CONNECTICUT
LAW REVIEW

VOLUME 45 JULY 2013 NUMBER 5

Article

Murder, Self-Defense, and the Right to Arms

DON B. KATES & ALICE MARIE BEARD

Despite being well aware of crime and uprisings, the framers of the Bill of Rights made a policy decision to guarantee a constitutional right to keep and bear arms, a constitutional right that "shall not be infringed." Courts should not ignore the policy decision of the framers, and courts should not supplant the framers' policy decision with their own. Empirical research shows that there is no gun control measure that has reduced murder, violent crime, suicide, or gun accidents. Thus, even under intermediate scrutiny, the government cannot prove that there is a reasonable fit between its objective of applying a gun control law to all people—both law-abiding and non-law-abiding—and its governmental justification to reduce crime.

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Murder, Self-Defense, and the Right to Arms

DON B. KATES[*] & ALICE MARIE BEARD[**]

I. INTRODUCTION

It is hard [for anti-gun advocates] to explain that where firearms are most dense violent crime rates are lowest, and where guns are least dense violent crime rates are highest.

– Hans Toch & Alan Lizotte, 1992[1]

[Based on national crime statistics,] areas in England, America and Switzerland with the highest rates of gun ownership were in fact those with the lowest rates of violence.

– Joyce Lee Malcolm, 2002[2]

In this Essay we supplement Professor Nicholas Johnson's discussion in *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*.

Almost all murders and serious non-fatal assaults are committed by people with criminal records, often long criminal records, with the exception of the few that are committed by the insane. Therefore, the claim of the gun prohibitionists that "most murders" are committed by ordinary gun owners is wantonly false. Murders by Blacks resemble murders committed by whites in that the perpetrators are almost always prior criminals. Multiple comprehensive studies find gun restrictions do not reduce gun crimes—because criminals ignore laws. Police are exempt from liability for not protecting victims because the job of the police is only to provide indirect protection by general patrol and by catching perpetrators; such indirect protection does not substitute for personal defense. Self-defense by armed civilians thwarts countless crimes per year. Criminological studies conclude victims with guns are less likely to be seriously injured than victims without. The Second Amendment

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[*] Attended Reed College, LLB; Yale Law School. Don B. Kates is a civil liberties lawyer and criminologist. During his time at Yale, he worked as a civil rights worker, on all occasions carrying firearms for his protection.

[**] B.A., Indiana University; J.D., George Mason University School of Law. Alice Marie Beard is an attorney in Washington, D.C. She first shot a .22 rifle when she was ten years old.

[1] Hans Toch & Alan J. Lizotte, *Research and Policy: The Case of Gun Control*, *in* PSYCHOL. & SOCIAL POL'Y 232 (Peter Suedfeld & Philip E. Tetlock eds., 1992).

[2] JOYCE LEE MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE 204 (2002).

guarantees the rights of law abiding, responsible adults to acquire and possess firearms.

II. CRIMINOLOGICAL DISCUSSION

Late eighteenth-century liberals firmly believed, as one prominent American divine expressed it, that the possession of arms by ordinary people was "harmless."[3] Modern criminology concurs: unlike ordinary people, murderers always turn out to be felons or (in a few cases) insane people. Professor Delbert S. Elliott's review so characterizes "virtually all" killers.[4]

Professor David M. Kennedy's review of studies from the nineteenth century onward shows that murderers are likely to commit their murders in the course of long criminal careers consisting primarily of nonviolent crimes, but including proportions of violent crimes that are larger than normal for other criminals.[5]

A. *A False Model*

Proponents of banning firearms to the general public falsely blame murder on law abiding gun owners. Uniformly they attribute "most shootings" not to felons or mentally ill people, but to ordinary gun owners.[6] Likewise, anti-gun activist Amitai Etzioni claims "most homicides are not committed by the 'hardened' criminal who would seek out a gun or other lethal weapon, whether or not it was legal, but rather by ordinary, 'law abiding' citizens who kill on impulse rather than by intent."[7]

This is diametrically contrary to established criminological fact. Professor Elliott's characterization of murderers as felons and mentally ill individuals is based on murder studies from the nineteenth century to 1997, and more recent data agree that murderers are extremely aberrant individuals whose prior felonies preclude their legally having guns. For example, a *New York Times* summary of 1,662 murders in New York from

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[3] TIMOTHY DWIGHT, 1 TRAVELS IN NEW ENGLAND AND NEW YORK 7 (Barbara Miller Solomon ed., Belknap Press 1969) (1823). Dwight, a Congregationalist minister was, *inter alia*, President of Yale University from 1795 until his death in 1817. *Id.* at ix, xvii.

[4] Delbert S. Elliott, *Life-Threatening Violence Is Primarily a Crime Problem: A Focus on Prevention*, 69 U. COLO. L. REV. 1081, 1087–88 (1998).

