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THE SECOND AMENDMENT: SCOPE AND CRIMINOLOGICAL CONSIDERATIONS

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THE SECOND AMENDMENT: SCOPE AND CRIMINOLOGICAL CONSIDERATIONS¹

By Don B. Kates² and Clayton E. Cramer³

ABSTRACT: The recent decision *D.C. v. Heller* (2008) has opened up the question of what the Second Amendment protects. What “arms” are protected? What classes of persons may be properly prohibited from being armed?

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“Self Defense, the primary canon of the law of nature...” [John Adams, 1770]⁴

“A people who would stand fast in their liberty should furnish themselves with weapons proper for their defence” -- Rev. Howard’s sermon to the Ancient and Honourable Artillery Company, Boston 1773]⁵

“[In free governments] there is not the slightest difficulty or jealousy about putting arms into the hands of every man in the country.”⁶

The “Standard Model” Of The Second Amendment

In *District of Columbia v. Heller* (2008) the United State Supreme Court struck down

¹ The authors gratefully acknowledge the helpful advice of Nicholas Johnson, C.B. Kates, Michael A. Lawrence, Nelson Lund, Dave Kopel, Robert Dowlut, and Joseph Olson. For errors the authors alone are responsible.

² Yale, LL.B., 1966.

³ Sonoma State University, M.A., History, 1998, B.A. History, 1994.

⁴ Quoted in Stephen Halbrook, *THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* (hereinafter cited as Halbrook *FOUNDERS*) 25 (2008).

⁵ *Id.*, p. 27.

⁶ *Id.*, p. 50 quoting a Maryland patriot writing in 1774.

Washington, D.C.'s prohibition of handguns. The opinion effectively endorses the so-called Standard Model view of the Second Amendment.⁷ The term “Standard Model” was coined by University of Tennessee constitutional law professor Glenn H. Reynolds⁸ to reflect two facts: First, an individual right is clearly what the Amendment’s rights clause (“the right of the people to keep and bear arms shall not be infringed”) guarantees, at least in the context of a Bill of Rights in which “right of the people” is repeatedly used to denote individual rights;⁹ and, second, the overwhelming majority of scholarly treatments agree that the Second Amendment guarantees an individual right to arms.¹⁰

The Standard Model interprets the Amendment as a guarantee of the right of at least law abiding, responsible adults to acquire and possess firearms. This remains the consensus among scholars despite the anti-gun lobby’s generous financing of two law reviews that published symposia that contained *only* papers opposing the Standard Model, and a third law review symposium in which only a single token Standard Model paper appeared. Professor Carl T. Bogus acknowledged that he intentionally sought an unbalanced result in the first of these three symposium issues.¹¹ Indeed, the term “Standard Model” has been accepted even by vigorous opponents of that model.¹²

Heller’s acceptance of the Amendment’s purposes will no doubt raise three further points that we endeavor to address here: (a) that guaranteeing a right to arms to law abiding, responsible adults is

⁷ District of Columbia v. Heller (2008), from the slip opinion.

⁸ Glenn T. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995).

⁹ Amendments I (right of the people to assemble) and IV (right of the people against unreasonable search); compare Amendment IX reserving the rights of the people to them; contrast Amendment X reserving the “powers” of the states to them. It has been observed that “As used throughout the Constitution, the people have ‘powers’ or ‘rights,’ but federal and state governments have ‘powers’ or ‘authority,’ never ‘rights.’” Emerson v. U.S., 270 F.3d 203, 227 (5 Cir. 2001) (emphasis added) citing examples.

¹⁰ The most recent assessment of which we are aware is: “Suffice it to say that the historical evidence so heavily favors a ... standard-model - approach, as reflected in the recent scholarship, that courts and others cannot help but conclude that the Second Amendment protects a right of the people....” Michael A. Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 58 (2007).

A partial list of scholarly articles endorsing the Standard Model is relegated to Appendix A rather than placing it in a footnote here because such a list would take up several pages of text.

¹¹ “We felt that, for a variety of reasons, the collective rights model was under represented in the debate, and wanted to give scholars an opportunity to enhance or further illuminate the collective rights position. Sometimes a more balanced debate is best served by an unbalanced symposium.” Carl T. Bogus (concerning the CHICAGO-KENT LAW REVIEW), firearmsconlawprof@listserv.ucla.edu, Eugene Volokh, moderator, June 11, 2001. See also David Hardy, *Joyce Foundation at it again -- Stanford Law Review*, OF ARMS AND THE LAW, July 18, 2006, http://armsandthelaw.com/archives/2006/07/joyce_foundation_5.php (Joyce Foundation funding an antigun issue of STANFORD LAW AND PUBLIC POLICY), David Hardy, *Joyce Foundation*, OF ARMS AND THE LAW, April 3, 2005, http://armsandthelaw.com/archives/2005/04/joyce_foundation.php (Joyce Foundation funding an issue of FORDHAM LAW REVIEW in which all papers but one were against the Standard Model), and Eugene Volokh, *Saul Cornell Responds to David Hardy’s Post*, VOLOKH CONSPIRACY, April 8, 2005, http://volokh.com/archives/archive_2005_04_03-2005_04_09.shtml#1112977026.

¹² See, e.g., John Randolph Prince, *The Naked Emperor: The Second Amendment and the Failure of Originalism*, 40 BRAND L. J. 659, 694 (2002), Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMM. 229 (1999), Garry Wills, *To Keep and Bear Arms*, NEW YORK REVIEW OF BOOKS, September 21, 1995 and Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibilities*, 75 BOSTON U. LAW REV. 57 (1995).

fully consistent with the findings of modern criminological research; (b) that the scope of the Second Amendment is limited to a right to possess only ordinary small arms for self-defense, not super-destructive military weaponry that is too indiscriminate to be used in legitimate self-defense; and (c) that the Amendment right extends only to responsible, law abiding adults but not criminals, the insane or juveniles.

The Criminological View Of Gun Ownership

The Canard that Blames Ordinary People for Murder

Though it doubtless will be so assailed, Heller's embrace of the Standard Model cannot be deemed criminologically dubious in recognizing the traditional right of law abiding responsible American adults to possess firearms. Gun control advocates have endlessly made false claims to the effect that:

most homicides are not committed by the 'hardened' criminal who would seek out a gun or other lethal weapon whether or not it was legal, but rather by ordinary, 'law abiding' citizens who kill on impulse rather than by intent [because a firearm was available in a moment of ungovernable anger].¹³

It bears emphasis that the quoted passage appeared naked of any supporting criminological reference. While burglaries, rapes and robberies are almost always committed by hardened criminals, it is peculiar that such claims assume that most *murderers* are ordinary, previously law abiding people. Such claims are routinely made in purportedly scholarly articles that *never* supply supporting references – for there are none.¹⁴ Perpetrator studies from the nineteenth century to the present invariably show that murderers are not law abiding, responsible adults; rather, “most murderers differ little from other major *criminals*.”¹⁵ Given the wide dissemination and political importance of this ordinary-citizen-as-murderer canard, we take the liberty of briefly reviewing some of the more recent contributions to the vast corpus of contrary criminological study conclusions:

¹³ Amitai Etzioni & Richard Remp, *TECHNOLOGICAL SHORTCUTS TO SOCIAL CHANGE* 107 (N.Y.: Sage, 1973). See, e.g., Frank J. Vandall, *A Preliminary Consideration Of Issues Raised In The Firearms Sellers Immunity Bill*, 38 AKRON L. REV. 113, 118-19 and footnote 28 (2005) citing as authoritative unsupported claims such as that of Prof. Christoffel (who heads her own gun ban advocacy group) that “most shootings are not committed by felons or mentally ill people, but are acts of passion that are committed using a handgun that is owned for home protection.”)

¹⁴ The one exception to this dearth of supporting references appeared in a pamphlet by the then mayor of New York which attributed to the 1972 F.B.I. UNIFORM CRIME REPORT (but without any specific page citation) the finding that “most murders (73% in 1972) are committed by previously law abiding citizens....” John V. Lindsay, *THE CASE FOR FEDERAL FIREARMS CONTROL* 22 (1973); reprinted at pp. 1549 et. seq. in *HEARINGS BEFORE THE SUB-COMMITTEE TO INVESTIGATE JUVENILE DELINQUENCY OF COMMITTEE OF THE JUDICIARY, U.S. Senate, 94th Congress, 1st sess., v. II* (1975).

The citation was fraudulent. The F.B.I.'s 1972 UNIFORM CRIME REPORT (UCR) did not yet exist when the Lindsay pamphlet purported to cite it; and when the 1972 UCR eventually was released its section titled “Careers in Crime” showed that 74.7% of murder arrestees that year had prior arrest(s) for a violent felony or burglary: 1972 UCR at 35-38.

¹⁵ Thomas B. Marvell & Carlisle E. Moody, *The Impact of High Out-of-State Prison Population on State Homicide Rates*, 36 CRIMINOLOGY 513, 517 (1998) (emphasis added); see *ibid* 518, n. 5 defining “major criminal” as “similar to what others call professional criminals, career criminals, or violent predators.”

- “the vast majority of persons involved in life-threatening violence have a long criminal record with many prior contacts with the justice system”¹⁶
- “homicide is usually part of a pattern of violence, engaged in by people who are known ... as violence prone.”¹⁷
- Psychological studies summarized as finding that 80-100% of juvenile murderers are psychotic or have psychotic symptoms.¹⁸
- Though only 15 per cent of Americans have criminal records, roughly 90 per cent of adult murderers have *adult* records (exclusive of their often extensive juvenile records), with an average adult crime career of six or more years, including four major felonies.¹⁹
- A *New York Times* study of the 1,662 murders in that city in the years 2003-2005 found “More than 90 percent of the killers had criminal records”²⁰
- “Some 95% of homicide offenders... [in a Kennedy School study had been] arraigned at least once in Massachusetts courts before they [murdered],... On average ... homicide offenders had been arraigned for 9 prior offenses....”²¹
- A history of domestic violence was present in 95.8% of the intra-family homicides studied.²²
- Of Illinois murderers in 1991-2000, the great majority had prior felony records.²³
- Eighty percent of 1997 Atlanta murder arrestees had previously been arrested at least once for a *drug* offense; and 70% had three or more prior *drug* arrests – in addition to all their arrests for *other* crimes.²⁴
- Baltimore police records show that 92% of 2006 murder suspects had criminal records.²⁵
- From a Milwaukee police compilation of data on 2007 and past years’ murders: “Most suspects had criminal records, and a quarter of them were on probation or parole.”²⁶

To reiterate, those who claim many or most murderers are ordinary law abiding, responsible adults *never* cite relevant supporting evidence. The closest they come is noting that murders often

¹⁶ Delbert S. Elliott, *Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 COLO. L. REV. 1081-1098 at 1093 (1998), collecting studies.

¹⁷ Gerald D. Robin, VIOLENT CRIME AND GUN CONTROL 47 (Academy of Criminal Justice Sciences: 1991).

