

THE HISTORICITY OF THE SECOND AMENDMENT RIGHT TO ARMS

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The so-called Standard Model view of the Second Amendment reads it as a guarantee of every law abiding, responsible adults' right to possess guns for self protection.¹ Until the 2000s, the Supreme Court had not addressed the issue but in the 2008 *Heller* case it definitively accepted the Standard Model view of the Second Amendment.² Accordingly, *Heller* struck down the District of Columbia's handgun and other gun bans. Two years later in *McDonald*, the Court reaffirmed the Standard Model view and struck down Chicago's handgun ban.³

Though denying its validity, even vigorous opponents have accepted the phrase Standard Model as describing the view that the Second Amendment guarantees the right to arms.⁴ While the vast majority of scholars concur in the Standard Model,⁵ gun ban advocates assail it as historically inaccurate.[fn] In this article we examine the historical evidence.

HISTORY: ATTITUDES OF THE FOUNDING FATHERS

Even before English colonies existed in the New World, Sir Walter Raleigh voiced what seems to have been the universal attitude of pre-20th Century European and American liberals toward the popular possession of arms: The cunning tyrant, Raleigh wrote, schemes "To unarm

¹ The phrase "standard model" originates in a literature review by Glenn Reynolds, "A Critical Guide to the Second Amendment", 62 TENN. L. REV. 461 (1995). As noted infra, the phrase has come to be used even by opponents of that view.

² *District of Columbia v. Heller*, 554 US 570, 128 S. Ct. 2783 (2008).

³ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 177 L. Ed2d 894 (2010).

⁴ 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).

⁵ See list of scholars and their writings in Appendix A. By actual count the number of post-1980 law review articles addressing the Amendment exceeds 250 (not counting student pieces). By actual count, about 90% accept the Standard Model though there are substantial disagreements over the details. See, e.g., Eugene Volock, "Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and Research Agenda." 56 U.C.L.A. Law Review 1443 (2009).

his people, and store up their weapons, under pretense of keeping them safe...."⁶

This was a recurrent theme of both the Founders and the liberal political philosophers they revered.⁷ As Professor Joyce Lee Malcolm, the modern historian of the Second Amendment,⁸ writes:

[T]he theme of arms possession as both the hallmark and the ultimate guarantee of personal liberty appears equally in the writings of Cicero, Locke, Trenchard, Rousseau [etc.] ...

Renaissance theorists as dissimilar as Nicholas Macchiavelli and Sir Thomas More, Thomas Hobbes and James Harrington [shared] a consensus that only men willing and able to defend themselves could possibly preserve their liberties.⁹

From Aristotle the classically educated Founders took his dictum that basic to tyrants is "mistrust of the people; hence they deprive them of arms."¹⁰ And from Aristotle the Founders also learned that confiscation of the Athenians' personal arms had been crucial to the tyrannies of the Pisistratids and the Thirty.¹¹

From Plutarch the Founders learned of Pompey's contemptuous response to victims of his troops' illegal exactions: "Stop quoting laws to us. We carry swords."¹²

Pompey's response epitomizes an aspect of the Founders' belief in the right to arms that is evident even to modern readers: the sheer physical power despots derive from being armed while depriving the populace of arms, thereby leaving them both helpless to resist oppression and totally dependent on the despots to protect their lives, families and homes.

⁶ 8 THE WORKS OF SIR WALTER RALEIGH, KT., NOW FIRST COLLECTED 22 (Oxford, 1829).

⁷ See Robert Shalhope, "The Ideological Origins of the Second Amendment", 69 JOURNAL OF AMERICAN HISTORY 599, 603 ("Civic virtue came to be defined as the freeholder bearing arms in defense of his property and his state.") and Stephen Halbrook, "The Second Amendment as a Phenomenon of Classical Political Philosophy" in D. Kates (ed.), FIREARMS AND VIOLENCE (1984).

⁸ Joyce Lee Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 139 (Harvard U. Press: 1994).

⁹ Malcolm, Disarmed: The Loss of the Right to Bear Arms in Restoration England (1980) at p. 1.

¹⁰ Aristotle, POLITICS 218 (J. Sinclair trans. 1962).

¹¹ Aristotle, THE ATHENIAN CONSTITUTION 47, 105 (H. Rackham trans. 1935).

¹² PLUTARCH'S LIVES, Pompey, Bk. 10, ch. 2; Penguin edition, p, 146.