[5] David M. Kennedy & Anthony A. Braga, *Homicide in Minneapolis: Research for Problem Solving*, 2 HOMICIDE STUDS. 263, 269, 274–76 (1998).

[6] *See* Frank J. Vandall, *A Preliminary Consideration of Issues Raised in the Firearms Sellers Immunity Bill*, 38 AKRON L. REV. 113, 118 & n.28 (2005) ("'[M]ost shootings are not committed by felons or mentally ill people, but are acts of passion that are committed using a handgun that is owned for home protection.'" (quoting Katherine Kaufer Christoffel, *Toward Reducing Pediatric Injuries from Firearms: Charting a Legislative and Regulatory Course*, 88 PEDIATRICS 294, 300 (1991))).

[7] AMITAI ETZIONI & RICHARD REMP, TECHNOLOGICAL SHORTCUTS TO SOCIAL CHANGE 107 (1973).

2003 to 2005 reported that "[m]ore than 90 percent of the killers had criminal records."[8]

Furthermore, according to a Massachusetts Kennedy School study, "[s]ome 95% of homicide offenders . . . were arraigned at least once in Massachusetts courts before they [murdered]", and [o]n average . . . homicide offenders had been arraigned for 9 prior offenses."[9]

The 2009 article by Don Kates and Clayton Cramer, *Second Amendment Limitations Criminological Considerations*, collected studies with identical results for Illinois, Milwaukee, Baltimore, and Atlanta.[10] In the District of Columbia—which banned handguns in 1976, thereafter attaining one of America's highest murder rates[11]—Kristopher Baumann, Chairman of the Fraternal Order of Police, said in 2010: "[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* . . . ."[12]

B. *Black Homicide*

Professor Nicholas Johnson's particular concern (black homicide) shows that the anti-gun model is equally false for murder among blacks. Black murderers are just like white murderers in that they are almost always felons and/or mentally ill.[13]

Consider, incidentally, what the more-guns-equal-more-murder myth would imply if anyone, including its propagandists, took it seriously. Black homicide rates are eight-to-ten times higher than white homicide rates;[14] therefore, if guns are a cause of murder, guns must be many times more common among blacks than whites. However, *in general*, urban blacks are less likely to own guns than are urban whites.[15] Those who are more likely to own guns are the tiny minority of black criminals. Rural blacks do own guns as frequently as whites.[16] Thus, if the anti-gun myth were correct, rural blacks would have far higher murder rates than urban

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[8] Jo Craven McGinty, *New York Killers, and Those Killed, by Numbers*, N.Y. TIMES, Apr. 28, 2006, at A1.

[9] Anthony A. Braga et al., *Understanding and Preventing Gang Violence: Problem Analysis and Response Development in Lowell, Massachusetts*, 9 POLICE Q. 20, 29–31 (2006).

[10] Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1343 (2009).

[11] *See* Adam Liptak, *Gun Laws and Crime: A Complex Relationship*, N.Y. TIMES, June 29, 2008, at WK1 (explaining that after Washington D.C.'s gun ban took effect, the city's murder rate became "substantially higher relative to" other major cities).

[12] Editorial, *Topic A*, WASH. POST, Apr. 18, 2010, at A15 (emphasis added).

[13] As to the prior crime records of murderers, see *supra* notes 8–10 and accompanying text.

[14] ROGER LANE, MURDER IN AMERICA: A HISTORY 320–21 (1997).

[15] *See* GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 71 (1997) ("[W]hite gun ownership exceed[ed] that for blacks by about 40 percent in 1996 . . . .").

[16] *Id.*

blacks. But the reverse is true. The gun murder rate among young black urban males is 9.3 times higher than among the well-armed young black rural males.[17]

That murderers are felons, the mentally ill, or juveniles is also suggested by European data showing that nations banning or severely restricting guns to the general population have three times more murder per capita than those allowing guns.[18] It appears that banning the only effective means of self-defense promotes murder by leaving law-abiding victims defenseless while murderers flout gun bans.

Russia's gun bans disarmed its populace by police-state enforcement methods and by poverty that made guns unaffordable.[19] The result? Since 1965, murder rates in gun-less Russia far exceed those in America.[20] Recently, the murder rate in Russia has been four-times higher than the murder rate in America.[21]

Gun ownership is already illegal for felons.[22] This is largely irrelevant to non-felons who are far less likely to murder. Furthermore,

> there is no good reason to suppose that people intent on arming themselves for criminal purposes would not be able

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[17] *See* Lois A. Fingerhut et al., *Firearm and Nonfirearm Homicide Among Persons 15 Through 19 Years of Age: Differences by Level of Urbanization, United States, 1979 Through 1989*, 267 J. AM. MED. ASS'N 3048, 3049 tbl.1 (1992) (providing statistics on the firearm homicide rates of urban and rural black males).

