

A MODERN HISTORIOGRAPHY OF THE SECOND AMENDMENT

Don B. Kates^{*}

The Second Amendment right to arms was uniformly viewed as an individual right from the time it was proposed in the late eighteenth century until legal debate over gun controls began in the twentieth century. This Essay seeks to illuminate major late twentieth century contributions to that debate.

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[O]ne loves to possess arms

—Thomas Jefferson to George Washington, 1796¹

I am thus far a Quaker . . . that I would gladly argue with all the world to lay aside the use of arms, and settle matters by negotiation, but unless the whole will, the matter ends, and I take up my musket and thank heaven he has put it in my power.

—Thomas Paine, 1775²

Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are inevitably ruined.

The great object is, that every man be armed.

—Patrick Henry, 1788³

^{*} L.I.b., Yale, 1966; criminologist and former law professor; participant in the *Heller* litigation both in the U.S. Supreme Court and in the Court of Appeals. The author wishes to acknowledge the generous assistance of Clayton Cramer, C.B. Kates, Rakhi Patel, Ann Roller, Eugene Volokh, and William Van Alstyne.

1. Letter from Thomas Jefferson to George Washington (June 17, 1796), in 9 THE WRITINGS OF THOMAS JEFFERSON 339, 341 (Albert Ellery Bergh ed., 1907).

2. Paine's quote can be found in A.J. AYER, THOMAS PAINE 8 (1988).

3. Patrick Henry, Virginia Ratifying Convention of 1788, reprinted in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 45, 386 (Jonathan Elliot ed., 2d ed. 1901) (1836) [hereinafter DEBATES].

Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe.

—Noah Webster, 1787⁴

One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms

—Joseph Story, 1840⁵

INTRODUCTION

Surprisingly in light of its enormous profusion since then,⁶ little on the Second Amendment was written before 1980. As I was one of the first of these late twentieth century writers, I shall provide an analysis of the modern etiology of what is called the “Standard Model” of the Second Amendment by its adherents and opponents alike.⁷ The Standard Model is, of course, the view accepted by the court in *District of Columbia v. Heller*.⁸

This Essay provides my personal appraisal of the scholarly literature that led to the outcome in *Heller*. After first describing the Standard Model view adopted in *Heller*, I proceed to discuss its acceptance by the legal academy, and what I view as major contributions to that acceptance. I then move to discussing anti-Standard Model theories.

In discussing these matters I begin with my own experience. As a civil rights worker in the South in the early 1960s, I always had a gun close at hand. But I had never thought seriously about the Second Amendment,

4. NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 43 (Philadelphia, Prichard & Hall 1787), *quoted in* STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 177 (1984).

5. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (New York, Harper & Bros. 1862).

6. See *infra* note 32.

7. The term “Standard Model” was coined by University of Tennessee College of Law Professor Glenn Harlan Reynolds to describe the view that the Second Amendment guarantees every responsible law-abiding adult the right to possess ordinary civilian arms. See Glenn Harlan Reynolds, *Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995). For the term’s acceptance even by vigorous opponents of the view, see, for example, Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221, 221 (1999); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibilities*, 75 B.U. L. REV. 57 (1995); John Randolph Prince, *The Naked Emperor: The Second Amendment and the Failure of Originalism*, 40 BRANDEIS L.J. 659, 687 (2002); Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62.

8. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008) (“There seems to us no doubt . . . that the Second Amendment conferred an individual right to keep and bear arms.”).

much less researched it. I took every civil liberties or constitutional law course Yale Law School then offered, but in those days none addressed the Second Amendment. My only information on the subject was word-of-mouth absorption of the then common wisdom in academia that the Second Amendment protected the states' right to a militia but not any right of individuals.

As a result, my first gun control article said nary a thing about the Second Amendment, though its discussion did focus on the need of minorities and dissenters to be able to arm themselves against night riders whom the government could not be trusted to control.⁹ Shortly after its publication I received a sheaf of materials on the Second Amendment, including a draft law review article from David Caplan,¹⁰ who was then a member of the National Rifle Association (NRA) Board.

Thus encouraged, I began my own Second Amendment research, which eventually led to the first modern publication on the subject in a leading law review.¹¹ It had a discussion of what I deemed as constitutionally permissible gun controls, many of which are bitterly opposed by the gun lobby. This prompted the NRA magazine to dismiss my article as "Orwellian Newspeak."¹²

I. LATE TWENTIETH CENTURY STANDARD MODEL ANALYSES

My first law review article was largely derivative of the NRA expert Professor Stephen Halbrook's own early work,¹³ along with that of David Caplan, Joyce Lee Malcolm,¹⁴ and Robert Shalhope.¹⁵ Though we all concluded that the Second Amendment guaranteed a meaningful individual right, our approaches often differed significantly.

The work of Steve Halbrook, a philosophy professor turned lawyer, traced the ideology of popular possession of arms back to ancient Greek and Roman thought.¹⁶ Professor Malcolm, a historian of England, focused on the

9. Don B. Kates, Jr., *Why a Civil Libertarian Opposes Gun Control*, C.L. REV., June/July 1976, at 24.

10. The draft was later published as David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976).

11. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 203 (1983).

12. Stephen Halbrook, *To Bear Arms for Self-Defense: Our Second Amendment Heritage*, AM. RIFLEMAN, Nov. 1984, at 28.

13. See Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON L. REV. 1 (1981).

14. See Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983).

15. See Robert Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1981).

16. See HALBROOK, *supra* note 4, at 7-35.

common law tradition of the armed subject in a series of articles which culminated in her book, *To Keep and Bear Arms: The Origins of an Anglo-American Right*.¹⁷ Professor Shalhope, an intellectual historian, emphasized the philosophical background harking back to Machiavelli and the English followers of the Florentine-Atlantic school's exaltation of the armed people.

My own approach to the philosophy on which the Second Amendment rests stressed the right of personal self-defense,¹⁸ which others mentioned but gave secondary attention. Except for some Quakers, late eighteenth century Americans universally believed self-defense both a right and a duty.¹⁹ Indeed, like Hobbes and Locke, they conceived self-defense to be the paradigm of an inalienable right: "the great natural law of self preservation, which, as we have seen, *cannot be repealed, or superseded, or suspended by any human institution*."²⁰

A related point is crucial for understanding why the Second Amendment exists: Late eighteenth century Americans believed the right to be armed for self-defense to be both integral to, and indistinguishable from, the right to self-defense.²¹ Insofar as modern philosophers address such issues, they generally also find that the right of self-defense necessarily implies a right to have a gun.²²

While the late twentieth century exponents of the Second Amendment mentioned above differed somewhat from each other in approach, all paid homage to a point Randy Barnett has made explicit: While innumerable comments can be cited in which late eighteenth century Americans supported

17. See JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994).

18. See Randy E. Barnett & Don B. Kates, Jr., *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1176–79 (1996); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87 (1992).