The Founders felt that for the citizenry to be armed was essential to the “diffusion of power” necessary to preserve liberty; for disarming the citizenry would give the state a “monopoly of power [which is] the most dangerous of all monopolies.”¹³ As one prominent proponent of the Constitution and the Bill of Rights declaimed: "Their swords, and every other terrible implement of the soldier, are the birthright of an American... [In America] the unlimited power of the sword is not in the hands of either the federal or state governments, but where I trust in God it will ever remain, in the hands of the people."¹⁴

Another aspect the Founders saw in being armed was a moral dimension that is foreign to modern thought, and especially alien to the thinking of those who decry the Second Amendment. The Founders’ ideal of the virtuous citizen harked back to the citizens of the ancient Roman Republic and Greek city-states who had been always armed and always ready to rush to rally to defend the city’s walls when the tocsin warned of approaching danger. The moral citizen was conscious of, and dedicated to fulfilling, the duty to defend himself, his home, family and polity, rather than being helplessly dependent on the uncaring state for all protection.¹⁵ It was in this sense that the Founders held that virtuous citizens had both right and duty to possess arms for the purpose of defending themselves, their homes and families and their community and nation.¹⁶ The liberal philosophical tradition to which our Founders were heir defined “[c]ivic virtue ... as the freeholder bearing arms in defense of his property and his state.”¹⁷

It was based on this tradition of civic virtue through possessing arms that Thomas

¹³ "THAT EVERY MAN BE ARMED" supra at 38 quoting late 18th Century newspaper articles.

¹⁴ Tench Coxe quoted in "THAT EVERY MAN BE ARMED", supra at 69; see generally pp. 67-69 for similar assertions by Federalists James Madison and Noah Webster, among others.

¹⁵ 18th and 19th Century American and English liberals agreed it was the duty of a free state to promote its citizens’ dedication to defending themselves and their families as a matter of instilling civic virtue independent of promoting national defense. Cf. Adam Smith, THE WEALTH OF NATIONS: "But a cowardly man, a man incapable either of defending or of revenging himself, evidently wants [i.e. lacks] one of the most essential parts of the character of a man. He is as much mutilated and deformed in his mind, as another is in his body, who is either deprived of some of its most essential members, or has lost the use of them. He is evidently the more wretched and miserable of the two; because happiness and misery, which reside altogether in the mind, must necessarily depend more upon the healthful or unhealthful, the mutilated or entire state of the mind, than upon the body. Even though the martial spirit of the people were of no use toward the defence [sic] of the society, yet to prevent that sort of mental mutilation, deformity and wretchedness, which cowardice necessarily involves in it, from spreading themselves through the great body of the people, would still deserve the most serious attention of government; in the same manner as it would deserve its most serious attention to prevent leprosy or any other loathsome and offensive disease, though neither mortal nor dangerous, from spreading itself among them; though, perhaps, no other public good might result from such attention besides the prevention of so great an evil."

¹⁶ See, e.g., Jefferson’s June 5, 1824 letter to Justice John Cartwright: “The constitutions of most of our States assert that all power is inherent in the people; that . . . it is their *right and duty* to be at all times armed;. . .” (Italics added.), 16 WRITINGS OF THOMAS JEFFERSON 45 (A.A. Lipscomb ed. 1903).

¹⁷ Robert Shalhope, "The Ideological Origins of the Second Amendment", 69 J. AM HIS. 599, 603 (1981).

Jefferson (who believed that every boy of ten should be given a gun as he had been) advised his 15 year old nephew:

*A strong body makes the mind strong. As to the species of exercises, I advise the gun. While this gives a moderate exercise to the body, it gives boldness, enterprise and independence to the mind. Games played with the ball, and others of that nature, are too violent for the body and stamp no character on the mind. Let your gun therefore be the companion of your walks.*¹⁸

By the late 18th Century these truisms of European liberalism were platitudes of our Founders' political thought. Compare Raleigh's words to those of Mr. Justice Story who had been a young lawyer when the Amendment was enacted:

One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people and making it an offense to keep arms.¹⁹

From the political philosophers they revered, the American Founders took the belief "that the perpetuation of a republican spirit and character in [a free] society depended upon the freeman's possession of arms as well as his ability and willingness to defend both himself and his society."²⁰

Thus James Madison (later to author the Second Amendment) assured Americans that the new federal government could not become a tyranny "because of the advantage of being armed, which the Americans possess over the people of almost every other nation."²¹ Toward the end of his life Madison remarked that tyranny "could not be safe with a numerical and physical force against it, without a standing army, an enslaved press and a disarmed populace."²²

Madison was, of course, the Federalist architect and champion of the Constitution. But

¹⁸ **The Jefferson Cyclopedia** 318 (Foley, ed., reissued 1967), emphasis added.

¹⁹ J. Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1840 republished, 1893).