[18] *See* Don B. Kates & Gary A. Mauser, *Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence*, 30 HARV. J.L. & PUB. POL'Y 649, 652 & tbl.1 (2007) (collecting statistics regarding the murder rate and rate of gun ownership in thirteen European countries).

[19] *Id.* at 651 n.3. Russia disarmed its population in 1929. *Id.*

[20] *Id.* at 651.

[21] *Id.*

[22] *See* 3 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 69 (3d ed. 1927) ("[A felon] could not own any property himself, nor could [his heirs] . . . claim through him."). 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 Eighth Amendment: "Rough" Justice Is Not Enough*, 14 HASTINGS CONST. L.Q. 451, 457 (1987). In the classical republican thought, which gave rise to the right to arms, that right was inextricably and multifariously linked to the virtuous citizenry. *See, e.g.*, Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 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."); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 231–33 (1983) [hereinafter Kates, Jr., *Original Meaning*] (explaining that the Founders "regarded the survival of popular government and republican institutions as wholly dependent upon the existence of a citizenry that was 'virtuous'"); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 128 (1986) ("Like Machiavelli [Harrington] believed that the preservation of popular and republican institutions depended upon the continued existence of a 'virtuous' citizenry."). The Supreme Court has made this clear: "[N]othing in [this Court's] opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." Dist. of Columbia v. Heller, 554 U.S. 570, 626 (2008).

> to do so even if the general availability of firearms to the larger population were sharply restricted. Here it may be appropriate to recall the First Law of Economics, a law whose operation has been sharply in evidence in the case of Prohibition, marijuana and other drugs, prostitution, pornography, and a host of other banned activities and substances—namely, that demand creates its own supply. There is no evidence anywhere to show that reducing the availability of firearms *in general* likewise reduces their availability to persons with criminal intent, or that persons with criminal intent would not be able to arm themselves under any set of general restrictions on firearms.[23]

III. DO GUN BANS REDUCE MURDER AND OTHER VIOLENT CRIME?

In 2004, the National Academy of Sciences studied gun control, reviewing 253 journal articles, 99 books, 43 government publications, and some empirical research of its own about gun crime.[24] The Academy could not identify any gun restriction that reduced violent crime, suicide, or gun accidents.[25] A year earlier, the Centers for Disease Control and Prevention ("CDC"), which endorses banning handguns and severely restricting other guns, released an exhaustive review of all extant literature. The CDC likewise could not identify any gun control measure that had reduced murder, violent crime, suicide, or gun accidents.[26]

A. *The Myth of Police Protection*

The argument that victims should be disarmed and should rely on police protection conflates two errors. First, police protection is generally unavailable. No matter how dedicated police may be, fewer than one million officers cannot protect more than 300 million Americans from crime.[27] Police might intervene in crimes they observe, so criminals take

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[23] JAMES D. WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA 137–38 (1983).

[24] Robert A. Levy, *Gun Control Measures Don't Stop Violence*, CNN OPINION (Jan. 18, 2011), http://articles.cnn.com/2011-01-18/opinion/levy.anti.gun.control_1_gun-control-gun-regulations-gun-related-crimes?_s=PM:OPINION.

[25] NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 6 (Charles F. Wellford et al. eds., 2005); Levy, *supra* note 24.

[26] CTRS. FOR DISEASE CONTROL & PREVENTION, FIRST REPORTS EVALUATING THE EFFECTIVENESS OF STRATEGIES FOR PREVENTING VIOLENCE: FIREARMS LAWS (2003), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm.

[27] *See* BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 1 (2011) ("State and local law enforcement agencies employed about 1,133,000 persons on a full-time basis in 2008, including 765,000 sworn personnel.").

care to strike when police are not observing. In less than 3% of reported serious crimes, police arrived in time even to arrest offenders, much less protect victims.[28]

Furthermore, as Professor Johnson's article shows, all too often police will not protect minority victims. Consider what happens when police are sued for not protecting victims: police lawyers invoke the universal principle that police prevent crime only indirectly—by patrolling the streets and by apprehending criminals after their crimes.[29]

Police are not legally responsible for protecting victims. The laws of every state exonerate police from suit for non-protection. Thus, the second error in relying on police protection is that protecting individuals is not the job of police. As an example, California's Government Tort Liability Act provides that a police department and its officers are not liable for injury caused by failure to enforce an enactment, nor for failure to provide police protection or failure to provide sufficient police protection, nor for failure to make an arrest or failure to retain an arrested person in custody.[30] Literally dozens of cases from the fifty states agree as a matter of common law.[31]

Regarding the fantasy that restraining orders will increase police

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[28] Dave Kopel, *911 Is a Joke . . . or Is It? Let's Find Out*, TCS DAILY (Jan. 5, 2005, 12:00 AM), http://www.ideasinactiontv.com/tcs_daily/2005/01/911-is-a-joke-or-is-it-lets-find-out.html.

