 Statutes at Large of South Carolina 353-54 (D.J. McCord ed. 1836-1873). Virginia passed a similar act entitled "An Act for Preventing Negroes Insurrections." 2 Statutes at Large; Being a Collection of All the Laws of Virginia, From the First Session of the Legislature, in the Year 1619, 481 (W.W. Hening ed. 1823).

The late Judge A. Leon Higginbotham, Jr. summarized a 1680 Virginia law:

> The 1680 statute would become the model of repression throughout the South for the next 180 years. The following provisions are illustrative of its codification of prejudice and the degree to which the statute attempted to make sure that blacks would be recognized as legally inferior:
>
> > 1680. Act X. Whereas the frequent meetings of considerable numbers of Negro slaves under pretense of feasts and burials is judged of dangerous consequence [it] enacted that no Negro or slave may carry arms, such as any club, staff, gun, sword, or other weapon, not go from his owner's plantation without a certificate and then only on necessary occasions; the punishment twenty lashes on the bare back, well laid on. And further, if any Negro lift up his hand against any Christian he shall receive thirty lashes, and if he be absent himself or lie out from his master's service and

> resist lawful apprehension, he may be killed . . . .
>
> If blacks could not leave the owner's plantation without a certificate, their mobility was destroyed; if blacks could not carry arms, the potential to resist was reduced.

A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process, The Colonial Period* 39 (1978) (quoting Act X, 1680; Guild, *Black Laws*, p. 45.)

The slave codes of all of the Southern states prohibited slaves from keeping or bearing firearms. The District of Columbia was no exception. Washington, D.C. was originally created out of existing parts of Virginia and Maryland. Congress provided that Virginia and Maryland law was to govern in Washington. Act of Feb. 27, 1801, ch. 15, 2 Stat. 103, 104. Thus, the slave codes of Maryland and, for a time, of Virginia, applied in Washington, D.C. The Virginia law which applied included a 1748 statute which provided that:

> No Negro or mulatto slave whatsoever shall keep or carry any gun, powder, shot, club or other weapon whatsoever, offensive or defensive... Provided, that slaves living at any frontier plantation, may be permitted to keep and use guns, powder, shot, and weapons, offensive or defensive, by license from a justice of the peace of the county wherein such plantation lies. . . . No free negro or mulatto,

> shall be suffered to keep or carry any firelock of any kind, any military weapon, or any powder or lead, with out first obtaining a license from the court of the county or corporation in which he resides, which license may, at any time, be withdrawn by an order of such court.

VA. CODE, ch. 3, §§ 7, 8 (1819).

Maryland law, which applied to its seceded portion of Washington D.C., included a statute enacted in 1715, which provided:

> No negro or other slave within this province shall be permitted to carry any gun, or any other offensive weapon, from off their master's land, without license from their said master; and if any negro or other slave shall presume to do, he shall be carried before a justice of peace, and be whipped, and his gun or other offensive weapon shall be forfeited to him that shall seize the same and carry such negro so offending before a justice of peace.

The General Public Statutory Law and Public Local Law of the State of Maryland, From the Year 1692-1839 Inclusive 31 (John D. Toy ed., 1840).

Jurist and abolitionist St. George Tucker summarized the badges of slavery: "To go abroad without a written permission; to keep or carry a gun, or other weapon; to utter any seditious speech; to be present at any unlawful assembly of slaves; to lift the hand in opposition to a white person, unless wantonly

assaulted, are all offenses punishable by whipping." St. George Tucker, *A Dissertation on Slavery* 65 (1796).

Thus, in many of the antebellum states, free and/or slave blacks were legally forbidden to possess firearms. State legislation which prohibited the bearing of arms by blacks was held to be constitutional due to the lack of citizen status of the Afro-American slaves. *State v. Newsom*, 27 N.C. 250 (1844). *Cooper v. Mayor of Savannah*, 4 Ga. 68, 72 (1848). Legislators simply ignored the fact that the U.S. Constitution and most state constitutions referred to the right to keep and bear arms as a right of the "people" rather than of the "citizen." Stephen Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 Go. Mason U. L. Rev. 1, 15 (1981).

Chief Justice Taney argued, in the infamous *Dred Scott* case, that the Constitution could not have intended that free blacks be citizens:

> For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operations of the special laws and from the police regulations which they [the states] considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, ... [A]nd it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold

> public meetings upon political affairs, and to keep and carry arms wherever they went.

Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 416-17 (1856) (emphasis added). In a later part of the opinion, Justice Taney enumerated the constitutional protections afforded to citizens by the Bill of Rights:

> Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

Id. at 450. Clearly, the Court viewed the right to keep and bear arms as one of the fundamental individual rights guaranteed to American citizens by the Bill of Rights; which blacks, who the Court claimed were not American citizens, could not enjoy.

B. Black Codes, Reconstruction and the Fourteenth Amendment: A Fundamental Individual Right to Keep And Bear Arms

After the Civil War, southern legislatures adopted comprehensive regulations, Black Codes, by which the new freedmen were denied many of the rights that white citizens enjoyed. These Black Codes often prohibited the purchase or possession of firearms by freedmen. The Special Report of the Anti-Slavery Conference of 1867 noted with particular emphasis that under the Black Codes, blacks were "forbidden to own or bear firearms, and thus were rendered defenseless against assaults." Reprinted in H. Hyman,

The Radical Republicans and Reconstruction 219 (1967).