19. Kates, *supra* note 18 (discussing the eighteenth century American belief in self-defense).

20. 3 JAMES WILSON, *THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D.* 84 (Bird Wilson ed., Philadelphia, Lorenzo Press 1804) (emphasis added). Compare this to Blackstone describing the right of "self-preservation and defense" as "the primary law of nature *which [cannot be] taken away by the law of society*." WILLIAM BLACKSTONE, 1 COMMENTARIES *144; 3 *id.* at *4 (emphasis added). Likewise, Locke affirmed that by the laws of nature everyone is both: a) "*bound to preserve himself, and*"; b) "*may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the preservation of the Life, the Liberty, Health, Limb or Goods of another*." JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 289 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690) (emphasis added).

21. See Barnett & Kates, *supra* note 18; Kates, *supra* note 18; WILSON, *supra* note 20.

22. See, e.g., Michael Huemer, *Is There a Right to Own a Gun*, 29 SOC. THEORY & PRACT. 297, 306–09 (2003); Todd C. Hughes & Lester H. Hunt, *The Liberal Basis of the Right to Bear Arms*, 14 PUB. AFF. Q. 1, 14–18 (2000); Lance K. Stell, *Self Defense and Handgun Rights*, 2 J.L. ECON. & POL'Y 265, 273–76 (2006); Samuel C. Wheeler III, *Arms as Insurance*, 13 PUB. AFF. Q. 111 (1999); Samuel C. Wheeler III, *Self-Defense: Rights and Coerced Risk-Acceptance*, 11 PUB. AFF. Q. 431, 433 (1997).

the desirability of being armed and/or a right to arms,²³ not a single comment can be found describing the Second Amendment as a collective right or a right of states.²⁴ Or, as Stephen Halbrook put it:

In recent years it has been suggested that the Second Amendment protects the “collective” right of states to maintain militias, while it does not protect the right of “the people” to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.²⁵

This point is reinforced by Dave Kopel’s massive analysis of nineteenth century discourse on the Second Amendment finding many references interpreting it as an individual right and no apparent consciousness that it could be anything else.²⁶

In sum, the evidence consistently showed the collective right and states’ right theories of the Amendment to be inventions of the twentieth century gun control debate that had no provenance in the thoughts of the Founding Fathers or of pre-twentieth century Americans. Modern legal writing on the Second Amendment right to arms overwhelmingly recognizes that it guarantees a right of law-abiding, responsible adults to possess arms for self-defense.

23. Since so many quotations were given on the first two pages of this Essay, I limit myself to a few others: The author of the Second Amendment, James Madison, assured Americans that they need not fear government because of “the advantage of being armed, which the Americans possess over the people of almost every other nation.” THE FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961). 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.” RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 640 (1971) (citing Douglass Adair, *James Madison’s Autobiography*, 2 WM. & MARY Q. 191, 208 (1945)). Thomas Paine believed that “[t]he supposed quietude of a good man allures the ruffian; while on the other hand, arms like laws discourage and keep the invader and the plunderer in awe, and preserve order in the world as well as property.” 1 Thomas Paine, Letter Addressed to the Addressers on the Late Proclamation, in THE WRITINGS OF THOMAS PAINE 45, 56 (Moncure Daniel Conway ed., 1894). George Mason affirmed: “to disarm the people; that it was the best and most effectual way to enslave them . . .” George Mason, Virginia Ratifying Convention of 1788, reprinted in 3 DEBATES, *supra* note 3, at 380.

24. Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 238, 260, 263 (2004).

25. HALBROOK, *supra* note 4, at 83.

26. See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYUL REV. 1359.

II. THE SECOND AMENDMENT AND THE (LEGAL) ACADEMY

In his early and seminal article, *The Embarrassing Second Amendment*, Sanford Levinson asserted that writing on the subject had been mostly by nonmembers of the academy; he speculated that this might be because many members of the academy support banning guns and were reluctant to take on the topic lest they find themselves endorsing as legal scholars a constitutional position at odds with their political preferences.²⁷

In truth, many early (pre-2000) scholarly publications came from practicing lawyers,²⁸ some of them gun lobby officers or employees.²⁹ By the same token, most of the few pre-2000 scholarly publications rejecting the individual right view came from officers or paid employees of the antigun lobby.³⁰ But more frequent than the early articles from nonacademy authors

27. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639–42 (1989).

28. The following articles exemplify endorsements of the Standard Model by private practitioners unconnected to the gun lobby: Todd Barnet, *Gun "Control" Laws Violate the Second Amendment and May Lead to Higher Crime Rates*, 63 MO. L. REV. 155 (1998); Sayoko Blodgett-Ford, *The Changing Meaning of the Right to Bear Arms*, 6 SETON HALL CONST. L.J. 101 (1995); Christopher Chrisman, *Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms*, 43 ARIZ. L. REV. 439 (2001); Anthony Dennis, *Clearing the Smoke From the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57 (1995); T. Markus Funk, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 85 J. CRIM. L. & CRIMINOLOGY 764, 776 (1995); J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39 (2001); Roy Lucas, *From Patsone & Miller to Silveira v. Lockyer: To Keep and Bear Arms*, 26 T. JEFFERSON L. REV. 257 (2004); Ronald S. Resnick, *Private Arms as the Palladium of Liberty: The Meaning of the Second Amendment*, 77 U. DET. MERCY L. REV. 1 (1999); Haydn J. Richards, Jr., *Redefining the Second Amendment: The Antebellum Right to Keep and Bear Arms and Its Present Legacy*, 91 KY. L.J. 311 (2003); Andrew M. Wayment, Comment, *The Second Amendment: A Guard for Our Future Security*, 37 IDAHO L. REV. 203 (2000); see also David G. Browne, Note, *Treating the Pen and the Sword as Constitutional Equals: How and Why the Supreme Court Should Apply Its First Amendment Expertise to the Great Second Amendment Debate*, 44 WM. & MARY L. REV. 2287 (2003); Ian Redmond, Note, *The Second Amendment: Bearing Arms Today*, 28 J. LEGIS. 325 (2002); T. Markus Funk, *Is the True Meaning of the Second Amendment Really Such A Riddle? Tracing the Historical "Origins of the Anglo-American Right,"* 39 HOWARD L.J. 411 (1995) (reviewing MALCOLM, *supra* note 17).

29. See, e.g., Caplan, *supra* note 10; David I. Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 4 DET. C. L. REV. 789 (1982); Robert Dowlut, *The Current Relevancy of Keeping and Bearing Arms*, 15 U. BALT. L.F. 32 (1984) (National Rifle Association (NRA) General Counsel); Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59 (1989); Robert Dowlut, *The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots*, 8 STAN. L. & POL'Y REV. 25 (1997); Pasquale V. Martire, *In Defense of the Second Amendment: Constitutional and Historical Perspectives*, 21 LINCOLN L. REV. 23 (1993); Thomas M. Moncure, Jr., *The Second Amendment Ain't About Hunting*, 34 HOW. L.J. 589 (1991); Thomas M. Moncure, Jr., *Who Is the Militia—The Virginia Ratifying Convention and the Right to Bear Arms*, 19 LINCOLN L. REV. 1 (1990).