[29] *See, e.g.*, Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 750–51 (2005) (deciding that a wife's restraining order against her estranged husband did not entitle her to a property interest in police enforcement of the restraining order); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 191 (1989) (holding that social workers did not have a "special relationship" with a child abuse victim that would give rise to an affirmative constitutional duty to protect); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (affirming that "whatever might be plaintiff's rights under tort law of Illinois, any duty of state officials to protect public from dangerous madmen was not among duties enforceable in suits under 1871 civil rights statute"); Riss v. City of New York, 240 N.E.2d 860, 860 (N.Y. 1968) (holding that the city was not guilty of negligence against an assault victim for failure to supply police protection upon request).

[30] CAL. GOV'T CODE §§ 821, 845, 846 (West 2012).

[31] *See, e.g.*, Ashburn v. Anne Arundel Cnty., 510 A.2d 1078, 1080–82 (Md. 1986) (holding that public officers are shielded from liability "where the officer's alleged negligence arose from the performance of his job in a manner which involved judgment and discretion"); Silver v. City of Minneapolis, 170 N.W.2d 206, 209–10 (Minn. 1969) (same); Everton v. Willard, 468 So.2d 936, 938–39 (Fla. 1985) (same); Weiner v. Metro Transp. Auth., 433 N.E.2d 124, 126–27 (N.Y. 1982) (holding that public officers are not under any greater duty to provide protection; thus, absent a special relationship, they are not liable); Sapp v. City of Tallahassee, 348 So.2d 363, 364–65 (Fla. Dist. Ct. App. 1977) (same); Warren v. Dist. of Columbia, 444 A.2d 1, 3 (D.C. 1981) (same); Davidson v. City of Westminster, 649 P.2d 894, 897–900 (Cal. 1982) (same); Simpson's Food Fair, Inc. v. City of Evansville, 272 N.E.2d 871, 875–76 (Ind. App. 1971) (same); Weuthrich v. Delia, 382 A.2d 929, 930 (N.J. Super. Ct. App. Div. 1978) (holding that the failure of a police officer to make an arrest does not subject the municipality to tort liability because municipalities are expressly immunized from tort liability); Riss v. City of New York, 240 N.E.2d 860, 860 (N.Y. 1968) (same); Keane v. City of Chicago, 240 N.E.2d 321, 322 (Ill. App. Ct. 1968) (same); Calogrides v. City of Mobile, 475 So.2d 560, 562 (Ala. 1985) (same); Chapman v. City of Philadelphia, 434 A.2d 753, 754–56 (Pa. Super. Ct. 1981) (same).

protection or provide protection generally, it is appropriate to note that paper orders do not stop murderers. Almost 25% of domestic murderers were under restraining orders when they killed.[32] Those who advocate gun bans advise women who are menaced by stalkers to eschew self-defense and rely on restraining orders.[33] However, the fact is that unless a prospective victim prepares to defend herself, her only defense is hope.

B. *Defensive Gun Use*

A statistician for the U.S. Justice Department's National Crime Victimization Study estimates that when defending against rape, robbery, or assault, guns help 65% of the time and make things worse about 9% of the time.[34]

There are hundreds of thousands of violent felonies annually.[35] Many Americans are armed, and handguns are used for self-defense *millions* of times per year.[36] "[S]urveys reveal a great deal of self-defensive use of firearms, in fact, more defensive gun uses than crimes committed with firearms."[37] For instance, "firearms are used over half a million times in a typical year against home invasion burglars; usually the burglar flees as soon as he finds out that the victim is armed, and no shot is ever fired."[38]

Overwhelmingly when victims draw guns, criminals flee. Criminals flee armed citizens because they want helpless victims, not gunfights with armed ones.

> Indeed, 36 percent of the respondents in [a study of imprisoned juvenile criminals] reported having decided at least "a few times" not to commit a crime because they

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[32] Linda Langford et al., *Criminal and Restraining Order Histories of Intimate Partner-Related Homicide Offenders in Massachusetts, 1991–1995*, *in* THE VARIETIES OF HOMICIDE AND ITS RESEARCH: PROCEEDINGS OF THE 1999 MEETING OF THE HOMICIDE RESEARCH WORKING GROUP 51, 59 (Paul H. Blackman et al. eds., 2000).

[33] *See Domestic Violence & Firearms Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (May 17, 2012), http://smartgunlaws.org/domestic-violence-firearms-policy-summary ("Laws that prohibit the purchase of a firearm by a person subject to a domestic violence restraining order are associated with a reduction in the number of intimate partner homicides.").

[34] Lane Hartill, *A Grandma with a Pistol in Her Purse*, CHRISTIAN SCI. MONITOR, Aug. 22, 2001, at 14.

[35] *See* MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2004, at 2 (2007), *available at* http://bjs.gov/content/pub/pdf/fssc04.pdf (showing that 194,570 people were convicted of a violent felony in 2004).