Mississippi's Black Code included the following provision:

> Be it enacted ... [t]hat no freedman, free negro or mulatto, not in the military ... and not licensed so to do by the board of police of his or her county, shall keep or carry firearms of any kind, or any ammunition, ... and all such arms or ammunition shall be forfeited to the informer ... .

1866 Miss. Laws ch. 23, §1, 165 (1865).

In response to the Black Codes and the South's deprivation of the civil rights of the freedmen, the U.S. Congress enacted a series of civil rights bills and the Fourteenth Amendment. The legislative histories of these acts and of the Fourteenth Amendment are replete with denunciations of the disarmament of blacks, and state the intent of the drafters to guarantee to the freedmen the individual right to keep and bear arms for personal self-defense. Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 256 (1983); Halbrook, supra, 4 Go. Mason U. L. Rev. at 21-26; Akhil Reed Amar, *The Bill of Rights* 264-266 (1998). The aforementioned intent was "[o]ne of the core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment." Amar, supra, *The Bill of Rights* 264. *See also*, Stephen Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear*

Arms, 1866-1876 (1998).

One of these civil rights acts was the Freedman's Bureau Act, which required that "laws ... concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens." 14 Stat 173, 176 (1866) (emphasis added).

In support of Senate Bill No. 9, which declared as void all laws in the former rebel states that recognized inequality of rights based on race, Senator Henry Wilson (R., Mass.) explained that: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages upon them ... ." Cong. Globe, 39th Cong., 1st Sess. 40 (1865).

The framers of the Civil Rights Act of 1866 argued that the issue of the right to keep and bear arms by the newly freed slaves was of vital importance. Senator William Salisbury (D., Del.) stated that "[i]n most of the southern States, there has existed a law of the State based upon and founded in its police power, which declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power." Id. at 478. Representative Henry J. Raymond (R., N.Y.) explained that the rights of citizenship entitled the freedmen to all the rights of United States citizens: "He has a defined status: he has a country and a home; a right to defend himself

and his wife and children; a right to bear arms; a right to testify in the Federal Courts ... ." Id. at 1266.

During the debate on the Fourteenth Amendment, Kansas Senator Samuel Pomeroy asked:

> And what are the safeguards of liberty under our form of Government? There are at least, under our Constitution, three which are indispensable--
>
> 1. Every man should have a homestead, that is, the right to acquire and hold one, and the right to be safe and protected in that citadel of his love
>
> . . . .
>
> 2. He should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world, where his wretchedness will forever remain complete; and
>
> 3. He should have the ballot . . . .

Cong. Globe, 39th Cong., 1st Sess 1182 (1866).

The legislators were specifically concerned with the violation in the South of the freedman's right to

keep and bear arms.

> Senator Howard . . . explicitly invoked "the right to keep and bear arms" in his important speech cataloguing the "personal rights" to be protected by the Fourteenth Amendment. Howard and others may have been influenced by the antebellum constitutional commentator William Rawle, who had argued in his 1825 treatise that the Second Amendment as written limited both state and federal government . . .

Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1167 (1991) (quoting Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)).

> [I]t is abundantly clear that the Republicans wished to give constitutional sanction to states' obligation to respect such key provisions as freedom of speech, the right to bear arms, trial by impartial jury . . . . The Freedman's Bureau had already taken steps to protect these rights, and the Amendment was deemed necessary, in part, precisely because every one of them was being systematically violated in the South in 1866.

Eric Foner, *Reconstruction* 258-59 (1988) (emphasis added).

Within three years of the adoption of the Fourteenth Amendment in 1868, Congress was considering legislation to suppress the Ku Klux Klan. In a report on violence in the South, Representative

Benjamin F. Butler (R., Mass.) stated that the right to keep arms was absolutely necessary for protection. He noted instances of "armed confederates" terrorizing blacks, and "in many counties they have preceded their outrages upon him by disarming him, in violation of his right as a citizen to 'keep and bear arms' which the Constitution expressly says shall never be infringed." H.R. Rep. No. 37, 41st Cong., 3rd Sess. 3 (1871).

The anti-KKK bill was originally introduced to the House Judiciary Committee with the following provision:

> That whoever shall, without due process of law, by violence, intimidation, or threats, take away or deprive any citizen of the United States of any arms or weapons he may have in his house or possession for the defense of his person, family, or property, shall be deemed guilty of a larceny thereof, and be punished as provided in this act for a felony.

Cong. Globe, 42nd Cong., 1st Sess. 174 (1871) (emphasis added).

Representative Butler explained the purpose of this provision:

> Section 8 is intended to enforce the well-known constitutional provision guaranteeing the right in the citizen to 'keep and bear arms,' ... . This provision seemed to your committee to be necessary, because they had observed that, before these midnight marauders made attacks

> upon peaceful citizens, there were very many instances in the South where the sheriff of the county had preceded them and taken away the arms of their victims. This was especially noticeable in Union County, where all the negro population were disarmed by the sheriff only a few months ago under the order of the judge ...; and then, the sheriff having disarmed the citizens, the five hundred masked men rode at night and murdered and otherwise maltreated the ten persons who were there in jail in that county.

H.R. Rep. No. 37, 41st Cong., 3rd Sess. 78 (1871).