¹⁸ Wade C. Myers & Kerrilyn Scott, *Psychotic and Conduct Disorder Symptoms in Juvenile Murderers*, 2 HOMICIDE STUDIES 160 (1998).

¹⁹ Gary Kleck & Don B. Kates, ARMED: NEW PERSPECTIVES ON GUN CONTROL 20-21 (2001).

²⁰ Jo Craven McGinty, *New York Killers, and those killed, by the numbers*, N.Y. TIMES, April 28, 2006.

²¹ Anthony A. Braga, et al., *Understanding and Preventing Gang Violence: Problem Analysis and Response Development in Lowell, MA*, 9 POLICE Q. 20-46 (2006).

²² Paige Hall-Smith et al., *Partner Homicide in Context*, 2 HOMICIDE STUDIES 400, 410 (1998).

²³ Philip Cook, et al. *Criminal Records of Homicide Offenders*, 294 JAMA 538-601 (2005).

²⁴ Dean G. Rojek, *The Homicide and Drug Connection*, in Blackman, et al., supra, at 135.

²⁵ Gus G. Sentementes, *Patterns persist in city killings: Victims, suspects usually black men with long criminal histories.....*, BALTIMORE SUN January 1, 2007. http://www.baltimoresun.com/news/local/baltimore_city/bal-te.ci.homicide01jan01.0.4002621.story?track=mostemailedlink .

²⁶ John Dietrich, *Before the Next Bullet Kills*, MILWAUKEE JOURNAL SENTINEL, Dec. 19, 2007.

occur between acquaintances and arise from arguments, or occur in homes.²⁷ Those who present these bare facts as proving that murderers are ordinary people are apparently laboring under the delusion that criminals don't have homes, acquaintances, or arguments. It is only by deduction from this delusion that anyone could conclude that since murderers also have homes, acquaintances, or arguments, murderers must be non-criminals. Of the many studies belying this, the broadest analyzed a year's national data on gun murders that occurred in homes between acquaintances: "the most common victim-offender relationship" was "where both parties knew one another because of prior illegal transactions."²⁸ In sum, guns or no guns, neither most murderers nor many murderers -- nor virtually any murderers -- are ordinary, law abiding responsible adults. So firmly is this established by perpetrator studies that it is recognized as a "criminological axiom."²⁹

Previously, we have examined the nature of violence and the individual. But what happens when we examine the effects of gun control at a societal level? Three recent general studies confirm that gun bans simply do not control or reduce criminal behavior. In 2004 the National Academy of Sciences released an evaluation based on its review of 253 journal articles, 99 books, 43 government publications and some empirical research of its own. It could not identify *any* gun control law that had reduced violent crime, suicide or gun accidents.³⁰ Neither could a 2003 evaluation of then-extant studies by the Centers for Disease Controls.³¹

In 2007 Canadian criminologist Gary Mauser and one of the Authors of the present article published a study that included a comparison of firearms ownership and murder rates for all European nations for which the data were available. The averaged murder rates for the nine nations with very low gun ownership (less than 5,000 guns per 100,000 population) was three times *higher* than the averaged murder rate of the seven nations with high gun ownership (more than 15,000 guns per 100,000 population).³² Though this result might seem anomalous, the anomaly is easily explained: Nations facing sharply rising criminal violence enact gun bans as a quick-fix solution. But since (by definition) gun bans disarm only the law abiding, the violent crime rates just keep rising. So violent crime is disproportionately associated with nations which have few guns overall. These nations have drastically decreased the overall number of guns because the law abiding disarm in response to the ban. But violent crime remains unaffected since those inclined to engage in it illegally retain their guns.³³

²⁷ See, e.g. Robert Spitzer, *THE POLITICS OF GUN CONTROL* 186 ff. (Chatham, N.J., Chatham House 1995) and Adler et al., *Correspondence*, 272 *JAMA* 1409 (1994).

²⁸ Gary Kleck, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 236 (1997).

²⁹ David Kennedy & Anthony Braga, *Homicide in Minneapolis: Research for Problem Solving*, 2 *HOMICIDE STUDIES* 263-290 (1998).

³⁰ Charles F. Wellford, John V. Pepper, and Carol V. Petrie (eds.), *FIREARMS AND VIOLENCE: A CRITICAL REVIEW* (National Academy of Sciences, 2004).

³¹ *FIRST REPORTS EVALUATING THE EFFECTIVENESS OF STRATEGIES FOR PREVENTING VIOLENCE: FIREARMS LAWS* (CDC, 2003) <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm> . Predictably, given the CDC's ardent support for gun control, it explained the result by asserting that the scores of studies it evaluated were inadequate.

³² See Tables 1 and 3 in Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide?: A Review of International Evidence*, 30 *HARVARD JOURNAL OF LAW & PUBLIC POLICY* 651-694 (2007).

³³ For instance, in 1997 rising violence despite ever more restrictive gun laws prompted England to ban and confiscate all legally owned handguns. In the ensuing years English violence rose to double American rates; the English police intelligence appraisal is that "anyone who wishes to obtain a firearm [illegally] will have little difficulty in doing

The policy implications are obvious: Since ordinary people rarely rob or murder, or commit other gun crimes, there is no point to disarming them. Rather, doing so is counterproductive because it leaves the innocent defenseless against violent predators.

The Criminology of Heller

The foregoing is amply borne out by Washington, D.C. data on the years preceding and following enactment of its gun bans voided in *Heller*. Over the five pre-ban years D.C.'s murder rate had fallen from 37 to 27 deaths per 100,000 population. After fifteen years under the bans it had tripled (1991 - 80.22 per 100,000).

Compare D.C. to neighboring Baltimore, which for years *before* the D.C. bans had had closely similar murder rates. Fifteen years after the D.C. bans Baltimore's murder rate had increased somewhat – but D.C.'s had so drastically increased as to be almost double Baltimore's.³⁴ Now compare D.C. to all other large American cities. Before the bans DC ranked fifteenth in large American city murder rates. Over the years since 1976 DC has been ranked first or second among big city murder rates in fifteen of those years and fourth in four of those years.³⁵

We do not argue that the D.C. results prove that disarming victims promotes murder. But surely they show that if banning the means of self-defense to law abiding, responsible adults reduces murder, it must be at most trivial, overwhelmed by whatever factors increased the murder rate in D.C. in the years after the ban.

Limiting The Second Amendment's Scope

Is The Right Individual?

The scope of the Second Amendment, and its limitations, can only be understood by reference to its underlying rationale. That rationale is personal self-defense, which the Founding Fathers and the liberal political philosophers they revered held to be the first of all natural rights. “Who,” Montesquieu asked, “does not see that self-protection is a duty superior to every precept?”³⁶ This was a rhetorical question in his time. It is no longer so today when so many intellectuals and academics reject and condemn the idea of personal self-defense.³⁷ The Founding Fathers and the natural rights philosophers they followed (inter alia Hobbes, Locke, Blackstone and Montesquieu) enthusiastically embraced the right of personal self-defense.³⁸ It bears emphasis that self-defense had a broader meaning then than it is usually conceived of having today. Self-defense included not only defense against apolitical crime but also against assassination, genocide and other politically motivated

so.” Quoted in Don B. Kates, *The Hopelessness of Trying to Disarm the Kind of People who Murder*, 12 BRIDGES 313-330 (2005).

³⁴ See Appendix B.

³⁵ Brief Of Criminologists, Social Scientists, Other Distinguished Scholars, And The Claremont Institute As Amici Curiae In Support Of Respondent, *D.C. v. Heller* (2008), appendix 4a.

³⁶ Montesquieu, 2 SPIRIT OF THE LAWS 60.

³⁷ For a review of the anti-self defense ideology that motivates the primary gun control groups and advocates see Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L. J. 1139 (1996) at 1254-59.

³⁸ See Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMM. 87, 90-94 (quoting Hobbes, Montesquieu, Blackstone, Algernon Sidney, Cesare Beccaria and Thomas Paine, among others).

oppressions – what Algernon Sidney called “the violence of a wicked magistrate who, having armed a crew of lewd villains” subjects the people to murder, pillage and rapine.³⁹

The Second Amendment guarantees a collateral principle in which the Founders followed the natural right philosophers. The Founders deeming indispensable to this primary right of self defense what Blackstone termed the “auxiliary” right to possess arms for the purpose of self defense.⁴⁰ The interrelationship the Founders saw between the right of self-defense and the right to possess arms for self-defense is illustrated by a 1790 lecture by James Wilson. Here is how Wilson, a law professor who served on the first Supreme Court, the primary drafter of the 1790 Pennsylvania Constitution, and a member of the 1787 Constitutional Convention, explained the right to use deadly force to repel a homicidal attacker:

[I]t is the great natural law of self preservation which, as we have seen, cannot be repealed or superseded, or suspended by any human institution. *This law, however, is expressly recognized in the Constitution of Pennsylvania “The right of the citizens to bear arms in defense of themselves shall not be questioned.”*⁴¹

Interestingly, insofar as modern philosophy addresses such issues, it concurs that the right of self-defense necessarily implies a right have a gun.⁴²

Given their background in natural rights philosophy, the understanding that the Amendment guarantees a right to possess the means of self-defense was universal among its authors, their contemporaries and later analysts down to the twentieth century.⁴³ Only when gun control became a political issue in the twentieth century did anyone suggest that the Amendment did not guarantee law abiding, responsible adults a right to arms for the defense of self, home, and family.

The attitude of twentieth century intellectuals and academics toward self-defense is diametrically opposite to those of the Founders. For this reason, they have invented some other purpose for the

³⁹ Algernon Sidney, 2 DISCOURSES ON GOVERNMENT 246 (New York: Richard Lee, 1805); Kates, *Ideology*, supra. Rape, robbery and murder by individual soldiers (who were, in fact, largely criminals recruited by jail-sweepings), particularly when billeted upon the king's enemies, was an aspect of English and French history of which the Founders were all too well aware. And it was an aspect of their own history, the Crown having attempted to enforce the Stamp Tax and other exactions by soldiers whose invasions of homes and businesses the Founders deemed criminal and believed had been accompanied by robbery, assault and rape -- wherefore Samuel Adams had called upon the populace to arm themselves individually for their own defense. Id. at 99-101.

⁴⁰ Ibid.

⁴¹ James Wilson, 3 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Bird Wilson, ed., 1804).

⁴² Michael Huemer, *Is There A Right to Own A Gun*, 29 SOCIAL THEORY & PRACTICE 297-324 (2003); Lester Hunt & Todd C. Hughes, *The Liberal Basis of the Right to Bear Arms*, 14 PUBLIC AFFAIRS Q. 1-25 (2000); Lance Stell, *Self Defense and Handgun Rights*, JOURNAL OF LAW, ECONOMICS, AND POLICY, 2006; Samuel C. Wheeler, *Self-Defense Rights and Coerced Risk-Acceptance*, 11 PUBLIC AFFAIRS Q. 431 (1997) and *Arms as Insurance*, 13 PUBLIC AFFAIRS Q. 111 (April, 1999).