30. See, e.g., Richard M. Aborn, *The Battle Over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 415 (1995) (written by the president of Handgun Control, Inc.); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You*

connected with either the pro- or antigun lobbies was nonlegal academy scholarship: publications by professional historians, political scientists, or philosophy professors supporting the individual right view.³¹

However valid Professor Levinson's generalization about the legal academy's neglect of the subject may have been when his article was written, that article preceded (indeed, may have sparked) a vast outpouring of publications supporting the individual right view.³² To reiterate, so overwhelm-

Seen Your Militia Lately?, 15 U. DAYTON L. REV. 5 (1989) (written by the general counsel for the Center to Prevent Handgun Violence); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991) (same); Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. 141 (1982) (written by a non-lawyer lobbyist for the National Coalition to Ban Handguns). But see Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383 (1983) (written by an antigun politician); Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 HAMLINE L. REV. 69 (1986) (law professor conceding that the Amendment does guarantee a right of personal security, but arguing that that can constitutionally be implemented by banning and confiscating all guns).

31. See, e.g., LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 341 (1988) (historian); William Marina, *Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective*, in *FIREARMS AND VIOLENCE* (Don B. Kates, Jr. ed., 1984) (historian); Malcolm, *supra* note 14 (historian); Robert Shalhope, *The Armed Citizen in the Early Republic*, LAW & CONTEMP. PROBS., Winter 1986, at 125; Shalhope, *supra* note 15 (historian); Robert Shalhope, *To Keep and Bear Arms in the Early Republic*, 16 CONST. COMMENT. 269 (1999); James E. Ely, Jr., Book Review, 52 WM. & MARY Q. 212, 213 (1995) (reviewing MALCOLM, *supra* note 17) (historian); F. Smith Fussner, Book Review, 3 CONST. COMMENT. 582 (1986) (reviewing STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984)) (historian); Joyce Lee Malcolm, Book Review, 54 GEO. WASH. L. REV. 452 (1986) (reviewing HALBROOK, *supra*); Jeremy Rabkin, *Constitutional Firepower: New Light on the Meaning of the Second Amendment*, 86 J. CRIM. L. & CRIMINOLOGY 231 (1995) (reviewing MALCOLM, *supra* note 17) (political scientist).

32. See, e.g., *GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS OF THE SECOND AMENDMENT* (Robert J. Cottrol ed., 1993); Robert J. Cottrol & Raymond T. Diamond, *Public Safety and the Right to Bear Arms*, in *THE BILL OF RIGHTS IN MODERN AMERICA* 72 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993); Robert J. Cottrol, *The Second Amendment*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 763 (Kermit L. Hall ed., 1992); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1205–11, 1261–62 (1992); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 (1991); Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889; Barnett & Kates, *supra* note 18; Barnett, *supra* note 24; Robert Cottrol & Raymond T. Diamond, "Never Intended to be Applied to the White Population": *Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995) [hereinafter Cottrol & Diamond, *Firearms Regulation*]; Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconstruction*, 80 GEO. L.J. 309 (1991) [hereinafter Cottrol & Diamond, *Afro-Americanist Reconstruction*]; Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1996); Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 HARV. J.L. & PUB. POL'Y 719 (1998); Brannon P. Denning, *Palladium of Liberty? Cause and Consequences of the Federalization of State Militias in the Twentieth Century*, 21 OKLA. CITY U. L. REV. 191 (1996); Brannon P. Denning & Glenn H. Reynolds, *Telling Miller's Tale: A Reply to David Yassky*, LAW & CONTEMP. PROBS., Spring 2002, at 113; Nicholas J. Johnson, *Plenary Power and Constitutional Outcasts: Federal Power, Critical Race*

ingly has that scholarship endorsed the individual right view that Glenn Reynolds coined the term Standard Model to describe that position.³³

It bears emphasis that the law professors who accept the Standard Model include many who are antigun; that is, not only have they never owned a gun or had any connection to the gun lobby, but their policy preferences are stringent gun control or outright prohibition. Sanford Levinson's *The Embarrassing Second Amendment* expressly includes himself in that group.³⁴ Scot Powe, a liberal Democrat and former clerk for Supreme Court Justice William O. Douglas, rigorously applies standards from his primary scholarship in the First Amendment to the Second Amendment. Though he is not sympathetic to gun ownership, he writes that "like all other constitutional law scholars who have taken the time to analyze the Second Amendment, I join them in reluctantly singing the Monkees' refrain: 'I'm a believer.'"³⁵ Alan Dershowitz, a former ACLU national board member who describes himself as "hating" guns, and wishing to see the Second Amendment repealed, yet says:

Theory and the Second, Ninth and Tenth Amendments, 57 OHIO ST. L.J. 1556 (1996); Nicholas J. Johnson, *Principles and Passion: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97 (1997); Nicholas J. Johnson, *Shots Across No Man's Land: A Response to Handgun Control, Inc.'s Richard Aborn*, 22 FORDHAM URB. L.J. 441 (1995); Sanford Levinson, *Superb History, Dubious Constitutional and Political Theory*, 12 WM. & MARY BILL RTS. J. 315 (2004); Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON U. CIV. RTS. L.J. 229 (2008); Nelson Lund, *Outsider Voices on Guns and the Constitution*, 17 CONST. COMMENT. 701 (2000); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996) [hereinafter Lund, *Past and Future*]; Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Calvin Massey, *Guns, Extremists and the Constitution*, 57 WASH. & LEE L. REV. 1095 (2000); Thomas B. McAfee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History or Precedent Stand in the Way?*, 75 N.C. L. REV. 781 (1997); L.A. Powe, Jr., *Guns, Words and Interpretation*, 38 WM. & MARY L. REV. 1311 (1997); Reynolds, *supra* note 7; Glenn Harlan Reynolds, *Guns, Privacy, and Revolution*, 68 TENN. L. REV. 635 (2001); Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007 (1994); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998) [hereinafter Volokh, *Commonplace*]; Eugene Volokh, "Necessary to the Security of a Free State," 83 NOTRE DAME L. REV. 1 (2007); Robert Weisberg, *Values, Violence, and the Second Amendment: American Character, Constitutionalism and Crime*, 39 HOUS. L. REV. 1 (2002); Kevin J. Worthen, *The Right to Keep and Bear Arms in Light of Thornton: The People and Essential Attributes of Sovereignty*, 1998 BYU L. REV. 137; Robert J. Cottrol & Raymond T. Diamond, "The Fifth Auxiliary Right," 104 YALE L.J. 995 (1994) (reviewing MALCOLM, *supra* note 17); Brannon P. Denning, *Professional Discourse, the Second Amendment and the "Talking Head Constitutionalism" Counterrevolution: A Review Essay*, 21 S. ILL. U. L.J. 227 (1997) (reviewing DENNIS A. HENIGAN ET AL., GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA (1996)).