The drafters of the civil rights acts and of the Fourteenth Amendment specifically intended to protect the individual fundamental right of the freedmen to keep and bear arms. Amar, supra, 100 Yale L.J. 1131. Amar, supra, *The Bill of Rights.* Halbrook, supra, 4 Go. Mason U. L. Rev. 1. Stephen Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms:" Visions Of the Framers of the Fourteenth Amendment*, 5 Seton Hall Const. L.J. 341-434 (1995).

> The [Reconstruction] Congressmen of this period were hardly interested in strengthening the state militias . . . or in reinforcing states' rights. The Congressional concern about the constitutional right to keep and bear arms was plainly a concern about the self-defense rights of individual citizens, especially freedmen.

David Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. Rev. 1359, 1453-54 (1998). As noted constitutional scholar Akhil Reed Amar commented, the focus of the Second Amendment had changed:

> In short, between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman. The Creation motto, in effect, was that if arms were outlawed, only the central government would have arms. In Reconstruction a new vision was aborning: when guns were outlawed, only the Klan would have guns. This idea, focusing on private violence and the lapses of local government rather than on the public violence orchestrated by central soldiers, is far closer to the unofficial motto of today's National Rifle Association, "When guns are outlawed, only outlaws will have guns."

Amar, supra, *The Bill of Rights*, at 266.

C. Post-Reconstruction

Even after the passage of the Civil Rights Act and the Fourteenth Amendment, southern states continued in their effort to disarm blacks. Some southern states reacted to the federal acts by conceiving a means to the same end: banning a particular class of firearms, in this case cheap handguns, which were the only firearms the poverty-stricken freedmen could afford. William Tonso, *Gun Control: White Man's Law*, Reason, Dec. 1985, at 23.

In the very first legislative session after white supremacists regained control of the Tennessee legislature in 1870, that state set the earliest southern postwar pattern of legal restrictions by enacting a ban on the carrying, "publicly or privately," of the "belt or pocket pistol or revolver." *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 172 (1871) (citing "An Act to Preserve the Peace and Prevent Homicide"). In 1879, the General Assembly of Tennessee banned the sale of any pistols other than the expensive "army or navy" model revolvers. *State v. Burgoyne*, 75 Tenn. 173, 174 (1881) (citing "An Act to Prevent the Sale of Pistols"). Don Kates, "Toward A History of Handgun Prohibition in the United States" in *Restricting Handguns: The Liberal Skeptics Speak Out* 14 (D. Kates ed. 1979).

In 1881, Arkansas followed Tennessee's law by enacting a virtually identical "Saturday Night Special Law," which again was used to disarm blacks. *Dabbs v. State*, 39 Ark. 353 (1882). Instead of formal legislation, other deep South states simply continued, in violation of the Fourteenth Amendment, to enforce the pre-emancipation statutes prohibiting the possession of firearms by blacks. Kates, supra, "Toward A History of Handgun Prohibition in the United States," at 14.

A different route was taken in Alabama, Texas, and Virginia: there, exorbitant business or transaction taxes were imposed in order to price handguns out of the reach of blacks and poor whites. An article in Virginia's university law review called for registration and a "prohibitive" sales tax on handguns as a way of disarming blacks. Comment, *Carrying Concealed*

Weapons, 15 Va. L. Reg. 391, 391-92 (1909).

In many jurisdictions, systems were emplaced where retailers would report to local authorities whenever blacks purchased firearms or ammunition. The sheriff would then arrest the purchaser and confiscate the firearm. Kates, supra, "Toward A History of Handgun Prohibition in the United States," at 14. Mississippi legislated this system by enacting the first registration law for retailers in 1906, requiring retailers to maintain records of all pistol and pistol ammunition sales, and to make such available to authorities for inspection. Id.

D. United States v. Cruikshank

Federal prosecutors, invoking the new civil rights laws, brought cases against KKK members and others who had violated the civil rights of freedmen. Many of these prosecutions involved charges that the defendants violated the Second Amendment rights of freedmen by confiscating the freedmen's firearms. *See* Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 Emory L.J. 921 (1984). One of these cases, arising out of the disarmament and murder of armed blacks in the Colfax courthouse (the "Colfax Massacre"), and a subsequent federal prosecution of Klansmen for violation of the freedman's civil rights under the Enforcement Acts, went to the Supreme Court. *See* 16 Stat. 140 § 6 (1870); *see also* 18 U.S.C. §§ 241-242 (1994). *United States v. Cruikshank*, 92 U.S. 542 (1875). The indictment in *Cruikshank* charged, inter alia, a conspiracy by Klansmen to

prevent blacks from exercising their civil rights, including the right of assembly and the right to keep and bear arms for lawful purposes.

Cruikshank upheld the Klan's repressive actions against blacks in the South by holding the Enforcement Acts unconstitutional. *Cruikshank*, 92 U.S. 542. The Court held that because the rights of the victimized freedmen, including the right to free speech and the right to keep and bear arms, existed independently of the Constitution, and the first and second amendments guaranteed only that such rights shall not be infringed by the federal government, the federal government had no power to punish a violation of such rights by private individuals or the states. The Fourteenth Amendment offered no relief, the Court held, because the case involved a private conspiracy and not state action; the aggrieved citizens could seek protection and redress only from the state government and not from the federal government. Id. at 553-54.