[36] 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) [hereinafter Kates, *The Limited Importance of Gun Control*].

[37] JAMES B. JACOBS, CAN GUN CONTROL WORK? 14 (2002).

[38] David B. Kopel et al., *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 166 (2008) (citing Robert M. Ikeda et al., *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 VIOLENCE AND VICTIMS 363, 366–67 (1997) (reporting results of a study conducted by the CDC)).

> believed the potential victim was armed. Seventy percent of the respondents reported having been "scared off, shot at, wounded, or captured by an armed crime victim."[39]

Criminological studies conclude that "[r]esistance with a gun appears to be [the] most effective [response to criminal attack] in preventing serious injury [to victims, and] . . . for preventing property loss."[40] As professors Hans Toch and Alan Lizotte write:

> [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.[41]

IV. THE SECOND AMENDMENT

The Founding Fathers placed the guarantee that "[a] well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed"[42] into the Bill of Rights because they considered the right peculiarly important and uniquely vulnerable to infringement. For the Founding Fathers and for the philosophers they knew, the right to arms was fundamental.[43] Stephen

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[39] JOSEPH F. SHELEY & JAMES D. WRIGHT, IN THE LINE OF FIRE: YOUTHS, GUNS, AND VIOLENCE IN URBAN AMERICA 63 (1995). Surveys of adult prisoners yield similar results. *See* JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 147 (expanded ed. 1986) (showing data that 39% of men surveyed decided not to commit a crime because they "knew or believed that the victim was carrying a gun").

[40] Jungyeon Tark & Gary Kleck, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*, 42 CRIMINOLOGY 861, 902 (2004); *see also* Lawrence Southwick, Jr., *Self-Defense with Guns: The Consequences*, 28 J. CRIM. JUST. 351, 367 (2000) ("The cash losses and property losses by victims of crime were analyzed and it was found that either the victim's taking other actions or having a gun reduced the probability of actually suffering a loss.").

[41] Toch & Lizotte, *supra* note 1, at 234 & n.10.

[42] U.S. CONST. amend. II.

[43] Though numerous law review articles address the philosophical background, the single most definitive treatment is still the opening chapters of then-Howard University philosophy professor Stephen Halbrook's book, *That Every Man Be Armed: The Evolution of a Constitutional Right*. STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 7 (1984); *see also* Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 601–09 (1982) ("To gain a fuller comprehension of the origins of the Second Amendment it is essential therefore to understand the place of the armed citizen in libertarian thought and the manner in which this theme became an integral part of American republicanism."); Shalhope, *The Armed Citizen in the Early Republic*, *supra* note 22, at 126–33 ("To grasp the meaning of the [Second A]mendment, as well as the beliefs of its authors, it is necessary to understand the intellectual environment of the late eighteenth-century America. Attitudes toward an armed citizenry in that time

Halbrook's 2008 book offers quotes to that effect from every important segment of late eighteenth-century American opinion.[44]

Thomas Jefferson's model for a state constitution was that "[n]o free man shall ever be debarred the use of arms."[45] Roger Sherman felt 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."[46] James Madison assured Americans that they could not be tyrannized by the new federal government because of "the advantage of being armed, which the Americans possess over the people of almost every other nation."[47] Sam Adams's anti-Federalist version of a right to arms to be added to the Constitution was 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."[48] Richard Henry Lee urged that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them."[49] Thomas Paine argued that "arms like laws discourage and keep the invader and plunderer in awe, and preserve order in the world . . . . Horrid mischief would ensue were [the good] deprived of the use of them [and] . . . the weak will become a prey to the strong."[50] Patrick Henry asserted that "[t]he great object is that every man be armed."[51] Joseph Story summarized the beliefs of late eighteenth-century Americans when he wrote, "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."[52]

Moreover, approbation for the right to arms was expressed in practically every eighteenth- and nineteenth-century American legal work

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had roots in classical philosophy, but drew most fully upon a tradition of 'republicanism' received from Niccolo Machiavelli through such intermediaries as James Harrington and James Burgh.").

[44] *See* STEPHEN P. HALBROOK, THE FOUNDER'S SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 262 (2008) (quoting, for example, Thomas Jefferson and Roger Sherman).

[45] *Id*.

[46] *Id.*

[47] THE FEDERALIST NO. 46, at 269 (James Madison) (A.B.A. ed., 2009); *see also* RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 640 (1971) (quoting Madison as saying that a tyranny is not a Republic and "could not be safe [from its people] . . . without a [proportionately very large] standing army, an enslaved press, and a disarmed populace").

[48] Kates, Jr., *Original Meaning*, *supra* note 22, at 224 (internal quotation marks omitted).

[49] RICHARD HENRY LEE, *The Constitution's Provisions for Distributing Powers Between the General and State Governments*, *in* LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 122, 124 (Walter Hartwell Bennett ed., 1978).