33. See Reynolds, *supra* note 7, at 463.

34. See Levinson, *supra* note 27.

35. Powe, *supra* note 32, at 1401.

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 public safety hazard 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 Constitution they don't like.³⁶

The overwhelming acceptance for the Standard Model in the legal academy is made especially notable by its opponents' attempts to counterbalance it. These have included the antigun lobby's generous financing of lesser law reviews to publish symposia on the Second Amendment in which only pieces opposing the Standard Model were allowed.³⁷

III. MILESTONES IN THE AMENDMENT'S MODERN HISTORIOGRAPHY

Having addressed the Second Amendment literature in general, I proceed to spotlight in chronological order what I deem to be the most important writings which led to the result in *Heller*.³⁸

- *Levinson's* Embarrassing Second Amendment *article*.³⁹ It forcibly directed the legal academy's attention to the Second Amendment.
- *My Michigan Law Review article*.⁴⁰ It provided an early road map of the Second Amendment for those interested in further research. Today, it remains the single most influential and comprehensive law review article on this subject and routinely is briefly mentioned as such by Standard Model opponents.⁴¹
- *Stephen Halbrook's research*. For almost three decades Steve Halbrook has tirelessly researched the original sources on virtually every aspect of the Second Amendment and published

36. Telephone Interview by Dan Gifford with Alan Dershowitz, Professor, Harvard Law School (May 3-4, 1994), *quoted in* Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 TENN. L. REV. 759, 789 (1995).

37. Two of these symposia contained only papers opposing the Standard Model while a third had a single token Standard Model paper. Carl T. Bogus, an antigun lobby official, has acknowledged that he sought to counterbalance the legal academy literature's overwhelming acceptance of the Standard Model: "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." Posting of Carl T. Bogus, to conlawprof@listserv.ucla.edu (June 11, 2001) (on file with author) (concerning the *Chicago-Kent Law Review*); *see also* Posting of Eugene Volokh to Volokh Conspiracy, http://volokh.com/archives/archive_2005_04_03-2005_04_09.shtml#1112977026 (Apr. 8, 2005, 15:17 EST).

38. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

39. Levinson, *supra* note 27.

40. Kates, *supra* note 11.

41. *See, e.g., Reynolds, supra* note 7, at 465.

his findings in dozens of law review articles.⁴² These articles' findings have been encompassed in a series of books by Halbrook.⁴³ Indicative of the importance of various of his works is the recent opinion in which the Ninth Circuit held the Second Amendment to be applicable against state and local government because it is incorporated by the Fourteenth Amendment.⁴⁴

- *Historian Joyce Lee Malcolm's 1994 Harvard University Press book.*⁴⁵ It comprehensively covers the history of the right to arms at English common law and has material on seventeenth and eighteenth century America. The book demolishes attempts to dismiss the Second Amendment as a "states' right" since, of course, England had no states to whom a right to arms could be misattributed.⁴⁶ Another desperate canard of Standard Model opponents is that seventeenth century English complaints about "disarmament" did not refer to any actual confiscations of arms but rather only to replacement of Protestant army officers with Catholics.⁴⁷ This book shows that actual gun bans and disarmament were the issues involved.⁴⁸
- *Discovery of prefatory clauses in the eighteenth century state bills of rights.* Many readers of the Second Amendment took its prefatory reference to the militia as somehow modifying its sweeping right to arms clause. This error was exposed by Eugene Volokh's discovery that all kinds of late eighteenth century state constitu-

42. Halbrook's research on the topic begins with Halbrook, *supra* note 13.

43. STEPHEN P. HALBROOK, *A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES* (1989); HALBROOK, *supra* note 4. Halbrook also authored the invaluable, *THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* (2008).

Halbrook has also researched and written widely on the firearms history underlying the Fourteenth Amendment. See STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876* (1998).

44. See, *Nordyke v. County of Alameda*, No. 07-15763, 2009 WL 1036086 (9th Cir. Apr. 20, 2009).

45. MALCOLM, *supra* note 17.

46. See George A. Mocsary, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 *FORDHAM L. REV.* 2113, 2124 & n.88, 2157 (2008) (discussing the misattribution problem in the context of state constitutional arms-bearing guarantees and noting that Vermont, while still an independent nation before joining the Union, guaranteed its citizens the right to arms in its constitution).

47. Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 *HASTINGS CONST. L.Q.* 961, 972 (1972).

48. See Kates, *supra* note 11, at 218–19.

tional right provisions had prefatory clauses.⁴⁹ It was well understood that if a rights clause was more sweeping, a prefatory clause did not limit it.⁵⁰

- *My Constitutional Commentary article.*⁵¹ Both supporters and opponents of the Standard Model, especially among the general populace, have assumed without examination that the purpose of the right to arms is to facilitate revolt against tyranny. This article clarifies that the actual purpose of the right to arms is self-defense; as Blackstone described it, the right to arms is auxiliary to the right to self-defense that the Founders saw as the primary human right. It bears emphasis, however, that the Founders did not view self-defense narrowly as just resisting apolitical violence; they saw it as including defense against political violence, for example, genocide.⁵²
- *David B. Kopel's review of nineteenth century references.*⁵³ This 183-page compilation found innumerable nineteenth century references to the Second Amendment as an individual right and no apparent consciousness of any alternative possible understanding.⁵⁴
- *Kates-Halbrook debate.*⁵⁵ Halbrook is the NRA's major outside authority (in contradistinction to its General Counsel, Robert Dowlut) on the Second Amendment. My position has always been less irredentist than theirs, as may be deduced from Halbrook's dismissal of my work as "Orwellian Newspeak."⁵⁶ In

49. Volokh, *Commonplace*, *supra* note 32, at 794–95.

50. "[B]ut when the words of the enacting clause are clear and positive, recourse must not be had to the preamble." JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 413 (Legal Classics Library 1986) (1826). The same principle prevails today. See, e.g., 2A NORMAN J. SINGER & J.D. SHAMBLE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:4, at 295 (7th ed. 2007) ("The preamble can neither limit nor extend the meaning of a statute which is clear. Similarly, it cannot be used to create doubt or uncertainty.") (emphasis added).

51. Kates, *supra* note 18.

52. See generally Don B. Kates, *Genocide, Self Defense and the Second Amendment*, 29 HAMLINE L. REV. 502 (2006).

53. Kopel, *supra* note 26.

54. *Id.* at 1377–78, 1387–90, 1399–1404.