²⁰ Robert Shalhope, The Armed Citizen in the Early Republic, 49 **Law & Contemp. Probs.** 125, 138. See Original Meaning supra at 231-34. Compare J.G.A. Pocock, THE POLITICAL WORKS OF JAMES HARRINGTON 54, 145 (Cambridge U. Press, 1977): "it was Harrington who first stated in English terms, the theses that only the armed freeholder was capable of independence and virtue"; the republican political philosophers espoused "the rapturous oratory of ... King People [based] not merely on rotatory balloting but on the union of 'arms and counsel', bullets and ballots, in a setting in which the citizens appeared in arms to manifest their citizenship, casting their votes even as they advanced and retired in the evolutions of military exercise."

²¹ James Madison, *The Federalist*, No. 46. The Federalist Papers' import for constitutional interpretation was recognized as early as *Cohens v. State of Virginia* (1821) 19 U.S. 264, 418-19 [5 L.Ed. 257].

²² Quoted in R. Ketcham, JAMES MADISON: A BIOGRAPHY 64, 640 (1971).

his approbation toward an armed populace was a late 18th Century platitude in which the Anti-Federalists fully concurred. A year before Madison's Second Amendment became law, Sam Adams had proposed an Anti-Federalist version: that "the said constitution [shall] be never construed ... to prevent the people of the United States who are peaceable citizens, from keeping their own arms."²³

Federalists and Anti-Federalists alike fervently endorsed the right to arms.²⁴ Statements lauding arms and the right thereto can be found in the writings of every Founder who addressed the subject.²⁵ These include not only Madison, Adams, Patrick Henry and Richard Henry Lee all of whom we have just referenced, but also Madison's compatriot Tench Coxe²⁶ as well as such prominent leaders of both factions as Noah Webster²⁷, Thomas Paine,²⁸ Roger Sherman,²⁹

²³ Quoted in Original Meaning supra at 224. Adams had endorsed the right to arms as early as 1772. See his "Rights of the Colonists as Men" which enumerated those rights as Life, Liberty and Property "together with the Right to support and defend them in the best manner they can." Quoted in Halbrook, THE FOUNDERS' SECOND AMENDMENT at????????

²⁴ E.g. Patrick Henry: "The great object is that every man be armed." 3 J. Elliott, DEBATES IN THE SEVERAL STATE CONVENTIONS 45 (2d Ed. 1836) and Richard Henry Lee: "to preserve liberty, it is essential that the whole body of the people always possess arms...." Letters from the Federal Farmer to the Republican 124 (W. Bennett ed. 1978).

²⁵ Stephen Halbrook, THE FOUNDERS' SECOND AMENDMENT; Original Meaning, supra, 82 MICHIGAN LAW REVIEW at 221-2 and 228-9.

²⁶ See note ? supra.

²⁷ "The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States." Webster quoted in Halbrook, FOUNDERS, p. 177.

²⁸ "arms like laws discourage and keep the invader and plunderer in awe and preserve order in the world as well as property." 1 WRITINGS OF THOMAS PAINE 56 (Conway ed. 1894).

²⁹ Compare Roger Sherman's avowal that he "conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack on his liberty and property, by whomsoever made." Halbrook, FOUNDERS supra p. 262.

Timothy Dwight³⁰, James Wilson,³¹ George Mason³² and Joel Barlow.³³ A modern historian has recently devoted an entire 300+ page volume to quotations from late 18th Century American endorsing the right to arms.³⁴

One might assume that their pacifist perspective would have led Quakers to oppose the right to arms. But the one Quaker who spoke out on the subject, the influential 18th Century lawyer William Rawle, who wrote the first American constitutional commentary, unqualifiedly endorsed the right to arms therein.³⁵

James Wilson's views are particularly interesting. He apparently felt the right to arms indistinguishable from the right of self-defense which was a sacred shibboleth of late 18th Century liberalism.³⁶ In a 1790 lecture Wilson, a principal author of Pennsylvania's Constitution, explained the right to use deadly force to repel murderous attacks:

[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.*"³⁷

In a July, 1796 letter to George Washington Thomas Jefferson expressed what seems to

³⁰ See Timothy Dwight, TRAVELS IN NEW ENGLAND xiv (London, 1823) and discussion infra.

³¹ James Wilson, *The Works of the Honourable James Wilson, L.L.D.* (Bird Wilson, ed., 1804) 3:84. See discussion infra.

³² 3 J. Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS 380 (2d ed. 1836).