⁴³ See Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?* 83 TEXAS L. REV. 238, 260 and 263 (2004) noting that, in contrast to Standard Model, advocates of the various states' right/collective rights theories have been unable to produce even a single example of those theories being mentioned by any eighteenth century American. Compare Kopel's comprehensive review of a century of post-1789 references to the Amendment that finds none stating the states' right theory. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359.

Amendment. Aware that its words had to mean *something*, they desperately strove to concoct any theory, no matter how baseless, other than the Standard Model. There are three slightly differing theories offered as an alternative to the Standard Model, each being equally ahistorical and even absurd.

States right: The single most popular theory from the middle of the last century has been that the Amendment was a disavowal of, and retrenchment on, the military and militia clauses of the original Constitution intended to safeguard the states' power over the militia.⁴⁴ This has been solemnly asserted despite – and without ever addressing – the following problems:

- a) Far from wanting to enhance state powers, the Amendment's author James Madison was an extreme exponent of federal power vis-a-vis the states. Madison deemed the Constitutional Convention a failure for having rejected his advocacy of yet more sweeping federal powers.⁴⁵
- b) Madison expressly informed Congress that his proposal exclusively concerned individual rights rather than restoring any "powers of the State Governments."⁴⁶
- c) The Amendment declares a "right of the people," a phrase used throughout the Constitution and Bill of Rights to describe individual rights.⁴⁷
- d) The Amendment nowhere uses the words "power" or "authority" which the Constitution invariably uses when describing government powers.⁴⁸
- e) Anti-Federalists did desire to reduce federal control over the militia and reinstate state control – for which purpose they offered the First Congress other constitutional amendments that were *rejected* by the Federalist-majority Senate.⁴⁹
- f) From the earliest decisions—when some of the authors of the Constitution were still alive and active in public affairs—the Supreme Court has held that federal power over the militia is *plenary*, with state authority existing only insofar as consistent with federal.⁵⁰

Collective right: This theory asserts that the Amendment grants a "collective right" in the sense

⁴⁴ Typical expositions of the state's right theory include: Ehrman and Henigan, *The Second Amendment in the 20th Century: Have You Seen Your Militia Lately?* 15 U. DAYTON L. REV. 5 (1989) and Dennis Henigan, *Arms, Anarchy and the Second Amendment*, 26 VALPARAISO U. L. REV. 107 (1991) -- both written by general counsel of Handgun Control, Inc. and Walter Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLIN L. R. 383 (1983).

⁴⁵ Joseph Ellis, *AMERICAN CREATION* 143-210 (2007) discussing Madison and the Constitutional Convention.

⁴⁶ *ANNALS OF CONGRESS*, House of Representatives, 1st Cong., 1st sess., 450.

⁴⁷ "As used throughout the Constitution, the people have 'powers' or 'rights,' but federal and state governments have 'powers' or 'authority,' never 'rights.'" *Emerson v. U.S.*, 270 F.3d 203, 227 (5 Cir. 2001) (emphasis added), citing multiple examples.

⁴⁸ *Id.*

⁴⁹ *JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES* (1820), reprinted as 1 *JOURNAL OF THE SENATE* 75 (Martin Claussen, ed. 1977); Halbrook *FOUNDERS* supra 277.

⁵⁰ *Houston v. Moore*, 18 U.S. 1, 24 (1820) (federal militia legislation preempts state), *Martin v. Mott*, 25 U.S. 19 (1827) (president's power to call militia from state control into federal service), *Selective Draft Law Cases*, 245 U.S. 366, 383 (1918) (Congress has authority to abolish states militia by bodily incorporating them into federal army), *Perpich v. Department of Defense*, 496 U.S. 334 (1990) (state militias may be called into federal service over state objection; federal authority over the militia is paramount). See J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39 (2001), which provides a detailed treatment of these issues.

of a “right” that cannot be enforced by anyone either for herself or for the group.⁵¹ Contrast the “collective” rights the Constitution does recognize, e.g., the First Amendment right to assemble and the Fifteenth and Nineteenth Amendment rights of particular groups to vote. All these rights can be enforced by people deprived of them by seeking enforcement on their own behalf or for the group.⁵²

“Sophisticated” Collective Right: This theory concedes that the Amendment does create an individual right to arms but one that can only be exercised in the context of military service.⁵³ To refute this it suffices just to inquire what it is supposed to mean – something no proponent of this theory has ever explained.

Do gays, the elderly, minors, and the disabled, all of whom are currently excluded from militia or military service, have a right to be included therein? If the Second Amendment protects a right to be armed as part of military service—but the government may determine who is allowed to serve in the militia or the standing army—then what right does the sophisticated collective right theory actually protect?

As another example, many civilians, soldiers and members of the National Guard believe that the military gravely erred in replacing the venerable 1911A1 .45 pistol with the lower caliber Beretta M-9 pistol and in adopting the low caliber .223 rifle. If the “sophisticated” collective right exists only in the context of military service, does it mean that those in service get to choose which guns the state or federal governments will procure and issue to them, regardless of what their superiors think? Do they have a right to be armed while in service, even if their assignment involves driving a truck? And if that is not what the “sophisticated” collective right theory means, then what does it mean to say that the Amendment creates a “right” to arms that can only be exercised in the context of military service?

Where would one look to determine the content of this supposed “right?” The evidence that these theories are not honest or serious attempts to understand the Amendment is that none of the theories’ numerous advocates has ever sought to explore their meaning or implications beyond just barely enunciating them. Significantly, the *only* attempt ever made to analyze what the state and collective right theories might mean is by Standard Model exponents.⁵⁴ To reiterate, these theories are just desperate attempts to concoct any explanation, no matter how baseless or even absurd, as an alternative to the Standard Model.⁵⁵

⁵¹ See Prince, *supra*, espousing the collective right view which he pithily describes as asserting that the right to arms the Amendment guarantees applies not to individual people, but “to the whole people as body politic” -- i.e., to no one. 40 BRAND L. J. *supra* at 694

⁵² See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963).

⁵³ For example Herz, 75 BOSTON U. LAW REV *supra* at 64, 66-77, 103-110 and 133-45 and elsewhere endlessly stressing that the right the Amendment guarantees is “narrow”, a “narrow individual right”, and is “narrow[ly] focus[ed] on the militia in defining the right to bear arms.” This is as close as the author gets to explaining what the Amendment does in his view. He offers no example or discussion of what kind of law might violate this negligible “right.” For description of this as the “sophisticated collective right” view see Emerson, *supra* 270 F.3d at 237.

⁵⁴ Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 W. & M. L. REV. 1737 (1995) at 1756-57.

⁵⁵ The baselessness and ahistorical absurdity can be illustrated by the heroic struggle opponents of the Standard Model have had to wage with the Amendment’s phrase “right of the people.” If that phrase appeared only in the Second Amendment, it would be possible, though very strained, to construe it as creating some kind of unique collective, non-individual, never enforceable right. But the phrase appears in both the First and Fourth Amendment where it is used to denote individual rights; and in the Ninth and Tenth Amendments the right of individuals (“the people”) are differentiated

Does the Second Amendment Protect All Types of Weapons?

While the *Heller* case involved only the question of handguns, the amicus brief of the U.S. in the *Heller* case raised the issue of whether the Amendment invalidates the federal licensing on machine guns. It answered that question in the negative based on the claim that that licensing is a reasonable regulation permitted by the Amendment. Thinking about this issue raises serious questions about what arms the Amendment protects—and which arms it does not.

Having outlined the various theories, we may now proceed to discuss what each implies about limitations on the Second Amendment right to arms with respect to the types of weapons that individuals might possess. Any theory of the Second Amendment should address in some consistent way what “right to keep and bear arms” means for each class of arms.

There are “ordinary firearms”: pistols; rifles; and shotguns which are analogous to, although more effective than the weapons familiar to the Founders.⁵⁶ There are automatic weapons—those that fire multiple shots from a single pull of the trigger—which while heavily regulated, remain lawful to own under federal law and in most states. There are highly destructive weapons such as artillery, flamethrowers, helicopter gunships, heavy bombers, nuclear weapons, and ICBMs.

Opponents of the Standard Model occasionally claim that an individual rights reading of the Amendment would mean that individuals have a right “to own bazookas, missiles or nuclear warheads” and other weapons of mass destruction.⁵⁷ By contrast, the principal exponent of even the NRA’s militant version of the Standard Model draws a distinction based on the category of weapons:

Since “arms” under the Second Amendment are those which an individual is capable of bearing, artillery pieces, tanks, nuclear devices, and other heavy ordnance are not constitutionally protected. Nor are other dangerous and unusual weapons, such as grenades, bombs, bazookas, and other devices which, while capable of being carried by hand, have never been commonly possessed for self-defense.⁵⁸

from the rights of the states.

Moreover, the slightest research into how late eighteenth century Americans described individual rights shows the phrase “right of the people” routinely used to describe individual rights. Madison introduction of the First Amendment read “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments...” Similarly with Madison’s other proposals: “The people shall not be restrained from peaceably assembling and consulting for their common good...” “The rights of the people to be secured in their persons; their houses, their papers, and their other property, from all unreasonable searches and seizures...” 1 ANNALS OF CONGRESS 451-2, 1st Cong., 1st sess. Numerous such examples appear in Halbrook, *FOUNDERS* supra, e.g., pp. 221 (That the People have a Right peaceably to assemble... That the People have a Right to Freedom of Speech... That the People have a Right to keep and bear arms”), 231 (“That the people have a right to freedom of speech), 239 (“the people have an equal, natural and inalienable right freely and peaceably to exercise their religion...”), 257 (the Bill of Rights “are calculated to secure the personal rights of the people”) 283 (“the right of the people to speak and publish their statements”), 289 (That the people have a right peaceably to assemble... That the people have a right to freedom of speech... That the people have a right to keep and bear arms.”).

⁵⁶ This includes semiautomatic weapons, regardless of whether they are deer hunting rifles, such as the Remington 7400, or so-called “assault weapons,” which are cosmetically similar to military rifles, but from a functionality and lethality standpoint, little different from the Remington.

⁵⁷ American Civil Liberties Union, *Gun Control*, <http://www.aclu.org/police/gen/14523res20020304.html>, last accessed July 2, 2008.

⁵⁸ Stephen P. Halbrook, *What the Framers Intended: A Linguistic Interpretation of the Second Amendment*, 49 *LAW & CONTEMP. PROBS.* 153 at 159-60 (1986).