55. See Don B. Kates, *The Second Amendment: A Dialogue*, LAW & CONTEMP. PROBS., Winter 1986, at 143; Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* LAW & CONTEMP. PROBS., Winter 1986, at 151 (1986).

56. See Halbrook, *supra* note 12. It should be noted that the limits I argue have also been criticized by another major authority on the Amendment. See Lund, *Past and Future*, *supra* note 32, at 45–46.

1986, we debated in *Law & Contemporary Problems*,⁵⁷ of which I was the guest editor. My *Michigan Law Review* article⁵⁸ had wrongly asserted that in colonial times the phrase “bear arms” had an exclusively military meaning. Given this error, I concluded that the Second Amendment was a guarantee for citizens to keep arms at home but had no implications as to civilians carrying arms outside the home.⁵⁹ Halbrook’s article demolished that by citing numerous late eighteenth century examples (including one of Madison) using the phrase “bear arms” in reference to hunting and other nonmilitary pursuits.⁶⁰

More important, our articles agreed that: (a) convicted felons have no right to arms and are properly subject to laws against their possessing guns; and (b) the right to arms extends only to ordinary small arms and not to the indiscriminate, ultradestructive military arms like cannons or missiles.⁶¹

- *Agreement among major figures in constitutional law.* Legal academy acceptance of the Standard Model in the late twentieth century was greatly influenced by that Model’s acceptance by all the major figures in modern American constitutional law who addressed the issue: Akhil Reed Amar, Randy Barnett, Leonard Levy, William Van Alstyne, and Eugene Volokh.⁶²
- *Clayton Cramer, James Lindgren, and the Bellesiles Scandal.* Michael Bellesiles was an Emory University history professor. He published a book and multiple articles full of preposterous lies such as: few colonial Americans owned or wanted to own firearms—they relied on swords and axes instead; insofar as firearms were available they were owned by colonial governments not by individuals; and women and all non-land owning men were prohibited from having guns.⁶³

57. See Kates, *supra* note 55; Halbrook, *supra* note 55.

58. Kates, *supra* note 11.

59. *Id.* at 219.

60. Halbrook, *supra* note 55.

61. See *id.* at 152 n.8, 159–60; Kates, *supra* note 11, at 261, 266; see also Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. (forthcoming June 2009).

62. See their various publications cited *supra* note 32. I do not mention Professors Lawrence Tribe or Mark Tushnet because their views on the Standard Model have, as yet, not had great impact since they appeared only in the twenty-first century.

63. See, e.g., MICHAEL A. BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* 46 (2000); Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607–1794*, 16 LAW & HIST. REV. 567, 576–80 (1998).

Bellesiles was a masterful fabricator of footnotes. But his fraudulence was easily apparent to anyone who compared the cited source to what he claimed it said.⁶⁴ Yet his claims supported the animus of “progressive” historians and law professors against the Standard Model. Disregarding all evidence to the contrary, they acclaimed the book,⁶⁵ which was accorded Columbia University’s Bancroft Prize, generally considered the highest honor for a work of American history.⁶⁶

Bellesiles’ frauds were exposed through the criticisms of Clayton Cramer, an unaffiliated historian and gun owner, and James Lindgren, a Northwestern University Law Professor and expert on social science research. Among other things, they uncovered the fact that probate records Bellesiles had purported to rely on said more or less the opposite from what he had alleged and that Bellesiles had not even reviewed them, though he claimed to have done so.⁶⁷ As a result of Cramer’s and Lindgren’s work, Emory University asked Bellesiles to resign.⁶⁸ Columbia University revoked his Bancroft Prize and demanded return of the prize money.⁶⁹ Bellesiles’ disgrace was widely

64. For instance, Bellesiles claimed his “examination of eighty travel accounts written in America from 1750 to 1860 indicates that the travelers did not notice that they were surrounded by guns and violence,” or that many Americans hunted with guns. BELLESILES, *supra* note 63, at 306. See generally *id.* at 103–04, 309. Among the writings he so mischaracterized is John James Audubon’s *Delineations of American Scenery and Character*. As anyone familiar with his life knows, Audubon was an ardent hunter and gun fanatic. One can scarcely read ten pages in this and Audubon’s other books without coming across an account of him or others shooting down a bird or animal. At least fifty-five pages of the book mention guns and hunting, including three separate chapters on different forms of hunting with guns. See JOHN JAMES AUDUBON, *DELINEATIONS OF AMERICAN SCENERY AND CHARACTER* 3, 6–12, 14, 16–17, 21, 26, 33, 41–47, 57, 59–63, 68–76, 82, 88, 93, 117, 122, 206, 210–16, 281–86 (1926).

65. See, e.g., Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 280 (2000); Carl T. Bogus, *Shootout*, 79 TEX. L. REV. 1641 (2001) (book review); Edmund S. Morgan, *In Love With Guns*, N.Y. REV. BOOKS, Oct. 19, 2000, at 30 (book review); Garry Wills, *Spiking the Gun Myth*, N.Y. TIMES, Sept. 10, 2000, § 7 (Book Review) at 5–6. Others have acclaimed other works by Bellesiles. See, e.g., Paul Finkelman, “A Well Regulated Militia”: *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 234–35 (2000); David Yassky, *The Second Amendment, Structure, History and Constitutional Change*, 99 MICH. L. REV. 588, 600 (2000).

66. See Robert F. Worth, *Prize for Book Is Taken Back From Historian*, N.Y. TIMES, Dec. 14, 2002, at C4.

67. See James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1819–24 (2002); James Lindgren, *Fall from Grace: Arming America and the Bellesiles Scandal*, 111 YALE L.J. 2195, 2203–04, 2208–14 (2002) (book review).

68. See Worth, *supra* note 66.

69. See *id.*

reported.⁷⁰ This reflected negatively on the credibility of his gullible academic supporters and their ahistorical attacks on the Standard Model.

- *The racist roots of gun control.* As documented in a number of articles, racial and ethnic oppression and stereotypes have historically formed the basis for many antigun laws.⁷¹
- *Criminological research on self-defense.* Eighteenth century liberals, both British and American, reposed great confidence in the efficacy of self-defense. For instance, the English radical Francis Place attributed the diminution of English antisemitism to Jews learning to defend themselves.⁷² In contrast, the habit of twentieth century gun control advocates has been to deride the efficacy of self-defense, particularly with guns.⁷³ This derision has fared poorly as criminological evidence has become available. For instance, Handgun Control chairman Pete Shields wrote that because burglars strike when no one is at home to shoot them and robbers confront too rapidly for householders to gain access to their guns, “[t]he handgun owner seldom even gets the *chance* to use his or her weapon” in self-defense.⁷⁴ But

70. See, e.g., David Mehegan, *New Doubts About Gun Historian*, BOSTON GLOBE, Sept. 11, 2001, at A30; Melissa Seckora, *Disarming America: A Prize-Winning Historian and His Gun Myths*, NAT'L REV., Oct. 15, 2001; Worth, *supra* note 66.