Cruikshank signaled the end of reconstruction and, with the *Slaughterhouse Cases*, that century's defeat of the Fourteenth Amendment's attempt to make the Bill of Rights effective against state government abuses. "Firearms in the Reconstruction South provided a means of political power for many. They were the symbols of the new freedom for blacks ... . In the end, white southerners triumphed and the blacks were effectually disarmed." Kennett and Anderson, supra, at 155. The *Cruikshank* decision gave the green light to the Klan, white militias and other racist groups to forcibly disarm the freedmen and impose white supremacy. George C. Rable, *But*

There Was No Peace: The Role of Violence in the Politics of Reconstruction 129 (1984).

E. Gun Control in the Twentieth Century

At the end of the 19th century, Southern states began formalizing firearms restrictions in response to an increased concern about firearms ownership by certain whites, such as agrarian agitators and labor organizers. In 1893, Alabama, and in 1907, Texas, began imposing heavy business/transaction taxes on handgun sales in order to resurrect economic barriers to ownership. South Carolina, in 1902, banned all pistol sales except to sheriffs and their special deputies, which included company strongmen and the KKK. Kates, supra, "Toward A History of Handgun Prohibition in the United States," at 14-15.

The Supreme Court of North Carolina, in striking down a local statute which prohibited the open carrying of firearms without a permit in Forsyth County, stated:

> To exclude all pistols, however, is not a regulation, but a prohibition, of arms which come under the designation of arms which the people are entitled to bear. This is not an idle or an obsolete guaranty, for there are still localities, not necessary to mention, where great corporations, under the guise of detective agents or private police, terrorize their employees by armed force. If the people are forbidden to carry the only arms within their means, among them pistols, they will be completely at the mercy of

these great plutocratic organizations.

State v. Kerner, 181 N.C. 574, 578, 107 S.E. 222, 225 (1921).

In the Northeast, the period from the 1870s to the mid-1930s was characterized by strong xenophobic reactions to Eastern and Southern European immigrants. Armed robbery in particular was associated with the racial stereotype in the public mind of the East and South European immigrant as lazy and inclined to violence and espousing anarchy. The fear and suspicion of these "undesirable" immigrants, together with a desire to disarm labor organizers, led to a concerted campaign by organizations such as the Immigration Restriction League and the American Protective Association, for the enactment of a flat ban on the ownership of firearms, or at least handguns, by aliens. Kates, supra, "Toward A History of Handgun Prohibition in the United States," at 15-16.

In 1911, New York enacted the Sullivan law. N.Y. PENAL LAW § 1897 (Consol. 1909)(amended 1911). "Of proven success in dealing with political dissidents in Central European countries, this system made handgun ownership illegal for anyone without a police permit." Kates, supra, "Toward A History of Handgun Prohibition in the United States," at 15. The New York City Police Department thereby acquired the official and wholly arbitrary authority to deny or permit the possession of handguns; which the department used in its effort to disarm the city's Italian population. The Sullivan law was designed to:

> strike hardest at the foreign-born element ... . As early as 1903 the authorities had begun to cancel pistol permits in the Italian sections of the city. This was followed by a state law of 1905 which made it illegal for aliens to possess firearms 'in any public place'. This provision was retained in the Sullivan law.

Kennett and Anderson, supra, at 177-78.

Most of the American handgun ownership restrictions adopted between 1901 and 1934 followed on the heels of highly publicized incidents involving the incipient black civil rights movement, foreign-born radicals, or labor agitators. In 1934, Hawaii, and in 1930 Oregon, passed gun control statutes in response to labor organizing efforts in the Port of Honolulu and the Oregon lumber mills. A Missouri permit law was enacted in the aftermath of a highly publicized St. Louis race riot. Michigan's version of the Sullivan law was enacted in the aftermath of the trial of Dr. Ossian Sweet, a black civil rights leader. Dr. Sweet had moved into an all white neighborhood and had been indicted for murder for shooting one of a white mob that had attacked his house while Detroit police looked on. Kates, supra, "Toward A History of Handgun Prohibition in the United States," at 18-19.

In its opening statement, in the NAACP's lawsuit against the firearms industry, the NAACP admitted the importance of the constitutional right:

> Certainly the NAACP of all organizations in this country understands and respects the

> constitutional right to bear arms. Upon the NAACP's founding in 1909 in New York City, soon thereafter it took up its first criminal law case [i]n Ossien, Michigan, where a black male, Mr. Sweet, was charged with killing a white supremacist along with several accomplices. The court, to rule out Mr. Sweet and his family to be pushed out of their home in Michigan, it was in that case that the presiding judge, to uphold Mr. Sweet's right to be with his family, coined the popular phrase "a man's home is his castle."

NAACP et al. v. Acusport, Inc. et al., Trial Tr. at 103, 99-CV-3999(JBW), 99-CV-7037(JBW) (E.D.N.Y. March 31, 2003). (The incident actually occurred in Detroit - not "Ossien" - Michigan in 1926. The NAACP and Clarence Darrow came to the defense of Dr. Ossian Sweet who had fatally shot a person in a white mob which was attacking his home because Dr. Sweet had moved into an all-white neighborhood. Furthermore, the phrase "a man's home is his castle," while certainly relevant to the Sweet case, first appears in an English 1499 case.)

After World War I, a generation of young blacks, often led by veterans familiar with firearms and willing to fight for the equal treatment that they had received in other lands, began to assert their civil rights. In response, the Klan again became a major force in the South in the 1910s and 1920s. Often public authorities stood by while murders, beatings, and lynchings were openly perpetrated upon helpless black citizens. And once again, gun control laws made sure

that the victims of the Klan's violence were unarmed and did not possess the ability to defend themselves, while at the same time cloaking the often specially deputized Klansmen in the safety of their monopoly of arms. Id. at 19.

