

# Bearing Arms: A Personal 'Right' in the Mind, but

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President Clinton promotes it. The National Rifle Association preaches it. And pollsters say the public believes in it.

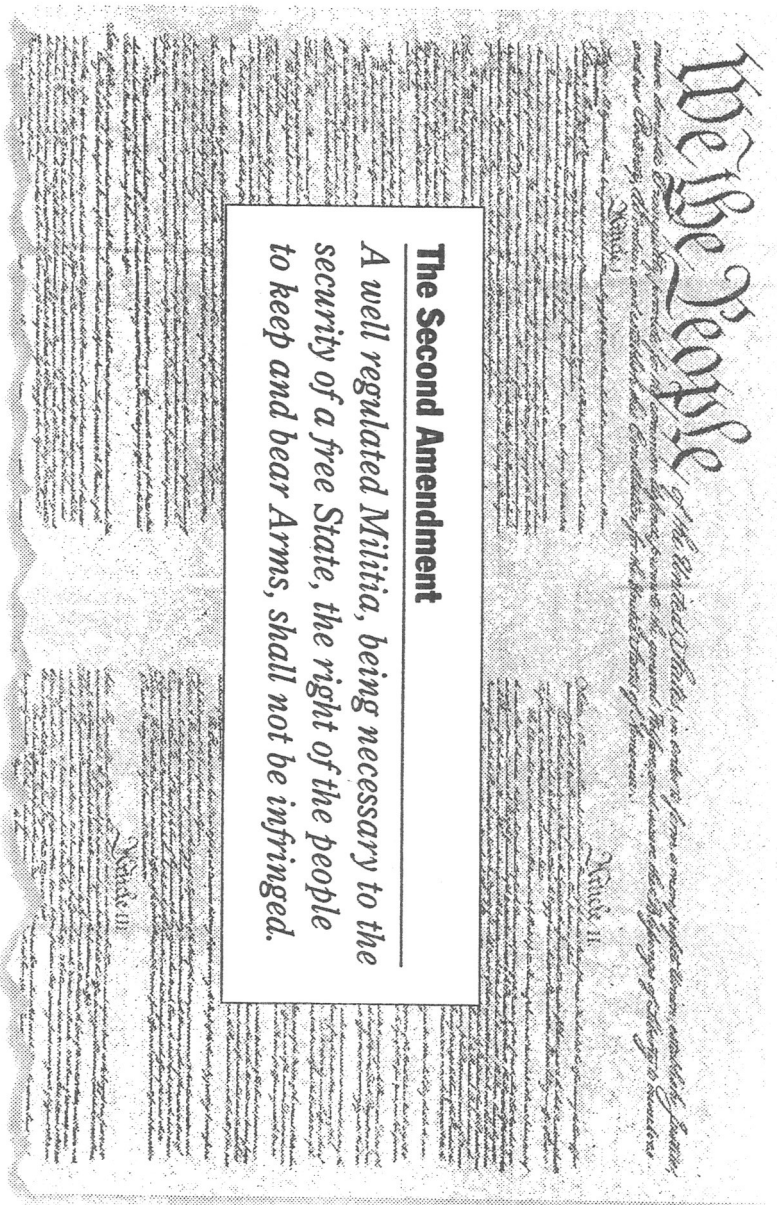
But the judges who interpret the nation's laws say the Second Amendment to the Constitution does not guarantee an individual's right to bear arms. In fact, no federal court has ever ruled that the Constitution guarantees Americans the right to own a gun.

In few areas of law is there such a vast gulf between what people think the Constitution protects and what the nation's judges say it protects. The difference between belief and reality infects the country's perennial gun control debates and exacerbates tensions after incidents like the 1993 shootout near Waco, Tex., and the Oklahoma City bombing last month, which put new attention on citizen paramilitary groups.

The Second Amendment "has been the subject of one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public," former chief justice Warren E. Burger said in a 1991 interview on PBS's "MacNeil/Lehrer NewsHour." Burger has said often that the "right to bear arms" belongs to the states, and he has attacked the NRA for fostering the opposite view.

The Second Amendment says, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The widespread legal and judicial view is that the Second Amendment guarantees a state's right to be armed—for example, in today's Na-



## Not in Court

### Constitutional Guard

When the Supreme Court has spoken in this area—and it has done so infrequently—it has begun with the idea that the Second Amendment protects a state's right to keep arms for a militia. In a nationally watched 1983 case, the justices let the town of Morton Grove, Ill., ban handguns. Without comment or dissent, they left intact a lower court decision rejecting the contention that Americans have a constitutional right to be armed.