71. See Cottrol & Diamond, *Afro-Americanist Reconstruction*, *supra* note 32; Cottrol & Diamond, *Firearms Regulation*, *supra* note 32; Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17 (1995); see also Stephen P. Halbrook, *Nazi Firearms Law and the Disarmament of the German Jews*, 17 ARIZ. J. INT'L. & COMP. L. 483 (2000).

72. Place described how Jews in eighteenth century England were insulted and attacked in the streets, until they learned boxing:

Dogs could not be used in the streets in the manner many Jews were treated. One circumstance among others put an end to the ill-usage of the Jews . . . [sic] About the year 1787 Daniel Mendoza, a Jew, became a celebrated boxer and set up a school to teach the art of boxing as a science, the art soon spread among the young the Jews and they became generally expert at it. The consequence was in a very few years seen and felt too. It was no longer safe to insult a Jew unless he was an old man and alone . . . [sic] But even if the Jews were unable to defend themselves, the few who would now be disposed to insult them merely because they are Jews, would be in danger of chastisement from the passers-by and of punishment from the police.

Francis Place, *Improvement of the Working Classes* (1834), quoted in R. K. WEBB, MODERN ENGLAND: FROM THE 18TH CENTURY TO THE PRESENT 115 n.14 (1968).

73. See, e.g., GEORGE D. NEWTON & FRANKLIN E. ZIMRING, FIREARMS AND VIOLENCE IN AMERICAN LIFE 68 (1969) (arguing that guns rarely protect homes from burglary or robbery); FRANKLIN E. ZIMRING & GORDON HAWKINS, THE CITIZEN'S GUIDE TO GUN CONTROL 31–32 (1987) (arguing that owning a gun makes one less safe, only providing the owner with an illusion of security).

74. PETE SHIELDS, GUNS DON'T DIE—PEOPLE DO 49 (1981).

it is now estimated that almost half a million times a year, Americans scare away home invaders with firearms.⁷⁵ More generally, three to six times as many victims use handguns to defend against criminals each year as criminals use handguns to commit crimes⁷⁶—so guns do up to six times more good than harm. In addition Handgun Control's advice to victims of rape or robbery is never to resist in any way: The best way to "keep you[rself] alive" is to "put up no defense—give them what they want, or run."⁷⁷ But empirical studies conclude: "The use of a gun by the victim significantly reduces her likelihood of being injured;"⁷⁸ "[r]esistance with a gun appears to be the most effective in preventing serious injury [to the victim, and] . . . the data strongly indicate that armed resistance is the most effective tactic for preventing property loss"⁷⁹

Though theoretically irrelevant to the legal issues, these results severely impacted legal academy resistance to the Standard Model.

- *Criminological studies on gun control.* In the 1960s, crime became a national issue and right-thinking progressive members of the academy accepted the crucial assumptions of the firearms prohibition movement. But these assumptions were based on nothing more than unsubstantiated speculation; as the premier legal academy proponent of gun control later admitted, "In the 1960s, there was literally no scholarship on the relationship between guns and violence and the incidence or consequences of interpersonal violence, and no work in progress."⁸⁰ When actual evidence became available it was uniformly negative to the unsubstantiated antigun speculations, and social scientists

75. See Robin M. Ikeda et al., *Estimating Intruder-Related Firearm Retrievals in U.S. Households*, 1994, 12 VIOLENCE & VICTIMS 363 (1997) (reporting the results of a study conducted by the Center for Disease Control (CDC)).

76. See Don B. Kates, *The Limited Importance of Gun Control from a Criminological Perspective*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 62, 68–69 (Timothy D. Lytton ed., 2005) (collecting studies).

77. SHIELDS, *supra* note 74, at 124–25.

78. Lawrence Southwick, Jr., *Self-Defense With Guns: The Consequences*, 28 J. CRIM. JUST. 351, 362 (2000).

79. Jungyeon Tark & Gary Kleck, *Resisting Crime: The Effects of Victim Actions on the Outcomes of Crimes*, 42 CRIMINOLOGY 861, 902 (2004).

80. ZIMRING & HAWKINS, *supra* note 73, at xi.

began repudiating their former allegiance to them.⁸¹ Confirming all of this are two recent general studies of gun control. In 2004, the U.S. National Academy of Sciences released its evaluation based on review of 253 journal articles, 99 books, 43 government publications, and some empirical research of its own.⁸² It could not identify any gun control measures that had reduced violent crime, suicide, or gun accidents.⁸³ The same conclusion was reached in a 2003 evaluation by the Centers for Disease Control's then-extant studies.⁸⁴

This vast corpus of negative criminological evaluations of gun control has been widely reported in sources available to the legal academy.⁸⁵ Again, though legally irrelevant, this research corroded legal academy opposition to the Standard Model.

A last point critically important in establishing the Standard Model is that the Second Amendment has to mean *something*. And the alternative meanings which have been so desperately invented by its opponents are either historically false or patently nonsensical.

81. Formally renouncing his 1960s support for prohibiting handguns, Professor Hans Toch of the School of Criminology at the State University of New York (Albany) wrote that actual research has proven:

[W]hen used for protection, firearms can seriously inhibit aggression and can provide a psychological buffer against the fear of crime. Furthermore, the fact that national patterns show little violent crime where guns are most dense implies that guns do not elicit aggression in any meaningful way. . . . Quite the contrary, these findings suggest that high saturations of guns in places, or something correlated with that condition, inhibit illegal aggression.

Hans Toch & Alan J. Lizotte, *Research and Policy: The Case of Gun Control*, in *PSYCHOLOGY & SOCIAL POLICY* 223, 234 & n.10 (Peter Suedfeld & Philip E. Tetlock eds., 1992).

Professors Wright and Rossi confessed that their minds had been changed by the comprehensive evaluation of gun studies they did for the U.S. Department of Justice: "The progressive's indictment of American firearms policy is well known and is one that both the senior authors of this study once shared. . . . The more deeply we have explored the empirical implications of this indictment, the less plausible it has become." JAMES D. WRIGHT, PETER H. ROSSI & KATHLEEN DALY, *UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA* 319–20 (1983).

82. See COMM. TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, *FIREARMS AND VIOLENCE: A CRITICAL REVIEW* 150, 192–93, 219 (Charles F. Wellford, John V. Pepper & Carol V. Petrie eds., 2005).

83. See *id.* at 150, 192–93, 219.

84. See *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws, MORBIDITY & MORTALITY WEEKLY REPORT: RECOMMENDATIONS & REPORTS* (CDC, Atlanta, Ga.), Oct. 3, 2003, Vol. 52, No. RR-14, at 11, available at <http://www.cdc.gov/mmwr/PDF/rr/rr5214.pdf>.