The Klan was also present in force in southern New Jersey, Illinois, Indiana, Michigan and Oregon. Between 1913 and 1934, these states enacted either handgun permit laws or laws barring alien handgun possession. The Klan targeted not only blacks, but also Catholics, Jews, labor radicals, and the foreignborn; and these people also ran the risk of falling victim to lynch mobs or other more clandestine attacks, often after the victims had been disarmed by state or local authorities. Id. at 19-20.

II. CURRENT GUN CONTROL EFFORTS: A LEGACY OF RACISM

Behind current gun control efforts often lurks the remnant of an old prejudice, that the lower classes and minorities, especially blacks, are not to be trusted with firearms. Today, the thought remains among gun control advocates: if the poor or blacks are allowed to have firearms, they will commit crimes with them. Even noted gun control activists have admitted this. Gun control proponent and journalist Robert Sherrill frankly admitted that the Gun Control Act of 1968 was "passed not to control guns but to control Blacks." Robert Sherrill, *The Saturday Night Special* 280 (1972). "It is difficult to escape the conclusion that the 'Saturday night special' is emphasized because it is cheap and it is being sold to a particular class of

people. The name is sufficient evidence - the reference is to 'nigger-town Saturday night.'" Barry Bruce-Briggs, *The Great American Gun War*, The Public Interest, Fall 1976 at 37.

The worst abuses at present occur under the mantle of facially neutral laws that are, however, enforced in a discriminatory manner. Even those laws that are passed with the intent that they be applied to all, are often enforced in a discriminatory fashion and have a disparate impact upon blacks, the poor, and other minorities. In many jurisdictions which require a discretionary gun permit, licensing authorities have wide discretion in issuing a permit, and those jurisdictions unfavorable to gun ownership, or to the race, politics, or appearance of a particular applicant frequently maximize obstructions to such persons while favored individuals and groups experience no difficulty in the granting of a permit. Hardy and Chotiner, "The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibitions" in *Restricting Handguns: the Liberal Skeptics Speak Out,* supra, at 209-10; Tonso, supra, at 24. In St. Louis,

> permits are automatically denied ... to wives who don't have their husband's permission, homosexuals, and non-voters .... As one of my students recently learned, a personal 'interview' is now required for every St. Louis application. After many delays, he finally got to see the sheriff who looked at him only long enough to see that he wasn't black, yelled 'he's alright' to the permit secretary, and

left.

Don Kates, *On Reducing Violence or Liberty*, 1976 Civ. Liberties Rev. 44,
56.

New York's infamous Sullivan Law, originally enacted to disarm Southern and Eastern European immigrants who were considered racially inferior and religiously and ideologically suspect, continues to be enforced in a racist and elitist fashion "as the police seldom grant hand gun permits to any but the wealthy or politically influential." Tonso, supra, at 24.

> New York City permits are issued only to the very wealthy, the politically powerful, and the socially elite. Permits are also issued to: private guard services employed by the very wealthy, the banks, and the great corporations; to ward heelers and political influence peddlers; ....

Kates, "Introduction," in *Restricting Handguns: the Liberal Skeptics Speak Out*, supra, at 5.

A. By Prohibiting the Possession of Firearms, the State Discriminates Against Minority and Poor Citizens

The obvious effect of gun prohibitions is to deny law-abiding citizens access to firearms for the defense of themselves and their families. That effect is doubly discriminatory because the poor, and especially the black poor, are the primary victims of crime and in many areas lack the necessary police protection.

African Americans, especially poor blacks, are disproportionately the victims of crime, and the situation for households headed by black women is particularly difficult. In 1977, more than half of black families had a woman head of household. A 1983 report by the U.S. Department of Labor states that:

> among families maintained by a woman, the poverty rate for blacks was 51%, compared with 24% for their white counterparts in 1977 ... . Families maintained by a woman with no husband present have compromised an increasing proportion of both black families and white families in poverty; however, families maintained by a woman have become an overwhelming majority only among poor black families .... About 60% of the 7.7 million blacks below the poverty line in 1977 were living in families maintained by a black woman.

U.S. Dept. of Labor, *Time of Change: 1983 Handbook on Women Workers* 118 Bull. 298 (1983).

The problems of these women are far more than merely economic. National figures indicate that a black female in the median female age range of 25-34 is about twice as likely to be robbed or raped as her white counterpart. She is also three times as likely to be the victim of an aggravated assault. Id. at 90. *See* United States Census Bureau, *U.S. Statistical Abstract* (1983). A 1991 DOJ study concluded that "[b]lack women were significantly more likely to be raped than white women." Caroline Wolf Harlow, U.S. Dept. of Justice, *Female Victims of Violent Crime* 8

(1991). "Blacks are eight times more likely to be victims of homicide and two and one-half times more likely to be rape victims. For robbery, the black victimization rate is three times that for whites . . . ." Paula McClain, *Firearms Ownership, Gun Control Attitudes, and Neighborhood Environments*, 5 Law & Pol'y Q. 299, 301 (1983).