The term “arms” as used in the Framers period—and especially in the context of “bear arms” – refers to those weapons that one could carry.⁵⁹ The Amendment thus does not extend to weapons such as cannon, helicopter gunships, heavy bombers, or ICBMs that individuals cannot “bear” or take in hand. The common pistols, rifles, and shotguns of today would seem completely within the definition of “arms” that the Founders would recognize (and probably ask to have).⁶⁰

It also seems plausible that “arms” in the modern context would be those of approximately similar capabilities or functionality to man-portable weapons of the eighteenth century, by analogy to how the modern printing press is functionally equivalent to the hand-cranked presses of 1791. Several orders of magnitude faster, yes, but still fundamentally a printing press. While there has been some significant improvement in the lethality of firearms, the change for most ordinary firearms is at most one or two orders of magnitude (as will be discussed in a few pages).

There *are* a few modern, highly destructive military weapons that would qualify as “arms” in the sense of being weapons that one can carry, such as a Stinger antiaircraft missile, and certain antitank weapons. These weapons are not functionally similar to eighteenth century arms either because they are indiscriminate in their destructiveness, or because they are many orders of magnitude more destructive (e.g., the Special Atomic Demolition Munition or “backpack nuke.”)⁶¹

There are certain problematic categories of “arms” that have eighteenth century functional equivalents, which were available for sale to civilians in the period after the Revolution, and that were sufficiently common to be specifically discussed (although not prohibited) in city fire safety ordinances, such as hand grenades.⁶² Automatic weapons are another problematic question for the Standard Model. It is at least arguable that, while automatic weapons were on the drawing boards (and in at least one case, successfully demonstrated in the eighteenth century),⁶³ an automatic weapon might, because of its dramatically enhanced lethality relative to weapons of the eighteenth century,

⁵⁹ Cramer, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS, (Praeger Press, 1994), 6-7.

⁶⁰ See James Madison’s description of his marksmanship with the rifle: “The most inexpert hands rec[k]on it an indifferent shot to miss the bigness of a man's face at the distance of 100 Yards. I am far from being among the best & should not often miss it on a fair trial at that distance.” James Madison, William T. Hutchinson and William M.E. Rachal, ed., 1 THE PAPERS OF JAMES MADISON 153 (Chicago: University of Chicago Press, 1962). See also Thomas Jefferson letter of June 19, 1796 to George Washington, “one loves to possess arms, though they hope never to have occasion for them” (explaining by analogy why he wished copies of certain papers, even though he might not ever need them). Henry Augustine Washington, ed., 4 THE WRITINGS OF THOMAS JEFFERSON 143 (Washington, D.C.: Taylor & Maury, 1854).

⁶¹ U.S. Department of Energy, *Openness Press Conference Fact Sheets*, December 22, 1997, <https://www.osti.gov/opennet/forms.jsp?formurl=reports/factsfin.html>, last accessed July 2, 2008.

⁶² AN ACT IN ADDITION TO THE SEVERAL ACTS ALREADY MADE FOR THE PRUDENT STORAGE OF GUN-POWDER WITHIN THE TOWN OF BOSTON (1786), prohibits bringing *loaded* grenades into homes in Boston; Hand grenades (probably roughly equivalent to a modern pipe bomb in destructiveness) were offered for sale in 1789; see MILITARY LABORATORY, AT NO. 34, DOCK STREET NEAR THE DRAWBRIDGE, PHILADELPHIA: WHERE OWNERS AND COMMANDERS OF ARMED VESSELS MAY BE SUPPLIED, FOR EITHER THE USE OF SMALL ARMS OR CANNON, AT THE SHORTEST NOTICE, WITH EVERY SPECIES OF MILITARY STORES. VIZ. [Signed and dated in mss.] Edward Pole, 1789 [Philadelphia] Printed by R. Aitken, No. 22 Market street, [1789], <http://memory.loc.gov/rbc/rbpe/rbpe14/rbpe147/1470090a/001dr.jpg>, last accessed July 2, 2008.

⁶³ Anthony Smith, MACHINE GUN: THE STORY OF THE MEN AND THE WEAPON THAT CHANGED THE FACE OF WAR 17 (Macmillan, 2004).

fall *outside* the protections of the Second Amendment—or at least be subject to substantially more restrictive regulation than ordinary firearms.

Keeping in mind the functional and scale of destructiveness questions, the Standard Model thus implies no more than that the Second Amendment guarantees law-abiding responsible adults the right to possess ordinary small arms – handguns, rifles and shotguns—and arguably, a more regulated right to possess machine guns and hand grenades—both of which are currently legal to own, although tightly regulated under federal law.

In contrast, what do the states’ right/collective right theories imply? If, as opponents of the Standard Model theorize, “the Second Amendment sought to keep state militias as a viable force in opposing the federal government,”⁶⁴ that necessarily implies that states have a Second Amendment right to possess all the same weapons that the federal government has. That would include the states’ rights to possess – independent of any kind of federal regulation – nuclear and biological weapons of mass destruction, as well as the right to raise armies without the consent of Congress.

Nor, under this theory, could the federal government prohibit a state from authorizing any persons they chose to designate as members of the militia to possess machine guns, hand grenades, backpack nukes, or biological and chemical weapons of mass destruction. While it is unlikely that that any state government would engage in such a grant of authority except to genuine members of the state militia, it is the logical consequence of a theory that claims that the Second Amendment protects a right of the states to rise up in revolution against the national government. Talk about giving federalism a disconcerting new twist!

Nor is it relevant under the states/collective right theories that the original Constitution forbids states having warships or raising armies.⁶⁵ After all, insofar as these theories have any genuine rationale (as opposed to just being a pretextual alternative to the Standard Model) it is a claim that the Second Amendment was an Anti-Federalist retrenchment on the original Constitution’s dictates of federal military supremacy. In contrast, the Standard Model says not that the Amendment sought to correct anything in the Constitution, but only that it guarantees a right to personal arms functionally equivalent to those universally endorsed by late eighteenth century Americans.

A quarter century ago one of the current authors wrote:

The argument that an armed citizenry cannot hope to overthrow a modern military machine flies directly in the face of partisan guerrilla and civil wars in the twentieth century. To make this argument (which is invariably supported, if at all, by reference only to *American* military experience in *non-revolutionary* struggles such as the two World Wars) one must indulge in the assumption that a handgun-armed citizenry will eschew guerrilla tactics in favor of throwing themselves headlong under the tracks of advancing tanks. Far from proving invincible, in the vast majority of cases in this century in which they have confronted popular insurgencies modern armies have been unable to suppress the insurgents. That is why the British no longer rule in Israel and Ireland, the French in Indo-China, Algeria and Madagascar, the Portuguese in Angola, the whites in Rhodesia, or General Somoza, General Bautista or the Shah in Nicaragua, Cuba or Iran respectively – not to mention the examples of the United States in Vietnam and the Soviet Union in Afghanistan. It is of course quite irrelevant for present purposes whether each of the struggles just mentioned is or was justified or whether the people

⁶⁴ Quoting states right theorist George C. Thomas, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 158 (2001)

⁶⁵ U.S. Const., Art. I, sec. 10, cl. 3.

benefitted therefrom. However one appraises these victories, the fact remains that they were achieved against regimes equipped with all the military technology which, it is asserted, inevitably dooms popular revolt.

Perhaps more important, in a free country like our own the issue is not *overthrowing* a tyranny but *detering* its institution in the first place. To persuade his officers and men to support a coup, a potential military despot must persuade them that his rule will succeed where our current civilian leadership and policies are failing. In a country whose widely divergent citizenship possesses upwards of 160 million firearms [as of 2005 upwards of 280 million firearms], however, the most likely outcome of usurpation (no matter how initially successful) is not benevolent dictatorship, but prolonged internecine civil war. ***

Even if the general's ambition does not recoil from the prospect of victory at such a cost, will his officers accept it?⁶⁶

Nothing which has occurred in the world in the quarter century since this was written has undercut its truth.

Are Handguns Protected Arms?

The Criminology of Handguns

The District of Columbia, seeking to defend its handgun ban in *Heller*, argued that widespread possession of handguns represents an especially serious public safety hazard. So even if the Amendment protects an individual right (which the District denied), it would not extend to pistols, which it characterized as “uniquely dangerous weapons” that present “unique dangers to innocent persons.”⁶⁷ In support of this claim the District offered two dubious assertions about modern handguns: that they are both more concealable and far more deadly than the weaponry that the Founders knew.

Before treating those points, it may useful to review some criminological evidence:

a) Annually, several times as many victims use handguns to defend against criminals as criminals use handguns to commit crimes⁶⁸ and “[r]esistance with a gun appears to be the most effective in preventing serious injury [to victims, and] the data strongly indicate that armed resistance is the most effective tactic for preventing property loss....”⁶⁹

b) The most charitable criminological appraisal of the District's 1976 handgun ban would be that it has achieved nothing by way of reducing murder and violence. This is charitable in treating as a mere coincidence the fact that since the handgun ban murder and violent crime rates catastrophically increased not only in absolute terms, but also in comparison to neighboring Baltimore and all other large American cities that did not ban handguns.⁷⁰

⁶⁶ *Original Meaning*, 82 MICH. L. REV. at 270-71 (italics in original). For the estimate that American gun ownership now approaches 280 million guns see Don B. Kates, *The Limits of Gun Control: A Criminological Perspective* in Timothy Lytton, ed., *SUING THE FIREARMS INDUSTRY: A LEGAL BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* (Ann Arbor, University of Michigan Press, 2005) at 63.

⁶⁷ Petition for Writ of Certiorari, *District of Columbia v. Heller*, No. 07-290 (U.S. Supreme Court), 22-23.

⁶⁸ Kates in Lytton supra at 68-69 (collecting studies).

⁶⁹ Tark & Kleck, 42 CRIMINOLOGY supra at 902; see also Southwick, 28 J. CRIM. JUSTICE supra at 351-370 (“The use of a gun by the victim significantly reduces her chance of being injured”).

⁷⁰ See statistics and discussion in the text accompanying footnotes 34-35 supra.

c) Russia has banned handguns since the 1920s, and, given Russian methods of law enforcement, the ban has succeeded in largely eliminating handgun murders. As a consequence, murderers use different methods, and Russia's murder rate has always been higher than ours. In recent years it has been almost four times higher.⁷¹

d) Almost eighty years of increasingly restrictive British gun control laws having failed to prevent increasing violent crime rates. Britain banned handguns in 1997, confiscating more than 150,000 previously legally licensed handguns. As of year 2000 Britain had the highest violent crime rate among industrialized nations – twice the American rate.⁷²

Modern Handguns: More Lethal Than Those of 1791?

One argument for disregarding the Second Amendment as obsolete is that the technology of firearms has advanced so dramatically since 1791. By this reasoning, a modern pistol provides so much destructive potential that the Framers, were they present today, would recognize the absurdity of allowing ordinary law-abiding persons to possess or carry such a weapon.

Among the more problematic aspects of the debate over guns is that people in general, and particularly gun control advocates, have both little accurate information about guns and much misinformation. This is the only way to account for claims that handguns should be banned because modern firearms are far more deadly than the firearms of the eighteenth century.