85. See, e.g., Kates, *supra* note 76; Daniel D. Polsby & Don B. Kates, *American Homicide Exceptionalism*, 69 U. COLO. L. REV. 969 (1998); Daniel D. Polsby, *Firearms Costs, Firearms Benefits and the Limits of Knowledge*, 86 J. CRIM. L. & CRIMINOLOGY 207 (1995); James D. Wright, *Second Thoughts About Gun Control*, 91 PUB. INT. 23 (1988); Daniel D. Polsby, *The False Promise of Gun Control*, ATLANTIC MONTHLY, Mar. 1993.

IV. COLLECTIVE RIGHT THEORIES: NONSENSE AND NONSENSE ON STILTS

The collective right view sees the Second Amendment as creating a right that belongs to everyone collectively, so that no one individual possesses or can assert it. As one proponent pithily describes it, the right to arms the Amendment guarantees applies not to individual people, but “to the whole people as body politic.”⁸⁶

A right that everyone has so no one can exercise it? This is not a theory. It is gibberish falsely garbed as a legal claim. It bears emphasis that none of its purported advocates has ever bothered to detail the meaning of this collective right gibberish, what effect it has, or why Congress would write a meaningless right into the Bill of Rights. Its proponents have no interest, and understandably see no point, in trying to explain this claim; their purpose in inventing it is to provide an explanation of the Amendment alternative to the Standard Model.

Contrast this “collective right” gibberish to the “collective” rights that our Constitution actually does create: The First Amendment creates a right for people to associate and for groups to assemble and petition government. Any member of a group denied those collective rights may vindicate them by litigating for himself and the group. Likewise, the Fifteenth and Nineteenth Amendments prohibit discrimination against voters singled out because of their race, color, or sex. Any person denied the right to vote because of membership in a group defined by race, color, or sex may sue to vindicate his own right and those of the other group members.

Can any honest person—much less a scrupulous legal scholar—seriously propose that a right can belong to everyone in such a manner that no one can assert it? This is an oxymoron; a paradigm of pseudointellectual gibberish.

If the collective rights theory is nonsense, the so-called sophisticated collective right theory is nonsense on stilts.⁸⁷ It posits that there is a right to

86. Prince, *supra* note 7, at 695. Other articles endorsing variations of the collective right theory include: Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998); Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIST. REV. 161 (2004); Harold S. Herd, *A Re-Examination of the Firearms Regulation Debate and Its Consequences*, 36 WASHBURN L.J. 196 (1997); Herz, *supra* note 7; David Yassky, *The Sound of Silence: The Supreme Court and the Second Amendment—A Response to Professor Kopel*, 18 ST. LOUIS U. PUB. L. REV. 189 (1999).

87. There is some dispute as to whether there actually is a “sophisticated collective right” theory. *Emerson v. United States*, 207 F.3d 203, 225 (5th Cir. 2001), rejects the idea of a sophisticated collective right but analyzes it separately from the collective right theory. *United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004), accepts the sophisticated collective right theory and lists other circuit decisions that also did so. But *Parker v. District of Columbia*, 478 F.3d 370, 380 (D.C. Cir. 2007), dismisses it as just a mendaciously disguised reiteration of the collective right theory.

arms, but one that can only be exercised in the context of militia or military service. Again, meaningless gibberish. Its proponents have not—because they cannot—adduced even one example of what a right to arms means that can only be exercised in the context of militia or military service. In abeyance of their making such inquiries, let me raise a few:

1) Under current U.S. Army practice, soldiers are not allowed to possess either their own arms or military arms without special permission. The normal practice is that they are unarmed. When committed to a combat zone they are still not permitted to have their personal arms. They are issued particular weapons which the Army deems suitable to the duties it has assigned them.⁸⁸

It would be interesting to query whether these practices are something a soldier can sue to have a court invalidate according to the supposed Second Amendment right that can only be exercised in the context of militia or military service?

2) Under the sophisticated collective right theory of the Second Amendment, can a soldier or militia member who has been issued the

88. My interview with Lt. Col. Dana K. Drenkowski, career military officer (JAG) (July 21, 2008), elaborates on this:

[On] every military base in the US, soldiers have to get the commander's permission to bring their own personally owned weapons on base. If they live in dorms or quarters for single soldiers, they have to store the weapons in the military police armory on base and check them out for use.

...

If soldiers live in a house on base (usually family men or women), they can store the weapons at the house, but all have to be registered with the military police/commander's office. This is universal throughout bases in the US, in all military forces

Overseas, they are usually not allowed to keep weapons on base, but again that is subject to local regulations (where the host country doesn't allow weapons, the soldiers cannot bring any to that assignment).

As far as weapons to use in combat, they indeed are issued what is believed [by the military] to be necessary, but are traditionally forbidden from bringing their own personal weapons to the party. This regulation is normally done by the theatre commander—it is his or her decision whether to allow personal weapons (normally just handguns), and the usual answer is NO

This is true for all services, as far as I know. It is usually not a service-wide requirement/ban, but done at a local level or, in combat, at the "theatre level" or combat command level. Theatre would be defined as the overall commander of combat forces in a theatre of combat. The combat command level for Iraq is the troop commander in Iraq itself. For example, Iraq is part of the Central Command theatre

My published orders sending me to Iraq had about 14 or 18 "special amendments" or additions on the back; one of them was that "personal firearms are forbidden." I am aware that sometimes one can have that paragraph omitted, or even have a paragraph amended to say that personal firearms are permitted, but that would depend upon having someone high up who approves and who will provide permission to change that particular paragraph—most of the time the commanders responsible for the orders would not change that paragraph, knowing as they did the MNF-I CO's feelings.

standard low-power .223 assault rifle and assigned to the front lines choose instead a high power .30 caliber sniper rifle and decide to construct a sniper's nest in a tree?

3) Does the sophisticated collective right theory mean that a soldier or militia member trained and assigned (without a firearm) to a kitchen as a cook has a right to reassign himself to the front lines with a rifle?

If it does not mean any of these things, what does it mean to call the Second Amendment a right to arms that can (only) be exercised in the context of militia or military service? And why do these queries have to be raised by an opponent of the collective right theories? Why have the theories' proponents not detailed what these mean in actual practice?

V. THE STATES' RIGHT THEORY

The alternative states' right theory that the Amendment was intended to exalt and to restore state control over the militias is not gibberish.⁸⁹ It is an intelligible theory. But it is entirely ahistorical, being beset by problems which states' right theory proponents have dealt with only by never mentioning them. Let me briefly describe some of the major problems:

1) The Second Amendment guarantees a "right of the people," phraseology which everywhere else in the Constitution denotes individual rights; nor does the Amendment use terms such as "powers" or "authority," which is how government powers are described throughout the Constitution.⁹⁰

2) The Second Amendment was not the product of some devotee of states' rights and powers vis-a-vis the federal government. It was authored by James Madison who was so extreme an advocate of federal power vis-a-vis the states that he deemed the Constitutional Convention a failure because it: a) rejected his proposal for a federal veto power over all state legislation; and b) provided for a Senate consisting of representatives of the states whereas Madison wanted representation to be apportioned according to population with no concession to the states as states.⁹¹

89. Articles espousing the states' right theory are epitomized by Ehrman and Henigan's writings. See Ehrman & Henigan, *supra* note 30; Henigan, *supra* note 30.