The need for the ability to defend oneself, family, and property is much more critical in the poor and minority neighborhoods ravaged by crime and without adequate police protection. Id.; Don Kates, *Handgun Control: Prohibition Revisited*, Inquiry, Dec. 1977, at 21. However, citizens have no right to demand or even expect police protection. Courts have consistently ruled "that there is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). Furthermore, courts have ruled that the police have no duty to protect the individual citizen. *DeShaney v. Winnebago County Dep't of Social Serv.*, 109 S.Ct. 998, 1004 (1989); *South v. Maryland*, 59 U.S. 396 (1855); *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. App. 1983) (en banc); *Warren v. District of Columbia*, 444 A.2d 1 (D.C. App. 1981) (en banc); *Ashburn v. Anne Arundel County*, 360 Md. 617, 510 A.2d 1078 (1986).

The fundamental civil rights regarding the enjoyment of life, liberty and property, the right of self-defense and the right to keep and bear arms, are merely empty promises if a legislature is allowed to restrict the means by which one can protect oneself and one's family. This constitutional deprivation

discriminates against the poor and minority citizen who is more exposed to the acts of criminal violence and who is less protected by the state.

Reducing gun ownership among law-abiding citizens may significantly reduce the proven deterrent effect of widespread civilian gun ownership on criminals, particularly in regard to such crimes as residential burglaries and commercial robberies. Of course, this effect will be most widely felt among the poor and minority citizens who live in crime-ridden areas without adequate police protection.

B. The Enforcement of Gun Prohibitions Spur Increased Civil Liberties Violations, Especially in Regard to Minorities and the Poor.

Constitutional protections, other than those afforded by the right to keep and bear arms, have been and are threatened by the enforcement of restrictive firearms laws. The enforcement of present firearms controls account for a large number of citizen and police interactions, particularly in those jurisdictions in which the purchase or possession of certain firearms are prohibited. Between 1989 and 1998, arrests for weapons carrying and possession numbered between 136,049 and 224,395 annually. FBI Uniform Crime Reports, *Crime in the United States Annual Reports(1989-1998)* Table: Total Arrests, Distribution by Age.

The most common and, perhaps, the primary means of enforcing present firearms laws are illegal

searches by the police. A former Ohio prosecutor has stated that in his opinion 50% to 75% of all weapon arrests resulted from questionable, if not clearly illegal, searches. *Federal Firearms Legislation: Hearings Before the Subcomm. on Crime of the House Judiciary Committee*, 94th Cong. 1589 (1975) [hereinafter House Hearings]. A study of Detroit criminal cases found that 85% of concealed weapons carrying cases that were dismissed, were dismissed due to the illegality of the search. This number far exceeded even the 57% percent for narcotics dismissals, in which illegal searches are frequent. Note, *Some Observations on the Disposition of CCW Cases in Detroit*, 74 Mich. L. Rev. 614, 620-21 (1976). A study of Chicago criminal cases found that motions to suppress for illegal evidence were filed in 36% of all weapons charges; 62% of such motions were granted by the court. Critique, *On the Limitations of Empirical Evaluation of the Exclusionary Rule*, 69 NW. U.L. Rev. 740, 750 (1974). A Chicago judge presiding over a court devoted solely to gun law violations has stated:

> The primary area of contest in most gun cases is in the area of search and seizure ... . Constitutional search and seizure issues are probably more regularly argued in this court than anywhere in America ... . More than half these contested cases begin with the motion to suppress ... these arguments dispose of more contested matters than any other.

House Hearings, supra, at 508 (testimony of Judge D. Shields).

These suppression hearing figures represent only a tiny fraction of the actual number of illegal searches that take place in the enforcement of current gun laws, as they do not include the statistics for illegal searches that do not produce a firearm or in which the citizen is not charged with an offense. The ACLU has noted that the St. Louis police department, in the mid-1970s, made more than 25,000 illegal searches "on the theory that any black, driving a late model car has an illegal gun." However, these searches produced only 117 firearms. Kates, *Handgun Control: Prohibition Revisited*, supra, at 23.

In light of these facts, many of the proponents of gun control have commented on the need to restrict other constitutionally-guaranteed rights in order to enforce gun control or prohibition laws. A federal appellate judge urged the abandonment of the exclusionary rule in order to better enforce gun control laws. Malcolm Wilkey, *Why Suppress Valid Evidence?*,Wall Street J., Oct. 7, 1977, at 14. A police inspector called for a "reinterpretation" of the Fourth Amendment to allow police to assault strategically located streets, round up pedestrians en masse, and herd them through portable, airport-type gun detection machines. Detroit Free Press, Jan. 26, 1977, at 4. Prominent gun control advocates have flatly stated that "there can be no right to privacy in regard to armament." Norville Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* 69 (1970).

Florida v. J.L. involved a defendant who had been stopped, searched, and arrested by Miami police after an anonymous telephone caller claimed that one

of three black males fitting the defendant's description was in possession of a firearm. Amongst other arguments, the State asked the Court to carve out a gun exception to the Fourth Amendment. The Supreme Court unanimously declined to create such an exception to the Fourth Amendment. *Florida v. J.L.*, 120 S.Ct. 1375 (2000).

Statistics and past history show that many millions of otherwise law-abiding Americans would not heed any gun ban. One should consider America's past experience with liquor prohibition. Furthermore, in many urban neighborhoods, especially those of poor blacks and other minorities, the possession of a firearm for self-defense is often viewed as a necessity in light of inadequate police protection.