³³ Explaining libertarian American ideology to European autocrats, Barlow wrote that "among the reasons tyrants disarm the citizenry is to degrade them, knowing that being unarmed "palsies the hand and brutalizes the mind: an habitual disuse of physical force totally destroys the moral; and men lose at once the power of protecting themselves, and of discerning the cause of their oppression." J. Barlow, ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE: RESULTING FROM THE NECESSITY AND PROPRIETY OF A GENERAL REVOLUTION IN THE PRINCIPLE OF GOVERNMENT, Parts I and II at 45 (London, 1792, 1795 & reprint 1956).

³⁴ Stephen Halbrook, THE FOUNDERS' SECOND AMENDMENT supra.

³⁵ W. Rawle, A VIEW OF THE CONSTITUTION 125-26 (2d ed., 1829).

³⁶ Compare John Adams calling "Self Defense the primary canon of the law of nature..." James Grant and James Douglas Grant, *John Adams: Party of One* (2005), p. 95.] to Montesquieu: "Who does not see that self-protection is a duty superior to every precept?" and James Monroe's description of self-defense as a sacred "human right." JAMES MONROE PAPERS, N.Y. Public Library (miscellaneous papers in his own handwriting).

³⁷ Wilson, supra emphasis added.

have been the universal sentiment of the Founders: “One loves to possess arms....”³⁸

Jefferson’s latest biographer notes that he loved guns, living and routinely traveling with them.³⁹ Jefferson named himself a “gun-man” writing that “every American who wishes to protect his farm from the ravages of quadrupeds and his country from those of biped invaders” should be a “gun-man,” adding “I am a great friend to the manly and healthy exercises of the gun.”⁴⁰

In short, the Founders believed, as Jefferson wrote that possessing guns “gives boldness, enterprise and independence to the mind”⁴¹ while, as George Mason put it, “to disarm the people that ... was the best and most effective way to enslave them.”⁴²

WHO ARE “THE PEOPLE” TO WHOM ARE GUARANTEED THE RIGHT TO ARMS?

To this question the inevitable answer law abiding, responsible adults. The Second Amendment guarantees “the right of *the people* to keep and bear arms.” Emphasis added. Convicted felons were not among “the people” as conceptualized by our Founding Fathers; under the law they knew, felons were “civilly dead,” having no right to own guns or any other property.⁴³

In the classical republican thought to which the Founders were heir the right to arms was inextricably and multifariously linked to the virtuous citizenry.⁴⁴ As stated in *State v. Hirsch*, 177 Or.App. 441, 34 P.3d 1209, 1212 (Or.App.2001):

³⁸ 9 WRITINGS OF THOMAS JEFFERSON 341 (A.A. Lipscomb ed., 1903).

³⁹ Jon Meacham, THOMAS JEFFERSON: THE ART OF POWER (2012) (**large print ed.**) 427.

⁴⁰ Meacham, *supra*, 427.

⁴¹ Jefferson in a letter of advice to a teenage nephew. *The Jefferson Cyclopedia* 318 (Foley ed., reissued 1967).

⁴² 3 J. Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS 380 (2d ed. 1836).

⁴³ A felon "could not own any property himself, nor could [his heirs] ... claim through him." 3 William S. Holdsworth, *A History of English Law* 69 (3d ed.1927) (footnote omitted). At common law felons were essentially 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...." Vernon M. Winters, "Criminal RICO Forfeitures and the Eight Amendment: 'Rough' Justice Is Not Enough," 14 *Hastings Const. L.Q.* 451, 457 (1987).

⁴⁴ 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 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.

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.***

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.

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).

In sum, neither lunatics nor minors nor persons convicted of serious criminal offenses have Second Amendment rights.

THE CRIMINOLOGY OF THE FOUNDING FATHERS

Many moderns think that the more guns there are in society the more violent crime there will be. This error is a simple matter of mistaking effect for cause: The more violence there is in a society, the more people will arm themselves for their own protection. But those thus armed do not commit violent crimes whether they have guns or not. As criminological studies uniformly show, serious violent crimes (including gun crimes) are never, or almost never, the work of ordinary people. (For typical study findings see Appendix B.) Summarizing such studies, Prof. Elliott notes that “virtually all” perpetrators of serious criminal violence are prior criminals, generally with long criminal records.⁴⁵

That was the Founding Fathers’ experience in a society that had literally universal gun ownership.⁴⁶ Under colonial law every man of military age was required to have a gun; moreover even households composed only of women and/or of males who were exempt from militia service because they were underage or overage were required to be armed.⁴⁷

The Founders’ experience with this universally armed society was that its rates of murder “were

⁴⁵ Delbert S. Elliott, "Life Threatening Violence is *Primarily* a Crime Problem: A Focus on Prevention," 69 COLO. L. REV. 1081, 1085 (1998).