While the capabilities of firearms have expanded substantially since the eighteenth century, this is not the only technology that has changed. Medical care, policing, and communications technology have far more than kept pace with firearms technology. This leads to the counterintuitive result that at least in a civil society, firearms are substantially *less* deadly today than they were in the Founders' era. Consider the following:

Suppose that in 1791 a lunatic on a balcony in a crowded mall had fired both barrels of a 10-gauge shotgun into the shoppers below. If the 90 missiles thus dispatched had struck 90 shoppers (an unlikely, although possible result), 60% or more of those who received a substantial wound in the head or torso would have died, given eighteenth century medical technology. Now suppose the same scenario today but with the killer using the powerful 9mm 15 shot semi-automatic handgun standardized by the U.S. Armed Forces as the Beretta M-9 and reloading with five extra fifteen shot magazines. First of all, before the killer had emptied even his first magazine most of his targets would have fled to cover. But let us assume that the crowd instead obligingly stood still so he could change magazines five times and shoot ninety of them. Of those ninety wounded, fewer than fourteen would die, given modern medical technology.⁷³

The example is gruesome but the lesson is clear. Our Founding Fathers, fervently believing self-defense to be the first human right, were willing to tolerate weaponry far more deadly than the handguns of the twenty-first century.

⁷¹ Kates & Mauser, 30 HARV. J. OF LAW & P.P. supra at 650-1.

⁷² Ibid at 654-56.

⁷³ Personal communication from Martin Fackler, M.D. (Colonel, U.S. Army retired), an experienced battle surgeon, co-author of the NATO Wound Manual, who until his retirement directed the U.S. Armed Forces Wound Ballistics Laboratory. As of the late twentieth century, handgun wounds killed roughly 15% of those wounded. See Don B. Kates, *The Value of Civilian Arms Possession as Deterrent to Crime or Defense Against Crime*, 18 AMERICAN JOURNAL OF CRIMINAL LAW 113 (1991) at 136 and studies cited in fn. 72.

The Size and Lethality of Modern Handguns

It is certainly true that firearms technology has advanced since 1791—but not as much as some seem to think. The concept of a repeating handgun was already more than a century old in 1791, if still unrefined.⁷⁴ Even with respect to single shot pistols, the technological advance since the late eighteenth century is less dramatic than it first appears. Pocket pistols of the Revolutionary era were often surprisingly compact, such as this example owned by Paul Revere.



PAUL REVERE'S POCKET PISTOL⁷⁵

Being so compact, those who were expecting trouble might carry two, four, or even six single shot pistols on their belt. This was a sufficiently common practice that pistols were often sold (or stolen) in pairs⁷⁶—and sometimes as a case of pistols or a brace of pistols.⁷⁷ The phrase “brace of pistols” frequently appears in eighteenth century accounts and fiction to describe this solution to the single shot problem.⁷⁸

⁷⁴ Clayton E. Cramer and Joseph Edward Olson, *Pistols, Crime, and Public Safety in Early America*, WILLIAMETTE LAW REVIEW (2008) (forthcoming).

⁷⁵ Courtesy of the Massachusetts Historical Society.

⁷⁶ Purchase records: William Hand Browne, ed., 42 ARCHIVES OF MARYLAND 63 (Baltimore: Maryland Historical Society, 1885); William P. Palmer, ed., 1 CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS, 1652-1781, PRESERVED IN THE CAPITOL AT RICHMOND 81 (Richmond: 1875). Stolen pairs of pistols listed in runaway ads: April 15 to April 27, 1737, [Williamsburg,] VIRGINIA GAZETTE (Parks), in Thomas Costa, ed., VIRGINIA RUNAWAYS: RUNAWAY SLAVE ADVERTISEMENTS FROM 18TH-CENTURY VIRGINIA NEWSPAPERS (<http://www.wise.virginia.edu/history/runaways/>); South Carolina Gazette, March 8, 1740; PENNSYLVANIA GAZETTE, May 24, 1733, April 2, 1752, October 25, 1753, December 5, 1754, August 10, 1774, May 10, 1775, January 8, 1767, March 29, 1780, December 5, 1781, May 19, 1784, June 27, 1787. Ads offering pairs of pistols for sale in the PENNSYLVANIA GAZETTE, August 31, 1749, September 19, 1751, October 1, 1761, October 21, 1762, December 14, 1774, April 15, 1776, January 24, 1778.

⁷⁷ PENNSYLVANIA GAZETTE, October 1, 1761, September 1, 1779.

⁷⁸ PENNSYLVANIA GAZETTE, May 20, 1756; *Some Account of the Loss of the Hartwell East-Indiaman*, THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1787 253 (London: J. Dodsley, 1789); *Account of the Disaster that befell his Majesty's Ship Guardian, Lieutenant Riou, Commander*, THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1790 260 (London: J. Dodsley, 1793); Jasper Sprange, THE TUNBRIDGE WELLS GUIDE 247 (London: J. Sprange, 1797); Matthew Gregory Lewis, 1 THE MONK: A ROMANCE 203 (Waterford: J. Saunder, 1796); Robert Bisset, DOUGLAS; OR, THE HIGHLANDER 189 (London: T.

A criminal carrying six single shot pistols in his pockets and on his belt in 1791 would admittedly not be as quick to fire those six shots as his 2007 counterpart using a revolver or semiautomatic pistol. A reasonably skilled wielder of a modern pistol could expect to *accurately* shoot perhaps 20 to 40 bullets in about 60 to 90 seconds (assuming that the shooter reloads without being shot by a bystander). The 1791 equivalent might fire six bullets in about ten seconds. This is an order of magnitude enhancement in the ability to wound.

On the other side of the equation, advances in medical, communication, and protective technology have more than kept pace with the improvement in handgun technology. As we have seen, in 1791 a torso or abdominal wound would kill in the majority of cases. Improvements in surgical technique and the ability to rapidly move victims to a hospital have also dramatically improved the chances of surviving gunshots. The development of full-time, professional police departments and the ubiquity of cell phones means that criminal misuse of firearms today can be met by an organized and effective response far more rapidly than in 1791. The improvements in firearms technology also means that civilians carrying concealed handguns have commensurately escalated their ability to respond to a criminal attack.

American Pistol Regulation Before the Second Amendment

Reviewing colonial laws and contemporary utterances, historian Robert Churchill concludes that late eighteenth century Americans had a right to keep arms that they saw as a vital and inviolable incident of their citizenship.⁷⁹ But what about pistols? Did the Framers mean to include pistols in “the right of the people to keep and bear arms?” What were their attitudes toward what the District of Columbia brief in *Heller* characterized as such “uniquely dangerous” weapons? Could it perhaps be that pistols were so scarce or so undangerous that the Framers simply overlooked the supposedly unique public safety hazard they represented?

There are almost no regulatory distinctions between pistols and long guns in statutes before 1791.⁸⁰ The only examples of laws that treat pistols differently from other arms suggest that pistols were regarded as either *less* dangerous than long guns, or perhaps, that they enjoyed some protected status as weapons of self-defense. In January of 1776, the Maryland Revolutionary government ordered those not prepared to associate with the Revolutionary cause to turn over their firearms for the use of the militia—with one notable exception. The counties were told to order all freemen to “deliver up to the committee of observation for this county, all fire-arms, if he hath any, *except pistols.*” Even with all the concerns about Loyalists who might take advantage of the arrival of British troops to cause mischief, there was apparently no perceived need to disarm them of pistols.⁸¹ A similar exception allowing those not entirely trusted with long guns—but trusted with pistols—

Crowder, 1800).

⁷⁹ Churchill, *LAW & HIS REVIEW* *supra*, at 25.

⁸⁰ Generally, see Clayton E. Cramer, *ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE* (Nashville, Tenn.: Nelson Current, 2006). A more focused discussion appears in Cramer and Olson, *Pistols, Crime, and Public Safety in Early America*, *supra*.

⁸¹ William Hand Browne, ed., 78 *ARCHIVES OF MARYLAND* 75, 110 (Baltimore: Maryland Historical Society, 1885), available at <http://www.msa.md.gov/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/am78--75.html> and <http://aomol.net/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/am78--110.html> .

appears in Maryland records as late as 1781.⁸²

Why were pistols not more heavily regulated? As one of the authors has demonstrated in another forum, the evidence from advertising, probate inventories, and official records shows that pistols were widely owned before, during, and after the Revolution, and that they were commonly used in self-defense, in violent crime, and for suicide. While less common, gun accidents appear repeatedly in this period. None of these uses, either intentional or accidental, seems to have been treated as startling or shocking, although the consequences were often tragic.⁸³ In sum, the Amendment's wording ("arms") would seem to include handguns no more or less than any other kind; and there is simply no evidence to suggest that the Founders generation regarded pistols as especially dangerous.

Do Criminals, Lunatics or Children Have a Right to Arms?

Does everyone qualify as a member of "the people" who have a right to "keep and bear arms"? To this question it might at first blush seem possible to respond with an unqualified negative. In classical republican thought the right to arms was inextricably and multifariously linked to that of civic *virtu*, i.e. the virtuous citizenry.⁸⁴ "One implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those, who, like children or the mentally unbalanced, are deemed incapable of virtue."⁸⁵ Moreover from time immemorial, various jurisdictions recognizing a right to arms have nevertheless taken the step of forbidding suspect groups from having arms.⁸⁶ American legislators at the time of the Bill of

⁸² Browne, 203 ARCHIVES OF MARYLAND 278 available at <http://aomol.net/megafile/msa/speccol/sc2900/sc2908/000001/000203/html/am203--278.html>.

⁸³ Cramer and Olson, *Pistols, Crime, and Public Safety in Early America*, supra.

⁸⁴ See, e.g., Nathan DeDino, *The Second Amendment and the Future of Gun Regulation: Historical, Legal, Policy, and Cultural Perspectives*, 73 FORDHAM L.REV. 487, 492 (2004) ("Historians have long recognized that the Second Amendment [of the U.S. Constitution] was strongly connected to the republican ideologies of the Founding Era, particularly the notion of civic virtue."), Robert Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 128ff. (1986) and *Original Meaning*, supra, 82 MICH. L. REV. at 231-33.

⁸⁵ *State v. Hirsch*, 338 Or. 622, 114 P.3d 1104, 1135 (Or. 2005) ("Felons simply did not fall within the benefits of the common law right to possess arms. That law punished felons with automatic forfeiture of all goods, usually accompanied by death." Quoting Kates, *Original Meaning*) Nonetheless, Hirsch, 1126-28 acknowledges that they could find no evidence of disarming of felons in the Colonial or early Republic period. Compare Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L.REV. 461, 480 (1995) (felons did not historically have a right to possess arms). See also Cramer, FOR THE DEFENSE OF THEMSELVES AND THE STATE, supra 65-67, for a list of decisions limiting firearms ownership by felons and ex-felons—the earliest of which being *People v. Camperlingo*, 69 Cal.App. 466, 231 P. 601 (1924). Interestingly enough, this statute prohibiting ex-felons from possession of a concealable firearm was adopted as part of a package of laws that banned alien possession, required licenses to carry concealed firearms. Even proponents recognized that some provisions might not be constitutional, but the hope was that it would have a "salutary effect in checking tong wars among the Chinese and vendettas among our people who are of latin [sic] descent." *New Firearms Laws Effective On August 7*, SAN FRANCISCO CHRONICLE, July 15, 1923, p. 3.