Federal and state authorities in 1975 estimated that there were two million illegal handguns among the population of New York City. Selwyn Raab, *2 Million Illegal Pistols Believed Within the City*, N.Y. Times, Mar. 2, 1975, at 1, (estimate by BATF); N.Y. Post, Oct. 7, 1975, at 5, col. 3 (estimate by Manhattan District Attorney). In a 1975 national poll, some 92% of the respondents estimated that 50% or more of handgun owners would defy a confiscation law. 121 Cong. Rec. S189, 1 (daily ed. Dec. 19, 1975).

Even registration laws, as opposed to outright bans, measure a high percentage of non-compliance among the citizenry. In regard to Illinois' firearm owner registration law, Chicago Police estimated the rate of non-compliance at over two thirds, while statewide non-compliance was estimated at three

fourths. In 1976, Cleveland city authorities estimated the rate of compliance with Cleveland's handgun registration law at less than 12%. Kates, supra, *Handgun Control: Prohibition Revisited*, at 20 n.1. In regard to citizens' compliance with Cleveland's "assault gun" ban, a Cleveland Police Lieutenant stated: "To the best of our knowledge, no assault weapon was voluntarily turned over to the Cleveland Police Department ... considering the value that these weapons have, it certainly was doubtful individuals would willingly relinquish one." Associated Press, *Cleveland Reports No Assault Guns Turned In*, Gun Week, Aug. 10, 1990, at 2.

In response to New Jersey's "assault weapon" ban, as of the required registration date, only 88 of the 300,000 or more affected weapons in New Jersey had been registered, none had been surrendered to the police and only 7 had been rendered inoperable. Masters, *Assault Gun Compliance Law*, Asbury Park Press, Dec. 1, 1990, at 1. As of November 28, 1990, only 5,150 guns of the estimated 300,000 semiautomatic firearms banned by the May 1989 California "Assault Gun" law had been registered as required. Jill Walker, *Few Californians Register Assault Guns*, Washington Post, Nov. 29, 1990, at A27.

These results suggest that the majority of otherwise law-abiding citizens will not obey a gun prohibition law; much less criminals, who will disregard such laws anyway. It is ludicrous to believe that those who will rob, rape and murder will turn in their firearms or any other weapons they may possess to the police, or that they would be deterred from

possessing them or using them by the addition of yet another gun control law to the more than twenty thousand gun laws that are already on the books in the U.S. James Wright, Peter Rossi and Kathleen Daly, *Under the Gun: Weapons, Crime and Violence in America* 244 (1983).

A serious attempt to enforce a gun prohibition would require an immense number of searches of residential premises. Furthermore, the bulk of these intrusions will, no doubt, be directed against racial minorities, whose possession of arms the enforcing authorities may view as far more dangerous than illegal arms possession by other groups.

> As civil liberties attorney Kates has observed, when laws are difficult to enforce, "enforcement becomes progressively haphazard until at last the laws are used only against those who are unpopular with the police." Of course minorities, especially minorities who don't "know their place," aren't likely to be popular with the police, and those very minorities, in the face of police indifference or perhaps even antagonism, may be the most inclined to look to guns for protection - guns that they can't acquire legally and that place them in jeopardy if possessed illegally. While the intent of such laws may not be racist, their effect most certainly is.

Tonso, supra, at 25.

III. THE DISTRICT'S GUN CONTROL LAWS HAVE BEEN A DISASTER.

More than thirty years ago the District of Columbia enacted the multi-faceted Firearms Control Regulations Act. The Act prohibits the possession of a handgun that was not registered with city police prior to Sept. 24, 1976. D.C. CODE ANN. § 7-2502.02(a)(4). It also requires the registration of all privately owned firearms and that firearms kept at home be rendered useless for protection by being "unloaded and disassembled or bound by a trigger lock or similar device." D.C. CODE ANN. §§ 7-2502.01(a), 7-2507.02.

The purpose of the ban was to alleviate violent crime. Yet, statistics indicate that during the 30 year ban, violent crime in the District has not been reduced, despite a national decline. To the contrary, since the District of Columbia banned handguns in 1976, violent crimes, particularly those involving firearms, have increased. Ironically, murder had been declining in the District before the ban, but increased after the ban was imposed. From 1971, when the murder and non-negligent manslaughter rate was 37.1 per 100,000, this number steadily declined until in 1976, when it had been reduced to 26.8 per 100,000. Bureau of Justice Statistics: Reported Crime in the District of Columbia, http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/RunCrimeStatebyState.cfm(select "District of Columbia," "Violent crime rates," and years "From: 1960 To: 2004"). After the handgun ban went into effect, the murder and non-negligent manslaughter rate immediately and dramatically increased to the point where, in 1991, the rate was

80.6 per 100,000; in other words, the effect of the handgun ban was that the murder rate tripled. Id. In comparison, the U.S. homicide rate rose only 12.64 % during that same period. Bureau of Justice Statistics: Reported Crime in United States-Total, http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/RunCrimeStatebyState.cfm (select "United States - Total," "Violent crime rates," and years "From: 1960 To: 2004"). (The national murder and non-negligent manslaughter rate went from 8.7 per 100,000 in 1976 to 9.8 per 100,000 in 1991. Id.) Senator Hutchison recently declared that "[t]he murder rate in D.C. today is eight times higher than the rest of the country, even though violent crime has decreased to a 27-year low nationwide." Senator Kay Bailey Hutchison, at http://www.senate.gov/~hutchison/prl647.htm.