⁴⁶ Because the colonies could not afford to support armies or police, colonial law required that every man of military age be armed and that every household have guns even if its residents were all either women and/or males over or under military age or otherwise exempt from military service. Men were legally required to carry arms whenever they went out. Original Meaning, 82 MICH. L. REV. 215-16 (1983).

⁴⁷ Original Meaning, *supra* 82 MICH. L. REV. 203, 215-16.

probably the lowest in the world" (to quote the modern historian of American criminology⁴⁸). As another historian puts it, in the Founders' time "murders were rare and few were with guns despite their wide availability."⁴⁹

With this background one Founding Father characterized popular gun possession as "harmless."⁵⁰ Another claimed that:

their conscious dignity, as citizens enjoying equal rights, [precludes armed citizens having any desire] to invade the rights of others. The danger (where there is any) from armed citizens, is only to the *government*, not to the *society*; as long as they have nothing to revenge in the government (which they cannot have while it is in their own hands) there are many advantages in their being accustomed to the use of arms and no possible disadvantage.⁵¹

The Founders' criminological beliefs may be assessed from Jefferson's having translated from the Italian and written into his personal journal of great quotations⁵² the long-winded flowery denunciation of arms bans penned by Cesare Beccaria, the Italian writer sometimes called "the father of criminology."⁵³

⁴⁸ R. Roth, AMERICAN HOMICIDE 14 (Harvard, 2009) (referring to the period after the Revolution). Note that Prof. Roth is discussing the North, the middle states and the mountain south where slave holding was low. Slave areas had distinctively higher murder rates.

⁴⁹ Roger Lane, MURDER IN AMERICA: A History (Ohio U. Press, 1997) pp. 48 and 59-60.

⁵⁰ Timothy Dwight, TRAVELS IN NEW ENGLAND xiv (London, 1823).

⁵¹ J. Barlow, ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE: RESULTING FROM THE NECESSITY AND PROPRIETY OF A GENERAL REVOLUTION IN THE PRINCIPLE OF GOVERNMENT, Parts I and II at 45 (London, 1792, 1795 & reprint 1956).

⁵² Halbrook, FOUNDERS, p. 132.

⁵³ "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 not by thoughtful consideration of the inconveniences and advantages of a universal decree." Quoted in Original Meaning, supra, 82 MICHIGAN LAW REVIEW at 234.

THE CONTROVERSY THAT ENGENDERED THE BILL OF RIGHTS

Before the original Constitution could be adopted it had to be approved by votes in conventions held in at least nine of the states.⁵⁴ A major obstacle involved popular concern over the original Constitution's lack of a Bill of Rights. This obstacle only gave way when Madison promised the Virginia Convention that if the Constitution was approved a Bill of Rights would immediately be added.

In response various states recommended specific rights to be added. The record here is dispositive that the Second Amendment guarantees an individual right. The right most often recommended by the states was a guarantee to Americans of "their own arms", "their *private* arms" – quoting the words of the respective Federalist and Anti-Federalist recommendations.⁵⁵

THE VERDICT OF MODERN SCHOLARSHIP

In sum, the Second Amendment responded to a widely felt need to guarantee Americans' right to arms. But the evidence to this which we have adduced is only part of the equation. Equally important is that **intense research has revealed not a single contrary view among late 18th Century American statesmen.**

Endorsement of the right to arms seems to have been universal.

Of course the desirability of the Second Amendment is as controversial today as it was quotidian in the time of the Founders. But the facts overwhelm the aversion many modern scholars feel toward the right to arms. The following list of those accepting the Standard Model is indicative of opinion among academics who have published in the area (but does not pretend to be a comprehensive listing of their writings):

AKHIL AMAR, Yale Law School: "The Bill of Rights as a Constitution," 100 Yale Law J. 1131, 1164ff. (1991).

RANDY BARNETT, Georgetown University School of Law: "Was the Right to Keep and Bear Arms Conditioned on Service in An Organized Militia," 83 TEXAS L. REV. 238 (2004).

ROBERT COTTROL, George Washington University School of Law: "'The Fifth Auxiliary Right'", 104 YALE L. J. 995 (1994).

CLAYTON CRAMER, College of Western Idaho, "[A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts](#)", 68 Temple Law Review 1178-1241 (1995).

⁵⁴ 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1512.

⁵⁵ Original Meaning supra at 222. Fewer states recommended guaranteeing the rights to free speech, to assemble, to due process etc. Id.

MICHAEL CURTIS, Wake Forest Law School: NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 104 (Duke, 1986).

BRANNON DENNING, Cumberland Law School: "Telling *Miller's* Tale: A Reply to David Yassky, 65 LAW & CONTEMP. PROBS. 113 (2002).