⁸⁶ See, e.g. Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?* 36 OKLA. L.REV. 65, 96 (1983) ("Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from possessing firearms]."), Joyce Lee Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 11 (Harvard, 1994) (disarmament of English and Welsh Catholics); Stephen P. Halbrook, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT 96ff. (1984) (American state prohibitions of arms to blacks), Hening, 7 STATUTES AT LARGE 35-36 (disarming Catholics who were not prepared to take the oath of allegiance to the King); Cramer, ARMED AMERICA, supra, 24-50 (discussing various laws regulating or prohibiting firearms ownership based on race or religion).

Rights seem to have been aware that the right to arms was not unlimited. During the Massachusetts debate on ratifying the original Constitution Samuel Adams proposed a bill of rights including that Congress could not “prevent the people of the United States *who are peaceable citizens* from keeping their own arms.”⁸⁷ A bit more broadly (and perhaps intended to include the mentally ill who had not yet been convicted of a crime), the Anti-Federalist minority of the Pennsylvania ratifying convention requested an amendment to the Constitution guaranteeing that “no law shall be passed for the disarming the people or any of them *unless for crimes committed or real danger of public injury from individuals....*”⁸⁸

Thus there is good reason to believe that the Founding Fathers would have deemed persons convicted of any of the common law felonies *not* to be among “the [virtuous] people” to whom they were guaranteeing the right to arms.⁸⁹ At common law felons were stripped of property and other rights: “A felon who had broken the social contract no longer had any right to social advantages, including transfer of property....”⁹⁰ A felon “could not own any property himself, nor could [his heirs] ... claim through him.”⁹¹ Perhaps more importantly, many of the statutory felonies of the Colonial, Revolutionary, and early Republic period in America, were *theoretically* punishable by execution, and were often so punished.⁹²

From the foregoing it seems that the Second Amendment does not preclude either Congress or state legislatures from treating dangerous criminals, the mentally incompetent, or juveniles as differing from the virtuous citizenry to whom the Amendment guarantees the right to arms. Indeed, Congress and various state legislatures have effectively done that, and with little objection from gun rights organizations. Federal law prohibits possession of a firearm by anyone who has been convicted of any felony whatever, or of a misdemeanor of domestic violence, or involuntarily committed to a mental institution. Persons in those categories are barred for life from firearm possession (with a very few exceptions where rights have been restored), as also are persons

⁸⁷ THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 182 (Neil H. Cogan ed. 1997) (italics added). See also the exclusion of those “as are or have been in Actual Rebellion” from the right to arms in the language proposed by the New Hampshire ratifying convention. *Ibid.*

⁸⁸ *Ibid.* at 181 (emphasis added).

⁸⁹ *United States v. Emerson*, 270 F.3d 203, 227 n. 21 (5th Cir.2001) (cites numerous authorities to the fact that “violent criminals, children, and those of unsound mind” were never seen as having a right to arms). It is probable that the capital punishment often accompanying these felonies in 1787 negated the need for further laws prohibiting the convicted felon from possessing arms.

⁹⁰ Vernon M. Winters, *Criminal RICO Forfeitures and the Eight Amendment: 'Rough' Justice Is Not Enough*, 14 HASTINGS CONST. L.Q. 451, 457 (1987).

⁹¹ 3 William S. Holdsworth, A HISTORY OF ENGLISH LAW 69 (3d ed.1927) (footnote omitted).

⁹² O.F. Lewis, THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845 12-13 (Albany, N.Y.: Prison Association of New York, 1992) (Pennsylvania capital crimes from 1718 to 1776 included “High treason; petty treason; murder; burglary; rape; sodomy; buggery [bestiality]; malicious maiming; manslaughter by stabbing; witchcraft by conjuration, arson” and somewhat later, counterfeiting. In 1786, capital crimes were reduced to “treason, murder, rape and arson.” *Ibid.*, 16. In 1794, reduced to first-degree murder alone. *Ibid.*, 28; 2 CONGRESSIONAL GLOBE 1456, 19th Cong., 1st sess. (1826)); New York Colony, 5 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 38 (Albany: James B. Lyon, 1904) (a 1770 statute punishing counterfeiting with “the Pains of Death without the Benefit of Clergy” although repealed by the Crown within two months); passed in 1771 with the same penalty, *Ibid.*, 163; two 1772 private relief laws providing for punishment by “the Pains of Death without the Benefit of Clergy” for perjury related to bankruptcy, *Ibid.*, 421, 424. Lewis, DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, *supra*, 51, indicates that New York eliminated capital punishment for all crimes except treason and murder in 1796.

dishonorably discharged from the military.⁹³ While there are some differences, almost all states have similar prohibitions.⁹⁴ although some of the state enactments are limited only to enumerated serious and violent felonies⁹⁵ and often automatically expire after the passage of period of responsible living.⁹⁶ In light of the evidence that violent felons are disproportionately involved in the commission of murders, notes 15-29 *supra*, laws prohibited convicted felons from possession of firearms are rather easy to defend as necessary for public safety.

Insofar as such exclusions from the right to arms have been litigated they have been upheld. Forty-three state constitutions currently guarantee individuals the right to arms and yet these have uniformly been held to allow bans on gun ownership by suspect groups.⁹⁷ Akhil Amar observes that the Founders viewed the right to arms as inextricably linked with the right to vote as incidents of full citizenship: Those who were armed were entitled to vote and those who voted were entitled to bear arms.⁹⁸ Thus it is particularly relevant to note that the right to vote may constitutionally be denied to convicted criminals.⁹⁹ By parity of reasoning it seems that criminals may be prohibited from possessing guns.

Mental illness and firearms disability is another area of difference between now and then. Until the 1960s, there appear to have been very few laws that disarmed—or even tried to disarm—those

⁹³ 18 USC 922 (g). Strictly speaking, 18 USC 922(d)(1) does not specify felony, but actually prohibits those who are under indictment or have been convicted of any crime “punishable by imprisonment for a term exceeding one year.”

⁹⁴ James B. Jacobs, *CAN GUN CONTROL WORK?* 32-34 (Oxford, Oxford U. Press 2002). See Cal. Welfare & Institutions Code § 8100 for an example statute; Donna M. Norris, Marilyn Price, Thomas Gutheil, and William H. Reid, *Firearm Laws, Patients, and the Roles of Psychiatrists*, 163 *AM. J. OF PSYCHIATRY* 1392-1396 (August 2006) summarizes differences from state to state with an emphasis on the legal duties of psychiatrists.

⁹⁵ See e.g., Minn. Stat. sec. 624.712, subdivision 5 (2008).

⁹⁶ See e.g., Mich. Comp. L. sec. 750.224f (2008).

⁹⁷ See, e.g., *State v. Hirsch*, *supra* 338 Or. 622, 114 P.3d 1104 at 1132-34 (felons are not part of the virtuous citizenry to whom the right to arms is limited), *Posey v. Commonwealth*, 185 S.W.3d 170 (Ky. 2006), and cases there cited. See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 *TEXAS REV. OF LAW & POLITICS* 191 (2006) for a list of all state constitutional right to keep and bear arms provisions. *Id.*, 205, identifies forty-*two* of the forty-four as protecting an individual right.

In *Commonwealth v. Davis*, 343 N.E.2d 847, 849 (Mass. 1976) held that the Mass. Const. provision was not individual—with no apparent awareness of the statements by John Adams, principal author of the 1780 Mass. Const., that suggest otherwise. (Adams, in arguing against non-governmental militias, argued for the authority of the government to regulate “arms in the hands of citizens” but with one important exception “except in private self-defence.” John Adams, Charles Francis Adams, ed., 6 *THE WORKS OF JOHN ADAMS* 197 (Boston: Charles C. Little and James Brown, 1851). See also *Commonwealth v. Murphy*, 166 Mass. 171, 172-173 (1896), which appears to have recognized that the provision was individual in nature, by making parallel arguments to those concerning concealed carry in other states where the right was recognized as individual.

In *City of Salina v. Blaksley*, 72 Kan. 230 (1905), the Kansas Supreme Court found that Kans. Const. § 4 “The people have the right to keep and bear arms for their defense and security;” protected not an individual right, but the right of the Kansas state government to organize a militia free of interference from the Kansas state government. In *Junction City v. Mevis*, 226 Kan. 526, 601 P.2d 1145 (1979), the Kansas Supreme Court voided a local gun control measure based on this provision without admitting that the Salina decision was wrongly made.

⁹⁸ Akhil Reed Amar, *THE BILL OF RIGHTS* 48. See also *Cooper and Worsham v. City of Savannah*, 4 Ga., 68, 72 (1848): “Free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office.”

⁹⁹ *Richardson v. Ramirez*, 418 U.S. 24 (1974). See also *DeVeau v. Braisted*, 363 U.S. 144 (1960) (felons may be prohibited from holding union offices).

who were mentally incompetent (either because of retardation or mental illness). This is partly because psychosis was rare in Colonial America and Revolutionary America, but predominately because the dangerously mentally ill did not enjoy the freedom that would require disarming them. Civil commitment—that is, locking up persons against their will because of mental illness—was a fairly informal procedure under Colonial law, which borrowed from both English common law and statutes. The “furiously insane” could be arrested by anyone.¹⁰⁰ Mental illness rates appear to have risen dramatically in the nineteenth and twentieth centuries,¹⁰¹ for reasons that remain something of a mystery, but may have something to do with urbanization.¹⁰² To the extent that the mentally ill were more likely to be hospitalized (or, in the early days, held in the almshouse or jail), there would have been no need to disarm them. A case can be made that deinstitutionalization, which created a host of other social ills for both the mentally ill and the larger society,¹⁰³ was a serious error. Correcting this mistake thus may be a solution to the apparent conflict between good public policy (disarming the severely mentally ill) and the original meaning of the Second Amendment.