[50] THOMAS PAINE, *Thoughts on Defensive War*, *in* WRITINGS OF THOMAS PAINE 55, 56 (Moncure Daniel Conway ed., 1894).

[51] DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 275 (Richmond, Enquirer Press 2d ed. 1805) (statement of Patrick Henry).

[52] JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (republished 1893) (1840).

discussing the matter.[53]

Search as they may, modern opponents of the right to bear arms have been unable to name even a single Founder who similarly contested this right. Eighteenth-century American thinkers—and eighteenth- and pre-eighteenth-century European liberals—were deeply protective of the right to bear arms.[54]

As Daniel D. Polsby, Dean of George Mason University School of Law, has written:

> [M]ost modern scholarship affirms that so far as the drafters of the Bill of Rights were concerned, the right to bear arms was to be enjoyed by everyone, not just a militia, and that one of the principal justifications for an armed populace was to secure the tranquility and good order of the community.[55]

Indeed, modern scholars affirming that the right was to be enjoyed by everyone include Harvard University law professor Alan Dershowitz, who personally deplores what he says the Second Amendment right means.[56] Dershowitz describes himself as hating guns and wishing to see the Second Amendment repealed.[57] Nonetheless, Dershowitz sees as "[f]oolish liberals who would try to read the Second Amendment out of the Constitution by claiming that it is not an individual right or that it is too much of a safety hazard."[58] Dershowitz's opinion is that liberals who take this view may be "encouraging others to use the same means to eliminate [other] portions of the Constitution"—perhaps portions that liberals want kept.[59]

The Second Amendment's command—that the right to keep and bear arms shall not be infringed—protects individuals against even popular conceptions of the public good. The judiciary noted early in this nation's

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[53] *See* Kates, *The Limited Importance of Gun Control*, *supra* note 36, at 221 n.68, 223 nn.75 & 79, 224 nn.81 & 84 (referencing letters, papers, news articles, and debates from the eighteenth and nineteenth centuries where authors supported the right to bear arms).

[54] *See* HALBROOK, THE FOUNDER'S SECOND AMENDMENT, *supra* note 44, at 32–35 (describing eighteenth-century liberal thought on arms, militia and military reform); Shalhope, *The Ideological Origins of the Second Amendment*, *supra* note 43, at 602–04 (describing the different theories and attitudes towards arms, the individual and society from the eighteenth century); Shalhope, *The Armed Citizen in the Early Republic*, *supra* note 22, at 125, 127–33 (describing the views of Harrington, Trenchard, Moryle Marchomon Nedham, Burgh and other authors of the eighteenth century and their thoughts regarding arms being the basic themes of power and oppression).

[55] Daniel D. Polsby, *The False Promise of Gun Control*, ATLANTIC MONTHLY, Mar. 1994, at 57, 59.

[56] *See* Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 TENN. L. REV. 759, 789 (1995) (reporting Dershowitz stated in a phone interview that he hates guns).

[57] *Id.*

[58] *Id.*

[59] *Id.*

history, in *Vanhorne's Lessee v. Dorrance*,[60] that the Constitution, and not the legislature, is supreme in the United States.[61] In addition, it is well-settled that constitutional guarantees must be liberally interpreted.[62]

A. *Right to Bear Arms Not Confined to the Home*

District of Columbia v. Heller[63] struck down a handgun ban and a ban on the possession of an operable firearm in the home on Second Amendment grounds.[64] *McDonald v. City of Chicago*[65] incorporated the Second Amendment to the states.[66] The facts in *Heller* and *McDonald* involved laws that were so sweeping that a person was forbidden to keep a pistol in the home for protection.[67] The next major question was then whether the right to bear arms is confined to the home. The Supreme Court provided guidance on this issue and did not restrict the *Heller* and *McDonald* opinions to the facts. The Court interpreted the term "bear arms" to mean carrying arms for protection and refused to restrict defensive carrying to the home.[68]

Thus far, one circuit court of appeals has turned the right to bear arms outside the home into an administrative privilege that may be granted or withheld by the licensing authority.[69] However, the Seventh Circuit has held that the right to bear arms is not restricted to the home: *Moore v. Madigan*[70] voided an Illinois law that forbade defensive carrying outside

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[60] 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012 (C.C.D. Pa. 1795).

[61] *Id.* at 308.

[62] *See* Lamont v. Postmaster General, 381 U.S. 301, 308–09 (1965) (applying strict scrutiny to determine whether the government violated a constitutional freedom and declaring "[the court] cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one"); Boyd v. United States, 116 U.S. 616, 635 (1886) (declaring that "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon" and that the "constitutional provisions for the security of person and property should be liberally construed").

[63] 554 U.S. 570 (2008).

[64] *Id.* at 635.