RAYMOND DIAMOND, Tulane University School of Law: "The Second Amendment: Toward an Afro-Americanist Consideration," 80 Georgetown L. J. 310-361 (1991).

DONALD DRIPPS, University of San Diego Law School: "Terror and Tolerance: Criminal Justice for the New Age of Anxiety," 1 Ohio St. J. Crim. L. 9 (2003).

GEORGE FLETCHER, Columbia University School of Law: THE TRIAL OF BERNHARD GOETZ 156 (N.Y. Free Press, 1988).

F. SMITH FUSSNER, Reed College: Essay Review, 3 Const. Comm. 582 (1986).

STEPHEN HALBROOK, Howard University: "The Jurisprudence of the Second and Fourteenth Amendments," 4 George Mason University Law Review 1-69 (1981).

NICHOLAS JOHNSON, Fordham University School of Law: "Firearms and the Black Community" forthcoming in the Connecticut Law Review.

DAVID KOPEL, N.Y.U. School of Law: "The Second Amendment in the Nineteenth Century", 1998 BRIG. YOUNG L. REV. 1359.

MICHEL KRAUS, George Mason University School of Law: *Fire and Smoke: Government Lawsuits and the Rule of Law*, Independent Institute 2000.

LEONARD LEVY, Claremont University: ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 341 (Macmillan, 1988).

CRAIG S. LERNER, George Mason University School of Law: *Heller and Nonlethal Weapons*, 60 Hastings Law Journal 1387 (2009).

SANFORD LEVINSON, University of Texas School of Law: "The Embarrassing Second Amendment", 99 YALE L. J. 637 (1989).

NELSON LUND, George Mason University School of Law: *The Past and Future of the Individual's Right to Arms*, 31 Georgia Law Review 1 (1996).

JOYCE LEE MALCOLM, George Mason University Law School: "TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (Harvard U. Press, 1994).
CALVIN MASSEY, Hastings School of Law: "Guns, Extremists and the Constitution,"

57 WASHINGTON & LEE LAW REVIEW 1095 (2000).

THOMAS McAFFEE, Southern Illinois School of Law, "Bringing Forward The Right to Keep and Bear Arms: Do Text, History or Precedent Stand in the Way?", 75 U. N.C. L. Rev. # 3 (1997).

GEORGE A. MOCSARY, University of Connecticut Law School: "Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right," 76 Fordham L. Rev. 2113 (2008).

JOSEPH E. OLSON, Hamline University Law School, *What Did "Bear Arms" Mean in the Second Amendment?*, 6 GEORGETOWN J. L. & PUB. POL'Y 511 (2008).

MICHAEL P. O'SHEA, Oklahoma City University School of Law: "Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense," 61 American University Law Review 585-676 (2012).

BRIAN ANSE PATRICK, University of Toledo, *Rise of the Anti-Media: In-Forming America's Concealed Weapon Carry Movement*, (Lanham MD. Lexington Books, 2010).

DANIEL D. POLSBY, Dean, Georg Mason University Law School, "Second Reading: Treating the Second Amendment as Normal Constitutional Law," REASON 3/1/1996.

L A. SCOT POWE, University of Texas School of Law: "Guns, Words and Interpretation," 38 WM. & M. L. REV. 1311-1403 (1997).

JEREMY RABKIN, Cornell University: "Constitutional Firepower: New Light on the Meaning of the Second Amendment," 86 J. CRIM. L. & CRIMINOL. 231-246 (1995).

GLENN H. REYNOLDS, University of Tennessee School of Law: "The Second Amendment and States' Rights: A Thought Experiment", 36 WILLIAM AND MARY LAW REVIEW 1737 (1995).

ROBERT SHALHOPE, University of Oklahoma: "The Ideological Origins of the Second Amendment," 69 J. AM HIS. 599 (1981).

LAWRENCE TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 901-902 (2000).

WILLIAM VAN ALSTYNE, Duke University School of Law: "The Second Amendment and the Personal Right to Arms", 43 DUKE L. J. 1236 (1994).

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ADAM WINKLER, U.C.L.A. Law School: Gunfight: The Battle over the Right to Bear Arms in America. (2011).

KEVIN WORTHEN, Brigham Young University Law School: "The Right to Keep and Bear Arms in Light of Thornton: The People and Essential Attributes of Sovereignty," 1998 BRIG. YOUNG L. REV. 137.