Non-Violent Felony As Firearms Rights Disqualifier

At common law the term “felony” applied only to a few very serious, very dangerous offenses such as murder, rape, and robbery. Parliament, and Colonial governments, added a great many felonies to the list in the centuries before the Revolution—including crimes that are now Constitutionally protected activities.¹⁰⁴ While many of these acts are no longer felonies in civilian life—indeed, no longer crimes—the military has its own code. Acts deemed crimes by the Uniform Code of Military Justice include adultery, sodomy, and, for officers, fraternizing with enlisted personnel.¹⁰⁵ So are: expressing contempt for a superior (including the president), disrespect,

¹⁰⁰ Albert Deutsch, *THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES*, 2nd ed. 419-20 (New York: Columbia University Press, 1949). Decisions that start to formalize these procedures appear in the 1840s: *Matter of Oakes* (Mass. 1845); *Hinchman v. Richie*, *Brightly* 143, 152 (C.P. Phila, 1849). See Paul S. Appelbaum and Kathleen N. Kemp, *The Evolution of Commitment Law in the Nineteenth Century: A Reinterpretation*, *LAW AND HUMAN BEHAVIOR*, 6:3-4 [1982], 345-7.

¹⁰¹ E. Fuller Torrey and Judy Miller, *THE INVISIBLE PLAGUE: THE RISE OF MENTAL ILLNESS FROM 1750 TO THE PRESENT* frontispiece and 124-47 (New Brunswick, N.J.: Rutgers University Press, 2001). For a contrary but less persuasive view, see Herbert Goldhamer and Andrew W. Marshall, *Psychosis and Civilization: Two Studies in the Frequency of Mental Disease* (Glencoe, Ill.: The Free Press, 1953).

¹⁰² G. Lewis, A. David, S. Andreasson, P. Allebeck, *Schizophrenia and city life*, *LANCET*. [July 18, 1992] 340(8812):137-40, abstract available at http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=1352565, last accessed September 13, 2006; M. Marcelis, F. Navarro-Mateu, R. Murray, J.P. Sellen, J. Van Os, *Urbanization and psychosis: a study of 1942-1978 birth cohorts in The Netherlands*, *PSYCHOLOGICAL MEDICINE*, [July 1998] 28(4):871-9, abstract available at http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=9723142, last accessed September 13, 2006; Torrey and Miller, *THE INVISIBLE PLAGUE*, supra at 122.

¹⁰³ Generally, see Rael Jean Isaac and Virginia C. Armat, *MADNESS IN THE STREETS: HOW PSYCHIATRY AND THE LAW ABANDONED THE MENTALLY ILL* (New York: The Free Press, 1990).

¹⁰⁴ See <http://www.claytoncramer.com/primary.html#SodomyLaws> for images of Colonial statutes that punished oral copulation, anal copulation, and bestiality, usually by death.

¹⁰⁵ *UNIFORM CODE OF MILITARY JUSTICE* (UCMJ) sec. 925, Art. 125 (sodomy); see generally Walter T. Cox, III, *Consensual Sex Crimes in the Armed Forces: A Primer for the Uninformed*, 17 *DUKE J. OF GENDER L. & POLY* 791 (2007) (Article by military judge).

malingering (calling in sick when you are not), desertion, insubordination, and disobedience to orders.¹⁰⁶ All of these are either felonies or penalized by dishonorable discharge that in itself bars the discharged person from acquiring or possessing a firearm.¹⁰⁷

Scores of civilian offenses, many of them posing no physical danger to others, are felonies. For instance: income tax evasion, anti-trust law violations, and, in California at least: knowingly marrying a person who is already married; and oral copulation with a person under 18 years of age even if the offender is also under that age.¹⁰⁸ Even more inconsistently, *Small v. U.S.* (2005) ruled that foreign felony convictions were *not* disqualifiers for firearms ownership—no matter how serious the crime. As Justice Thomas’ dissent pointed out:

As explained above, the majority's interpretation permits those convicted overseas of murder, rape, assault, kidnaping, terrorism, and other dangerous crimes to possess firearms freely in the United States. *Supra*, at 9, and n. 7. Meanwhile, a person convicted domestically of tampering with a vehicle identification number, 18 U. S. C. §511(a)(1), is barred from possessing firearms.¹⁰⁹

For civilians, *Lawrence v. Texas*¹¹⁰ pretty well settles that consensual sex of any kind between spouses, or between consenting adults of any marital status, is a constitutionally protected activity. But even were a prohibition on such activity valid,¹¹¹ it would be next to absurd to suggest that conviction of a “felony” in which untold millions of Americans routinely engage could disqualify them from the right to arms now that the constitutional status of that right has been recognized. Equally absurd would be any claim that income tax evasion, anti-trust law violations or (however appropriately punishable it might be in a military situation) calling George Bush a jackass should disqualify anyone from owning a firearm. Insofar as federal or state statutes would seek to bar arms possession by such felons, those laws would seem to be invalid on their face.

Even if the courts continue to hold that the Second Amendment’s protections do not extend to *violent* ex-felons, it would seem plausible that they might decide that lifetime disarmament for all felonies qualifies as disproportionate punishment for the crime. In a series of cases starting with Justice Field’s dissent in *O’Neil v. Vermont* (1892), the Supreme Court has *sometimes* recognized that a punishment that is disproportionate to the crime is a “cruel and unusual punishment.”¹¹² While the Court has not consistently held to this requirement for proportionality of punishment in non-capital cases,¹¹³ there might be a stronger argument for such an approach where a non-violent felony

¹⁰⁶ UCMJ sec. 925, articles 85, 86, 87, 88, 89, 91 and 115.

¹⁰⁷ The UCMJ does not divide crimes into felonies and misdemeanors but convictions may be treated as either based on civilian definitions. These include the standard that any crime for which one year or more confinement is a possible punishment is a felony. See 18 U.S.C. 3559; US Coast Guard COMMANDANT INSTRUCTION 5520.5E <http://www.uscg.mil/hq/g-o/g-o-cgis/comdtinst%205520.5E.doc>.

¹⁰⁸ Cal. Pen. C. 284 and 288a (b)(1)

¹⁰⁹ *Small v. U.S.*, 544 U.S. 385 (2005).

¹¹⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹¹¹ Military courts have held consensual sexual acts criminalized by the Uniform Code of Military Justice are still crimes and subject to punishment. Cox, *supra*, at 795-802.

¹¹² *O’Neil v. Vermont*, 144 U.S. 323, 339-41 (1892) (J. Fields, diss.); *Weems v. U.S.*, 217 U.S. 349, 364-5 (1910) (violating the “cruel and unusual punishment” clause of the Philippines Bill of Rights).

¹¹³ *Rummel v. Estelle*, 445 U.S. 263 (1980). See *Kennedy v. Louisiana* (2008) for a recent example of applying

conviction's disabilities conflict with the Second Amendment.

Disarming Groups Based On Race Or Religion

The tradition whereby suspect groups can be denied the right to arms includes groups defined by race or religion. Thus the English Bill of Rights' right to arms guarantee was expressly limited to Protestants.¹¹⁴ Does this suggest that Congress or a state legislature could similarly ban firearms ownership, e.g. responding to extremist riots and terrorist activity such as have recently occurred in England, France, Denmark and elsewhere by a ban on firearms ownership by Muslims?

Before addressing the legal implications it is useful to point out that such a ban would be counterproductive. Our knowledge of terrorist intentions has often come from information volunteered to the F.B.I. and local authorities by law abiding, moderate Muslims.¹¹⁵ Not only would a discriminatory ban on firearms ownership by Muslims anger the Muslim community in general, it would leave law abiding Muslims who reported extremist plots defenseless against retaliation by the extremists. At the same time it would do nothing to disarm the extremists. Even ardent gun control advocates concede that gun laws cannot disarm terrorists and professional criminals.¹¹⁶

Regardless of its criminological merits, would a ban on gun possession by Muslims or other racial or religious groups be constitutional? In the long tradition of the English right to arms such bans have often existed.¹¹⁷ But in America, the situation with respect to religion was substantially more liberal. There are three examples of statutes disarming religious minorities in America—and two of them are less than they first appear. Massachusetts Bay Colony disarmed Anne Hutchinson's Antinomian heretics in 1637.¹¹⁸ Georgia prohibited the indentured Acadians who were expelled

disproportionality arguments to capital punishment for child rape.

¹¹⁴ *Original Meaning*, 82 MICH. L. REV. supra at 239.

¹¹⁵ The following partial list is from the website MUSLIMS FOR A SAFE AMERICA: "A White Muslim informant, William 'Jamaal' Chrisman, helped convict an African-American Muslim, Derrick Shareef, who pled guilty to plotting to attack a Rockford, IL shopping mall with hand grenades. 'What brought me to the government was after 9-11 Muslim scholars in Saudi Arabia and Morocco said it was incumbent on Muslims to stop terrorists,' Chrisman testified. 'Anyone involved in terrorism was deemed the brother of the devil.'" *** "An Egyptian-American Muslim informant, Osama Eldawoody, helped convict an Egyptian-American Muslim in NY, James Elshafay, and a Pakistani Muslim immigrant, Shahawar Matin Siraj, of conspiring to blow up a NY subway station." *** "A Yemeni Muslim informant, Mohamed Alanssi, helped convict an African-American Muslim in NY, Tariq Shah, of pledging allegiance to Al Qaeda and offering to train Al Qaeda members in martial arts and hand-to-hand combat."

¹¹⁶ Richard Harding, *Firearms Ownership and Accidental Misuse in S. Australia*, 6 ADELAIDE L. REV. 271, 272 (1978) (political criminals cannot be disarmed), Franklin Zimring, *Is Gun Control Likely to Reduce Violent Killings?* 35 U. CHI. L. REV. 721 (1968) (professional criminals cannot be disarmed); NATIONAL LAW JOURNAL, April 13, 1981, p. 14 (anti-gun editorial nevertheless conceding that "No amount of control will stop a determined assassin -- or a determined street robber -- from getting a gun.")

¹¹⁷ 1 W. & M. 15 (1688) "That no Papist or reputed Papist, of refusing, or making Default, as aforesaid, shall or may have or keep in his House, or elsewhere, or in the Possession of any other Person to his Use, or at his Disposition, any Arms, Weapons, Gunpowder, or Ammunition (other than such necessary weapons as shall be allowed to him by Order of the Justices of the Peace, at their General Quarter-Sessions, for the Defence of his House or Person)." Compare the more restrictive statute for Ireland, 7 Will. III 5 (1695), which makes no exception for "necessary weapons."