[65] 130 S. Ct. 3020 (2010).

[66] *Id.* at 3026.

[67] *See Heller*, 554 U.S. at 628–29 (stating that the law at issue "totally bands handgun possession in the home"); *McDonald*, 130 S. Ct. at 3026 ("Chicago residents who would like to keep handguns in their homes . . . are prohibited from doing so by Chicago's firearms laws.").

[68] The holding in *Heller* was clear in that the District's ban on handgun possession in the home violates the Second Amendment. *Heller*, 544 U.S. at 635. However, in dicta, the Court also interpreted the right to "bear arms" to "guarantee the individual right to possess and carry weapons in case of confrontation," indicating that the right extends beyond the home. *Id.* at 592.

[69] *See* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 100 (2d Cir. 2012) ("[E]xtensive state regulation of handguns has never been considered incompatible with the Second Amendment . . . . This includes significant restrictions on how handguns are carried . . . and even in some instances, prohibitions on purchasing handguns.").

[70] 702 F.3d 933 (7th Cir. 2012), *rehearing en banc denied by* 708 F.3d 901 (7th Cir. 2013).

the home.[71] *Moore* is in harmony with state court decisions holding that self-defense is a constitutionally protected reason for obtaining a license to carry a firearm.[72]

The Seventh Circuit refused to judicially repeal the right to bear arms in *Moore*. Its decision was compelled by the plain words of the Second Amendment, and by *Heller* and *McDonald*. Other courts share this view. In *Woollard v. Sheridan*,[73] the district court held that Maryland's "good and substantial reason" requirement[74] for obtaining a license to carry a pistol outside the home was not reasonably adapted to the State's interest in public safety and crime prevention.[75] Thus, the law impermissibly infringed the Second Amendment right to keep and bear arms; however, that decision was reversed.[76] In *Bateman v. Perdue*,[77] the district court held that the Second Amendment right to keep and bear arms undoubtedly is not limited to the confines of the home.[78]

In *United States v. Weaver*,[79] the district court held that the Second Amendment right to bear arms extends outside the home.[80] The court noted that *Heller* acknowledged that, by the time of the founding, the right to have arms was "fundamental" and "understood to be an individual right protecting against both public and private violence."[81] Thus, the right to bear arms must be extended in some form to wherever a person could become exposed to such forms of violence.[82] *Weaver* and *Heller* noted that, from the beginning, the right to keep and bear arms has been understood to encompass not only self-defense, but also militia membership and hunting, neither of which is a home-bound activity.[83] Hence, "[c]onfining the right to the home would unduly eliminate such

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[71] *Id.* at 934, 942.

[72] *See* Schubert v. DeBard, 398 N.E.2d 1339, 1341 (Ind. App. 1980) ("We think it clear that our constitution provides our citizenry the right to bear arms for their self-defense."); Rabbitt v. Leonard, 413 A.2d 489, 491 (1979) (stating that the Connecticut Constitution gives a right to both "bear arms to defend the state . . . and he may also bear arms to defend himself").

[73] 863 F. Supp. 2d 462 (D. Md. 2012), *rev'd*, Woollard v. Gallagher, No. 12-1437, 2013 WL 1150575 (4th Cir. Mar. 21, 2013).

[74] MD. CODE ANN. PUB. SAFETY § 5-306(a)(5)(ii) (West 2013).

[75] *Woollard*, 863 F. Supp. 2d at 476, *rev'd*, Woollard v. Gallagher, No. 12-1437, 2013 WL 1150575 (4th Cir. Mar. 21, 2013).

[76] *Id.*

[77] 881 F. Supp. 2d 709 (E.D.N.C. 2012).

[78] *Id.* at 714.

[79] No. 2:09-cr-00222, 2012 U.S. Dist. LEXIS 29613 (S.D.W. Va. Mar. 7, 2012).

[80] 2012 U.S. Dist. LEXIS 29613, at *13; *see* Peterson v. Martinez, No. 11-1149, 2013 U.S. App. LEXIS 3776 (10th Cir. Feb. 22, 2013) (holding that concealed carrying is not protected by the Second Amendment or by the Privileges and Immunities Clause, but noting in dicta that the Second Amendment protects open carrying and is not confined to the home).

[81] *Weaver*, 2012 U.S. Dist. LEXIS 29613, at *11 (quoting *Heller*, 554 U.S. at 594).

[82] *Id.* at *13.