To reiterate, every late 18th Century American who addressed the subject endorsed the right to arms and popular possession of arms. Out of sheer desperation modern opponents of the right to arms have had to just eschew discussing late 18th Century American opinion and the endorsement of arms by prominent spokesmen including Thomas Jefferson, James Madison, James Monroe, Thomas Paine, James Wilson, Patrick Henry, Richard Henry Lee, Noah Webster, Tench Coxe, Roger Sherman, Timothy Dwight, George Mason and Joel Barlow.⁵⁶

Instead opponents of that right have had to resort to the previously unheard of step of paying the few professors who will do so to write denying the right to arms in minor law reviews which are paid to publish these mendacious articles. In contrast, neither the NRA nor other pro-gun groups have ever had to pay scholars to research and write -- or journals to publish -- the hundreds of scholarly articles concluding that the Second Amendment guarantees ordinary law abiding responsible adults a right to own guns.⁵⁷

It bears emphasis that many of the scholars we have cited dislike the NRA and initially recoiled at embracing the right to arms. Consider the words and example of Harvard law professor Alan Dershowitz, a former ACLU national board member, who describes himself as hating guns and wishing to see the Second Amendment repealed. He nevertheless deprecates

foolish liberals who are trying to read the Second Amendment out of the Constitution by claiming it's not an individual right or that it's too much of a safety hazard[; they] don't see the danger in the big picture. They're courting disaster by encouraging others to use the same means to eliminate portions of the

⁵⁶ See quotations and citations given throughout this article.

⁵⁷ The post-1980 literature concluding that the Second Amendment guarantees responsible law abiding adults the right to arms is so voluminous that a footnote listing it would take up the entirety of several law review pages. So we have had to relegate the list to Appendix A.

Constitution they don't like."⁵⁸

In sum: 18th Century statements hailing the right to arms are so numerous that they literally fill a whole volume. In contrast, frantic research has failed to unearth even a single 18th Century American utterance disapproving of the right to arms or of its being constitutionally guaranteed. Nor did any late 18th Century American ever perceive the Amendment as a state's right or degrade it as a meaningless "collective right." Rather, as Sam Adams urged, to the Founders there was no validity to laws that "... prevent the people of the United States who are peaceable citizens, from keeping their own arms."

In noting this literally overwhelming late 18th Century American endorsement of the right to arms we are not suggesting that that provides a definitive guidebook for all controversies as to the validity of current gun laws. While Jefferson himself constantly carried a "breast pistol," it is certainly arguable that states yet have authority to prohibit the **concealed** carrying of arms. A fortiori, it is arguable that states have the power to require that if guns are carried they must be carried concealed rather than openly.

APPENDIX A:

APPENDIX B: WHO COMMITS GUN CRIMES?

Criminological studies of murder and murderers began in the late 19th Century. From then to now they invariably reveal that perpetrators in virtually every case were not ordinary gun owners but long time outlaws, often-times people who are forbidden to have guns because of their long criminal records. Summarizing studies up to the date of his 1997 article, Prof. Elliott writes that "virtually all individuals who become involved in life-threatening violent crime" have prior criminal records, generally long ones.⁵⁹ For a host of studies to the same effect, see the margin.⁶⁰

⁵⁸ Quoted in Dan Gifford, "The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason," 62 TENN. L. REV. 759, 789 (1995).

⁵⁹ Delbert S. Elliott, "Life Threatening Violence is *Primarily* a Crime Problem: A Focus on Prevention," 69 COLO. L. REV. 1081-1098 at 1089 (1998).

⁶⁰ Roger Lane, MURDER IN AMERICA: A HISTORY (Ohio U. Press, 1997) p. 259 (data on Philadelphia homicides from the 1950s through the early 1960s showed, "Victims as well as offenders, finally, tended to be people with prior police records, usually for violent crimes such as assault,..."; David M. Kennedy, "Pulling Levers, Chronic Offenders, High Crime Settings, and A Theory of Prevention," 31 VALPARAISO L. REV. (1997) ("...domestic violence offenders, at least those who come to the attention of the criminal justice system, tend to have robust [prior] offending histories.") (collecting studies); John DiIulio, "The Question of Black Crime", 117 THE PUBLIC INTEREST 3, 16, 17 (1994): ("About 11 percent of murder arrestees [nationally] ... [were] on pretrial release (for an earlier crime) at the time of the offense."; "According to the [federal] B[ureau] of J[ustice] S[tatistics] National Pretrial Reporting Program, which is based on data from the nation's 75 most populous counties and encompasses most big cities, in 1990 14 percent of murder arrestees were on probation and 7 percent were on parole" when the murder occurred.); A. Swersey and E. Enloe, HOMICIDE IN HARLEM (N.Y., Rand, 1975) 17 ("the great majority of both perpetrators and victims of assaults and murders had previous arrests, probably over 80% or more"); R.