¹¹⁸ J. Franklin Jameson, ed., JOHNSON'S WONDER-WORKING PROVIDENCE: 1628-1651 175 (New York: Barnes & Noble, Inc., 1959); Nathaniel B. Shurtleff, 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 211-12 (Boston: William White, 1853); John Winthrop, James Kendall Hosmer, ed., 1 WINTHROP'S JOURNAL: "HISTORY OF NEW ENGLAND" 1630-1649 215 (New York: Charles Scribner's Sons, 1908); *Ibid.*, 240-1,

from Nova Scotia “to have or use any fire Arms or other Offensive Weapons otherwise than in his Masters Plantation or immediately under his Inspection.”¹¹⁹ This, however, was not a general prohibition on Catholics being armed, but a prohibition on a group of Catholics who had refused to swear allegiance to the British government. Their religion was not the cause of their disarmament, but their lack of loyalty to the Crown. Virginia’s 1756 “Act for disarming Papists” actually did not do so; it only required Catholics or suspected Catholics to swear an oath of loyalty to the government as a condition of retaining their arms. Only those who refused the oath were disarmed.¹²⁰ Maryland’s governor asked the legislature to disarm Catholics in 1756 (suggesting that Britain’s Disarming Papists Act was not applicable in America), but they declined to pass his bill.¹²¹ Certainly by the standards of 1791, “right of the people” would seem to preclude disarming of religious minorities—and of course, the First Amendment’s guarantee of freedom of worship might also limit governmental authority. Indeed, Madison’s notes on his proposal contrasted it to the English Bill of Rights which guaranteed arms only to Protestants—which strongly implies that he understood the right to not have any religious limitations.¹²²

With respect to race, the situation in 1791 America was far less liberal. Laws disarming slaves, and in some states, free blacks, were common throughout the Colonial period, and into the early Republic.¹²³ While generally declining by the end of the Colonial period, laws limiting sale of guns and ammunition to Indians were widespread.¹²⁴ Chief Justice Taney’s *Dred Scott* opinion made it clear that blacks could not be citizens of the United States because of the many rights that they would therefore enjoy—including the right “to keep and carry arms wherever they went.”¹²⁵ If not for the Fourteenth Amendment, it is conceivable that statutes disarming blacks and Indians might survive an originalist test (although it is inconceivable that Congress or the state legislatures would adopt such laws). However, the ratification of the Fourteenth Amendment, especially because it was first and foremost intended to protect the rights of the freedmen to be armed for self-defense,¹²⁶ precludes any

explains that many were disarmed for petitioning the General Court against banishing Anne Hutchinson, “and would not acknowledge their fault....”

¹¹⁹ Allen D. Candler, comp., 18 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 190-1 (Atlanta, Ga.: Chas. P. Byrd, 1911).

¹²⁰ 7 HENING STATUTES AT LARGE 35-37 (1756).

¹²¹ Browne, ARCHIVES OF MARYLAND, 52:454, 474-5.

¹²² *Original Meaning*, 82 MICH. L. REV. 237, fn. 144. The same contrast was made by Madison’s colleague St. George Tucker in his discussion, the earliest legal commentary on the Second Amendment. St. George Tucker, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA (1803; republished, Buffalo, N.Y.: Dennis & Co., 1965).

¹²³ Cramer, ARMED AMERICA, 30-34.

¹²⁴ Cramer, ARMED AMERICA, 41-49.

¹²⁵ *Scott v. Sanford*, 60 U.S. (19 How.) 393, 417, 450.

¹²⁶ Generally, see Stephen P. Halbrook, *Freedmen, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876* (Westport, Conn.: Praeger Press, 1998). Also see Cramer, *FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS* 97-127 (Westport, Conn. Praeger Press, 1994). The respected Reconstruction historian Eric Foner points out: “Some portions of the Bill of Rights were of little moment in 1866.... *But it is abundantly clear that 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, and protection against cruel and unusual punishment and unreasonable search and seizure.*” Eric Foner, *RECONSTRUCTION* 258-9 (New York: Harper & Row, 1988).

racially discriminatory gun control laws.

Moreover the Second Amendment is to be construed in tandem with the rest of the Constitution. While those who detest firearms often seem to perceive them as legally *sui generis*, the guarantees of freedom of religion, of due process, and equal protection do not contain any special “gun exception.”¹²⁷ Taking those guarantees in tandem with the Second Amendment, it would seem that no level of government could prohibit gun ownership because of a person’s race or religion.¹²⁸

Conclusion

The Second Amendment reflects the Founding Fathers’ accurate perception that banning guns to the general populace is counterproductive. Those who will flout such basic admonitions as “you shall not murder” also flout gun laws. Such laws disarm only the law abiding whose gun ownership is not a problem. This is doubly counterproductive: First, it deprives victims of the only means of self-defense with which the weak can defeat predation by the strong.¹²⁹ Second, it diverts scarce law enforcement resources away from the very difficult task of trying to control the lawless to the useless task of trying to deprive victims the means of self-defense.

We know that the Founders also saw gun bans as counterproductive and oxymoronic. That was the view of the liberal Italian philosopher Cesare Beccaria (“the father of modern criminology”), whose words Jefferson laboriously copied into his handbook of great quotations:

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty--so dear to men, so dear to the enlightened legislator--and subject innocent persons to all the vexations that the quality alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and

¹²⁷ See *Florida v. J.L.*, 529 U.S. 266 (2000) in which a unanimous court rejected Florida's suggestion to adopt a “gun exception” to the Fourth Amendment.

¹²⁸ The Equal Protection Clause is nominally addressed only to the states. But *Bolling v. Sharpe*, 347 U.S. 497 (1954) held that its principles are embraced by the Fifth Amendment’s Due Process Clause which is addressed to the federal government. Due process includes “the rights to acquire, enjoy, own and dispose of property.” *Lynch v. Household Finance Corp.*, 405 U.S. 540, 544 (1972).

¹²⁹ “Only a gun can allow a 110 pound woman to defend herself against a 200 pound man.” Linda Gorman & David B. Kopel, *Self-defense: The Equalizer*, 15 FORUM FOR APPLIED RESEARCH AND PUBLIC POLICY 92 (2000). Compare Don B. Kates, *The Limits of Gun Control: A Criminological Perspective* in Timothy Lytton, ed., *SUING THE FIREARMS INDUSTRY* (2005) at 70: “A gun is the only mechanism that gives a weaker victim parity with an attacker (even if the attacker also has a gun). The next best alternative, a chemical spray, is ineffective against precisely those who are most likely to engage in violent attacks: people who are under the influence of drugs or alcohol or who are extremely angry.”

As to the ineffectiveness of chemical sprays see, e.g. James B. Jacobs, *The Regulation of Personal Chemical Weapons: Some Anomalies in American Weapons Law*, 15 U. DAYTON L. REV. 141 (1989).

not by thoughtful consideration of the inconveniences and advantages of a universal decree.¹³⁰

The same view was held by Jefferson's contemporaries such as Thomas Paine who observed: "The peaceable part of mankind will be continually overrun by the vile and abandoned while they neglect the means of self-defense.... since some will not [disarm], others dare not lay them aside... Horrid mischief would ensue were one half the world deprived of the use of them; ... the weak will become a prey to the strong."¹³¹

There is a clear public policy case for prohibiting criminals or mentally incompetent from possessing arms. Difficult though it may be to enforce laws against their possession of arms, such laws may occasionally prove useful.¹³² The consensus in favor of such laws is so strong that it seems unlikely that the courts will strike them down. The Amendment does not foreclose bans on possession of bombs, biological weapons and the other ultra-destructive weapons of modern warfare that are not suitable for self-defense. It is imperative, however, that those drafting gun control laws in the post-Heller era remember that the focus of those laws must be those who because of immaturity, criminal behavior, or mental incompetence, are likely to be a threat to public safety. The vast majority of adults in America are not.

¹³⁰ Cesare Beccaria, trans. by Henry Palolucci, *ON CRIMES AND PUNISHMENTS* 87-88 (New York: Bobbs-Merrill Co., 1963). Beccaria was also a major influence on other late eighteenth century American thinkers, such as John Adams and Benjamin Franklin. See Christopher Hitchens, *THOMAS JEFFERSON: AUTHOR OF AMERICA* 63-64 (2005); Marcello Maestro, *CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM* 3, 134-8, 141 (Philadelphia: Temple University Press, 1973); Frederick Kidder, *HISTORY OF THE BOSTON MASSACRE...* (Albany, N.Y.: Joel Munsell, 1870) 232 (John Adams quoting Beccaria while defending the British soldiers); John Adams, Charles Francis Adams, ed. 6 *THE WORKS OF JOHN ADAMS* .160 (on how the ideas of Beccaria, among others, "are now becoming universal"). G.O.W. Mueller, *Whose Prophet Is Cesare Beccaria? An Essay on the Origins of Criminological Theory*, in William S. Laufer and Fred Adler, ed., 2 *ADVANCES IN CRIMINOLOGICAL THEORY* 1-2 (discussing Beccaria's influence on Franklin, Jefferson, and Adams).

¹³¹ 1 *WRITINGS OF THOMAS PAINE* 56 (Conway ed. 1894).

¹³² See the discussion by career BATF agent-turned-criminologist William J. Vizzard, *SHOTS IN THE DARK: THE POLICY, POLITICS, AND SYMBOLISM OF GUN CONTROL* (N.Y.: Rowman & Littlefield, 2000) at 166-69. He provides an example from his years as a BATF supervising agent: "Two long-time felons with prior murder and other felony convictions were stopped by California Highway Patrol officers for speeding. The officers observed blood on the subjects' clothing.... A search of the trunk revealed clothing soaked with human blood, an assault rifle, and a pistol. Imbedded in the frame of the pistol were bits of human flesh. Although subsequent investigation by homicide investigators and ATF agents working under my supervision, never located a victim, both subjects received sentences of approximately 20 years in federal prison for firearm possession [by a felon which is a federal crime]." *Supra*, at 166.

Appendix A: Scholarly Publications Endorsing The Standard Model (1980-2001)

J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DETROIT-MERCY LAW REVIEW 39 (2001)

Nelson Lund, *Outsider Voices on Guns and the Constitution*, 17 CONST. COMM. 701 (2000)

Calvin Massey, *Guns, Extremists and the Constitution*, 57 WA & LEE L. REV. 1095 (2000)

Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms*, 7 W. & M. BILL OF RTS. J. 347 (1999)

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Appendix B: D.C. And Baltimore Murder Rates (1960-2004)

year	DC	Baltimore
1960	10.59	11.40
1961	11.31	9.51
1962	11.55	11.25
1963	11.90	15.29
1964	16.54	15.55
1965	18.57	14.19
1966	17.83	19.02
1967	22.50	21.83
1968	25.06	26.18
1969	37.66	25.93
1970	29.25	25.50
1971	36.64	36.13
1972	32.94	37.41
1973	36.53	32.18
1974	38.43	34.15
1975	33.08	30.61
1976	27.00	23.98
1977	28.16	20.68
1978	28.21	25.19
1979	27.45	30.97
1980	31.33	27.52
1981	35.01	28.61
1982	30.59	28.45
1983	28.94	24.94
1984	27.63	27.25
1985	23.17	27.63
1986	30.39	30.61
1987	35.33	29.54
1988	58.53	30.63
1989	69.53	34.34
1990	77.98	41.44
1991	80.22	40.64
1992	74.13	44.31
1993	76.26	48.16
1994	67.71	43.44
1995	62.01	45.65
1996	69.36	45.81
1997	53.02	43.33
1998	46.00	47.13
1999	42.26	46.88
2000	41.85	40.28

2001	40.57	39.69
2002	46.76	37.70
2003	44.65	41.86
2004	35.77	43.53