In that case, the 7th U.S. Circuit Court of Appeals ruled that the Second Amendment restricts federal authority in this area, not that of state

and local governments. The court stated, "We conclude that the right to keep and bear handguns is not guaranteed by the Second Amendment."

Yet, the "right to bear arms" is such a part of the American lexicon that in 1991, on the 200th anniversary of the Bill of Rights, a Los Angeles Times poll found that 62 percent of those surveyed believed their right to own a gun or rifle was guaranteed by the Constitution.

The gap between the prevailing legal view and public understanding is widened by an atmosphere of growing public distrust of government and an increasingly political conflict over gun control.

"The aftermath of Oklahoma City is certainly provoking a national political debate about the Second Amendment," said University of Texas law professor Sanford Levinson, one of the few academics who argue that individuals have a right to guns. He said "the legal academy and elite bar" reject a constitutional right to own guns because of their own opposition to private ownership of firearms.

Lawyers like himself who argue that the Second Amendment protects gun ownership "are kind of dis-

missed with a supercilious giggle," said Levinson, adding that he has become "the perfect poster boy for the NRA. I'm a liberal Democrat and haven't held a gun in my arms since I went to camp when I was 13."

After the Oklahoma City bombing, Clinton appeared on CBS's "60 Minutes" and said people have a right to guns. He drew a contrast between lawful conduct and terrorist violence: "They have a right to believe whatever they want, they have a right to say whatever they want, they have a right to keep and bear arms, they have a right to put on uniforms and go out on the weekend. They do not have the right to kill innocent Americans."

Harvard law professor Laurence H. Tribe, whose writings have influenced how many law professors and judges understand the Constitution, said popular notions of fundamental American law sometimes conflict with what is on the books.

"I think there are at least two constitutions of the United States," he said. "There is a kind of mythic constitution that reflects widely held beliefs, slogans. And then there is the one that starts with a piece of paper at the Archives and has an extensive history."

culture and America's frontier spirit should be considered. He quotes James Madison referring to "the advantage of being armed, which the Americans possess over the people of almost every other nation." Said Levinson, "The advantage in question was not merely the defense of American borders; a standing army might well accomplish that. Rather, an armed public was advantageous in protecting political liberty."

Stephen P. Halbrook, who often represents the NRA in court, said the Founding Fathers wanted to allow people guns for personal use but also so they would be ready if called upon to defend their state against an oppressive federal government. He said the prevailing view of history is not necessarily the correct view.

While the NRA vigorously advocates a personal right to guns, it rarely has relied on the Second Amendment in its legal challenges to gun control. The NRA has won trial court rejections of the Brady bill handgun waiting period based on the 10th Amendment's limits on federal power.

Dennis A. Henigan, general counsel to Handgun Control Inc., scoffs at the NRA's failure to press its Sec-

Tribe asserts that the Second Amendment's history and text demonstrate it was intended to prevent federal interference with a state militia. He stresses the importance of the opening clause referring to a "well regulated Militia."

Former chief justice Burger wrote in *Parade* magazine in 1990 that the Second Amendment grew out of the Founding Fathers' belief that a state military force was necessary to protect the security of the state. He quotes Elbridge Gerry, one of the founders and eventually James Madison's vice president, as arguing that a state militia was necessary "to prevent the establishment of a standing army, the bane of liberty."

Burger acknowledges that in the past 200 years national defense has eclipsed the role played by state militias, but says, "A state militia, like a rifle and powder horn, was as much a part of life as the automobile is today; pistols were largely for officers, aristocrats—and dueling."

Countering this view, Levinson quotes other founding statesmen in an article in the *Yale Law Journal* and notes that George Mason asked: "Who are the militia? They consist now of the whole people."

Levinson says the 18th century

ond Amendment stance in court cases. "When it comes to vindicating this supposedly fundamental right, the NRA is all talk and no action," he said. "The NRA knows that every time the arguments about the history and meaning of the Second Amendment are put before a court of law, its version of an absolute, inalienable 'right' is shown to be nothing but an illusion."

No matter how one views the Second Amendment, scholars on both sides say, it is not the last word on gun ownership. Regardless of what the Constitution says about the right to bear arms, such ownership can still be permitted, just as states permit all sorts of conduct not mentioned in the Constitution.

However, scholars note, even if the Constitution did guarantee a right to keep guns, it would not stop government from regulating possession and use in the name of public safety. In this vein, the right to free speech in the First Amendment is not absolute, and governments have been able to restrict, for example, obscenity and words that provoke violence.