There are exceptions to this but they are paradigm examples of the classic exception that prove the rule. First, there are cases like Patrick Purdy who was able to legally buy the rifle with which he killed five when he shot up a Stockton, CA schoolyard. He could only so because lazy prosecutors had plea bargained each of his multiple felonies down to misdemeanors.⁶¹

Concomitantly, before he shot President Reagan and James Baker John Hinckley had been caught committing the federal felony of trying to sneak a gun onto a commercial airliner. (At that point he was stalking President Carter.) Had he been tried and convicted of this felony or of the correlative state crime he could not have legally bought another gun – even if he had not been serving a lengthy prison sentence. But, again, a lazy prosecutor plea bargained his felony down to a misdemeanor.

Reviewing studies Prof. Kennedy et al writes that based on Marvin Wolfgang's pioneering PATTERNS IN CRIMINAL HOMICIDE (1948?) "and later research reveal[] that [both] homicide victims and offenders often have extensive criminal histories and that most crime is committed by a relatively small number of serial offenders."⁶² In fact, based on actual criminal records, the Academy of Criminal Justice Sciences concludes that "the average murderer turns out to be no less hardened a criminal than the average robber or burglar."⁶³

The truth is that ordinary people do not commit gun crimes and that those who commit such crimes are criminal owners of illegal guns. It is virtually never the case that gun crimes are committed by ordinary people.

Consider some post-2000 studies (i.e., published after Elliott's and Kennedy's papers):
* "homicide is usually part of a pattern of violence, engaged in by people who are known ... as violence prone."⁶⁴

* Psychological studies summarized as finding that 80-100% of juvenile murderers are psychotic

Narloch, CRIMINAL HOMICIDE IN CALIFORNIA 53-54 (Sacramento, Cal. Bur. of Crim. Stats., 1973); FBI, UNIFORM CRIME REPORT-1971 at 38 (77.9% of homicide arrestees nationally over a year period had prior criminal records); D. Mulvihill, et al. CRIMES OF VIOLENCE: REPORT OF THE TASK FORCE ON INDIVIDUAL ACTS OF VIOLENCE (Washington, D.C., Gov't. Printing Office, 1969) at 532 (table showing that 74.7% of murder arrestees nationally over a four year period in the early 1960s had priors for violent crime or burglary).

⁶¹ Don B. Kates, *Gun Control: A Realistic Assessment*, Pacific Research Foundation (1990). available at <http://catb.org/~esr/guns/gun-control.html>.

⁶² David Kennedy, et al., "Homicide in Minneapolis: Research for Problem Solving," 2 HOMICIDE STUDIES 263, 269 (1998); see also 267.

⁶³ Gerald D. Robin, VIOLENT CRIME AND GUN CONTROL 47 (Academy of Criminal Justice Sciences: 1991).

⁶⁴ Ibid.

or have psychotic symptoms.⁶⁵

* Though only 15% of Americans have criminal records, roughly 90 percent 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.⁶⁶

* 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"⁶⁷

* "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...."⁶⁸

* "A history of domestic violence was present in 95.8%" of the intra-family homicides studied.⁶⁹

* Of Illinois murderers in 1991-2000, the great majority had prior felony records.⁷⁰

After the Supreme Court voided Washington, D.C.'s handgun ban as violating the Second Amendment, Kristopher Baumann, Chairman of the Fraternal Order of Police commented:

[In Washington D.C. crime history there is no]... record of a registered gun having been used in the commission of a crime. *The problem is not individuals who legally own guns; the problem is criminals....*⁷¹

⁶⁵ Wade C. Myers & Kerrilyn Scott, "Psychotic and Conduct Disorder Symptoms in Juvenile Murderers," 2 HOMICIDE STUDIES 160 (1998).

⁶⁶ Gary Kleck & Don B. Kates, ARMED: NEW PERSPECTIVES ON GUN CONTROL 20-21 (2001).

⁶⁷ Jo Craven McGinty, "New York Killers, and those killed, by the numbers," N.Y. TIMES, April 28, 2006.

⁶⁸ Anthony A. Braga, et al., "Understanding and Preventing Gang Violence: Problem Analysis and Response Development in Lowell, MA," 9 POLICE Q. 20-46 (2006).

⁶⁹ Paige Hall-Smith et al., "Partner Homicide in Context," 2 HOMICIDE STUDIES 400, 410 (1998).

⁷⁰ Paige Hall-Smith et al., "Partner Homicide in Context," 2 HOMICIDE STUDIES 400, 410 (1998).

⁷¹ Washington Post, Sunday, April 18, 2010 at A15, emphasis added.