"Five years before the D.C. Council banned nearly all firearms in 1976, the District's murder rate fell from 37 to 27 per 100,000 people. In the five years after 1976, the murder rate rose to 35 per 100,000 people. Between 1976 and 1991, the D.C. homicide rate rose 200 percent. The national homicide rate during the same 15-year period rose just 12 percent. According to the FBI, the District has the highest violent crime rate in the nation of any city over 500,000 people. Its homicide rate is eight times higher than the rest of the country and four times higher than similarly sized Ft. Worth, Texas. The comparison is apt. Texas has some of the most constitutional gun laws in the country." *Repeal D.C. gun ban*, Wash. Times, May 21, 2005, at A12.

Studies for Congress, the Department of Justice (DOJ), the Congressional Research Service, the Library of Congress, the National Academy of Sciences (NAS), and the Centers for Disease Control and Prevention (CDC) have found no evidence that "gun control" reduces crime. "The fact is that there are perhaps 20,000 gun laws now in effect in this country. That these laws have had limited or no effect on the rate of violent crime is reasonably transparent."James Wright, Peter Rossi and Kathleen Daly, *Under the Gun: Weapons, Crime and Violence in America*, 323 (1983). A 1998 Library of Congress study concluded that "it is difficult to find a correlation between the existence of strict firearms regulations and a lower incidence of gun-related crimes." Library of Congress, *Report for Congress: Firearms Regulations in Various Foreign Countries* 1, LL-98-3, 97-2010 (1998).

The Act makes no exception for cases of self-defense. The District of Columbia is the only jurisdiction in the U.S. that prohibits keeping firearms in an operable condition at home for defense against criminal attack. As a result, law abiding D.C. residents have been deprived of the right to defend themselves even in their own homes, and criminals have unleashed havoc throughout District neighborhoods at a rate unparalleled by any other city in the country.

Violent crime occurs faster than the police are able to react. And, in the District, unarmed citizens are at the mercy of violent attackers. Nation-wide, in 69.2% of all cases of violent crime, it took more than 5 minutes for the police to respond. Bureau of Justice

Statistics: Table 107. Personal property crimes, 2003, http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus/current/cv03107.pdf (last visited June 15, 2006). In 40.3% of all the violent crimes reported, it took police more than 11 minutes to respond. Id. Despite having the largest law enforcement presence for any American city, the District continues to be plagued by violent crime. "[T]he District has more officers per capita than any other city with a population of at least 500,000." Matthew Cella, *Police Response to 911s Slowing: D.C. Cops Take Minute More*, Wash. Times, May 10, 2004, at A1. Yet, the District's Metropolitan Police Department is doing worse than even the national average response time. The District's Metropolitan Police Department's average response time for the highest priority calls in fiscal year 2003 was 8 minutes and 25 seconds. Id. "D.C. Council member Kathy Patterson, Ward 3 Democrat and chairman of the Judiciary Committee, which oversees the police department, said the slower response times were disturbing. ...'Seconds matter when you're talking about 911 response,' she said." Id.

The case of Rebecca Griffin is illustrative. Ms. Griffin awoke to the screams of one of her daughters, a witness in an upcoming criminal trial, being bound and gagged by two kidnappers in her Washington, D.C., home. Although another daughter called the police, they, of course, did not appear until long after the fact. When Ms. Griffin and her other daughters tried to rescue the bound daughter, one of criminals attacked with a knife, slashing Ms. Griffin and one of the daughters. Fortunately, Ms. Griffin was able to break free and retrieve an unregistered .32 cal.

revolver and shoot the knife-wielding home invader. The other suspect fled. Brian Reilly, *Mother Shoots Intruder,* Wash. Times, December 14, 1994, at C3. The very idea that someone like Ms. Griffin should be charged with and prosecuted for possessing an unregistered handgun, possessing ammunition for an unregistered firearm, possessing a loaded firearm and carrying a pistol without a license in the home, and that she should be imprisoned for years, simply for protecting her children from knife-wielding violent criminals that had broken into her home, is unconscionable.

The right of defending one's life is one of the most basic rules of nature. (The right to defend oneself from a deadly attack is also a fundamental right. "The right to defend oneself from deadly attack is fundamental." *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982). In no place should this rule apply more than in one's home. "Inherent in the right to defend one's home, one's castle, is the right to have suitable and effective means to do so. In modern times, effective self-defense implies a handgun." David Caplan & Sue Wimmershoff-Caplan, *Postmodernism and the Model Penal Code v. The Fourth, Fifth, and Fourteenth Amendments - and the Castle Privacy Doctrine in the Twenty-First Century*, 73 U. Missouri-Kansas City School of Law 1073, 1105 (Summer 2005).

CONCLUSION

Gun control laws like the ones at issue in this case bear especially hard on the poor and minorities. Enforcement of gun control laws, like the ones at issue,

will have a disparate impact upon minorities and the poor.

Judgment below should be upheld.

Respectfully Submitted,

Stefan Bijan Tahmassebi
*Counsel of Record
3117 Woodland Lane
Alexandria, VA. 22309
(703) 267-1259

Prof. Robert Cottrol
George Washington University Law School
2000 H Street, N.W.
Washington., D.C. 20052
202) 994-5023

Prof. Raymond T. Diamond
Tulane University School of Law
6329 Freret Street
New Orleans, LA. 70118
(504) 865-5962

Attorney for Amicus Curiae Congress of Racial Equality