90. See *Emerson*, 270 F.3d at 228 ("[A]s used throughout the Constitution, 'the people' have 'rights' and 'powers,' but federal and state governments only have 'powers' or 'authority,' never 'rights.'") (emphasis added) (citing multiple examples).

91. See JOSEPH J. ELLIS, *AMERICAN CREATION* 143–210 (2007) (discussing Madison and the Constitutional Convention).

3) Madison and his mentor Jefferson did not see the federal powers in the original Constitution as excessive vis-à-vis the states; if anything needed correction, they believed, it was the lack of a set of guarantees for personal rights, not a lack of guarantees for states' rights.⁹²

4) In discussing his proposals in Congress, Madison differentiated the criticism some politicians had levelled at the Constitution for diminishing state power from the concern of the great majority of the people, which was the lack of a bill of rights protecting individual liberties.⁹³

5) Far from thinking the Second Amendment would meet their desire to guarantee state powers over the militia, Anti-Federalists in the First Congress sought to accomplish this by separate proposed constitutional amendments—which were defeated by the Federalist-majority Senate.⁹⁴

6) Neither in Congress nor the state legislatures was there either any objection to an individual right clause or any suggestion that it would restore state power over the militia; the only objections made were to the militia clause on the ground that it did not do anything.⁹⁵

7) The Amendment follows early state constitutional rights provisions in having a prefatory clause (the militia clause) preceding the rights declaration; the principle of construction, then as now, was that the prefatory clause cannot narrow or nullify the declared right.⁹⁶

8) Notwithstanding the Second Amendment, from the earliest time the U.S. Supreme Court has consistently held federal authority over the militia to be plenary with state authority limited to matters as to which the federal government has not spoken.⁹⁷

92. See CHRISTOPHER HITCHENS, THOMAS JEFFERSON: AUTHOR OF AMERICA 105 (2005) (discussing Madison's correspondence with Jefferson who was then ambassador to France).

93. 1 ANNALS OF CONG. 431–42 (Joseph Gales ed., 1834).

94. For Virginia's request to this effect, see 3 DEBATES, *supra* note 3, at 660. For North Carolina's identical request, see 4 DEBATES, *supra* note 3, at 245. Congress' rejection appears in SENATE JOURNAL, Sept. 8, 1789, 1st Cong., 1st Sess., at 75.

95. HALBROOK, *supra* note 43, at 4. For instance, the Anti-Federalist *Centinel* complained of the Second Amendment's precatory preface, "[T]he absolute command vested by [the original Constitution] in Congress are [sic] not in the least abridged by this Amendment." MALCOLM, *supra* note 17, at 163 (quoting *Centinel, Revived*, No. XXIX, INDEP. GAZETTEER (Phila.), Sept. 9, 1789, at 2). Similar comments were made in some state legislative debates over ratifying the Bill of Rights. HALBROOK, *supra* note 43, at 279–98.

96. See *supra* note 50.

97. See *Perpich v. Dep't of Def.*, 496 U.S. 334, 354 (1990) (holding that state militias may be called into federal service over state objection and that federal authority over the militia is paramount); *Selective Draft Law Cases*, 245 U.S. 366, 383 (1918) (holding that Congress has authority to abolish states' militia by bodily incorporating them into the federal army); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 32–33 (1827) (noting the president's power to call militia from state control into federal service is exclusive); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 24 (1820) (holding that federal militia legislation preempts state militia legislation).

CONCLUSION

From the enactment of the Second Amendment until the outset of the early twentieth century gun control debate, it was understood that this Amendment guaranteed all responsible, law-abiding Americans a right to possess firearms for personal defense. Fictions such as the states' right theory or collective right theories were entirely unknown to the Founding Fathers and for a century after their time.

One aspect of the twentieth century gun control debate was the invention and acceptance of these fictions in order to facilitate proposals to ban and to confiscate all firearms. But in the late twentieth century these inventions led to a very substantial debate among legal scholars. From that scholarship, and often contrary to the scholars' personal preferences, the overwhelming conclusion of legal and historical writers is that the Second Amendment preserves the right of all responsible, law-abiding adults to be armed for the defense of themselves, their homes, and their families.

Recognizing these facts does not doom rational, moderate controls. The National Rifle Association should accept that many possible controls are just plain common sense. For example, the NRA itself pioneered laws prohibiting handgun possession for persons who had been convicted of violent crimes. These laws have now sensibly been extended to prohibiting possession of any kind of firearms by the deranged and by children.⁹⁸ Likewise, there is no legitimate (that is, ordinary sporting or self-defense) reason for civilians to possess indiscriminate, superdestructive military weaponry (for example, bazookas, grenades, or missiles).

The Second Amendment does not preclude such sensible laws—nor many foolishly non-cost-effective ones such as gun registration.⁹⁹ This Amendment protects only responsible, law-abiding adults in the possession of ordinary civilian small arms.¹⁰⁰

98. Parents have, of course, a constitutional right to instruct their children in the use of firearms for hunting and other proper purposes. See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 519 (1925) (noting a parental right to have children attend parochial schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that a statute forbidding teaching children languages other than English infringes parental right of control under due process).

99. For a discussion of some constitutional potential controls, see Kates, *supra* note 11, at 258–67; Kates, *supra* note 55; Halbrook, *supra* note 55.

100. Articles in this Symposium by Professors Lund and Winkler criticize the *Heller* opinion for ahistorically endorsing laws against gun possession by felons, the insane, and children. See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009); Adam Winkler, *Heller's Catch 22*, 56 UCLA L. REV. 1551 (2009). Though *Heller* does neglect to furnish it, there is ample historical support for excluding such people from the right to arms: Nations which accepted the right to arms invariably extended that right only to virtuous citizens; and at

The states' right and collective right views are not just intellectually frivolous. They have had a severely negative effect on rational gun controls by producing blind irredentist opposition to regulation in the belief that the gun control movement's goal is prohibition and confiscation of all arms kept for defense of one's family, home, and self.¹⁰¹ Now that *Heller* has recognized the unconstitutionality of such legislation, it is to be hoped that the gun control struggle can turn into a rational effort to agree on moderate, sensible firearms regulations.

common law felons were "civilly dead," having lost all rights including the right to possess property of any kind. See Kates & Cramer, *supra* note 61.

101. This is not an irrational belief because that is precisely what many gun control advocates seek. See Barnett & Kates, *supra* note 18, at 1254–59 (providing supporting quotations and examples).