[83] *Heller*, 554 U.S. at 598; *Weaver*, 2012 U.S. Dist. LEXIS 29613, at *11–12.

purposes from the scope of the Second Amendment's guarantee."[84] It properly extends to any environment where covered activities or needs may happen, except for a few "sensitive places" discussed in *Heller*.[85]

Judge Niemeyer, writing separately in *United States v. Masciandaro*,[86] argues that the right to bear arms outside the home is plausible:

> Masciandaro also argues that he possessed a constitutional right to possess a loaded handgun for self-defense outside the home. I would agree that there is a plausible reading of *Heller* that the Second Amendment provides such a right, at least in some form. . . .
>
> Because "self-defense has to take place wherever [a] person happens to be," it follows that the right extends to public areas beyond the home. . . .
>
> Consistent with the historical understanding of the right to keep and bear arms outside the home, the *Heller* Court's description of its actual holding also implies that a broader right exists. The Court stated that its holding applies to the home, where the need "for defense of self, family, and property is *most acute*," suggesting that some form of the right applies where that need is not "most acute." Further, when the Court acknowledged that the Second Amendment right was not unlimited, it listed as examples of regulations that were presumptively lawful, those "laws forbidding the carrying of firearms in sensitive places such as *schools and government buildings*." If the Second Amendment right were confined to self-defense *in the home*, the Court would not have needed to express a reservation for "sensitive places" outside of the home.[87]

B. *Interpreting the Second Amendment*

Inferior courts have not adopted a consistent approach to analyzing Second Amendment challenges in the wake of *Heller* and *McDonald*. One approach is an intermediate scrutiny standard. Under intermediate scrutiny, the question becomes whether there is a reasonable fit between the challenged law and a substantial government objective.[88] Thus, the government bears the burden of demonstrating (1) that it has an important

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[84] *Weaver*, 2012 U.S. Dist. LEXIS 29613, at *12 (emphasis omitted).

[85] *See Heller*, 554 U.S. at 626 (describing such "sensitive places" as schools and government buildings).

[86] 638 F.3d 458 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011).

[87] *Id.* at 467–68 (citations omitted).

[88] United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010).

governmental end or interest and (2) that the end or interest is substantially served by enforcement of the law.[89] For example, in a challenge to an indictment under 18 U.S.C. § 922(g)(9) based on prior conviction of a misdemeanor crime of domestic violence, the government was required to prove under an intermediate scrutiny standard whether there was a reasonable fit under the Second Amendment between the law and a substantial government objective.[90]

The burden is on the government to substantiate the fit between its objective and the means of serving that objective. In *United States v. Carter*,[91] the defendant conditionally pled guilty to "possessing a firearm while being an unlawful user of marijuana, in violation of 18 U.S.C. § 922(g)(3)."[92] The conditional guilty plea reserved for appeal the question of whether his conviction violated his Second Amendment right to keep and bear arms.[93] Acknowledging his marijuana use, the defendant contended "he was nonetheless entitled, under the Second Amendment, to purchase the guns for the lawful purpose of protecting himself . . . in his home."[94] "Because the right of self-defense in the home is the central component of the Second Amendment protection, and is fundamental and necessary to the system of ordered liberty," the defendant urged the appellate court to employ strict scrutiny in reviewing his claim that the statute infringed his Second Amendment rights.[95] Applying the intermediate scrutiny standard, the appellate court concluded that Congress had an important objective for enacting the drug-user statute to reduce gun violence, and it might have reasonably served that objective by disarming drug users and addicts.[96] Nonetheless, the appellate court found that the government failed to make the record to substantiate the fit between its objective and the means of serving that objective.[97] "Without pointing to any study, empirical data, or legislative findings, [the government] merely argued . . . that the fit was a matter of common sense."[98] As a result, the judgment was vacated, and the case was remanded for further proceedings.[99]

Another approach is a two-step inquiry, asking first "whether the challenged law imposes a burden on conduct falling within the scope of the

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[89] *Id.*
[90] *Id.* at 677, 683.
[91] 669 F.3d 411 (4th Cir. 2012).
[92] *Id.* at 413.
[93] *Id.*
[94] *Id.* at 414.
[95] *Id.* (citations omitted).
[96] *Id.* at 421.
[97] *Id.*
[98] *Id.* at 419.
[99] *Id.* at 421.

Second Amendment's guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification."[100] If it does not, then the challenged law is valid.[101] If it does (regulation burdens conduct that falls within the scope of the Second Amendment's protections), the court moves to the second step of applying an appropriate form of means-end scrutiny.[102] However, the court in *United States v. Carpio-Leon*[103] cautioned that "[i]n reaching our conclusion that illegal aliens do not belong to the class of law-abiding members of the political community to whom the protection of the Second Amendment is given, we do not hold that any person committing any crime automatically loses the protection of the Second Amendment."[104]

In *National Rifle Association of America v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*,[105] the Fifth Circuit stated that a two-step inquiry has emerged as the prevailing approach to evaluating Second Amendment challenges to firearm laws.[106]

> [T]he first step is to determine whether the challenged law impinges upon a right protected by the Second Amendment—that is, whether the law regulates conduct that falls within the scope of the Second Amendment's guarantee; the second step is to determine whether to apply intermediate or strict scrutiny to the law, and then to determine whether the law survives the proper level of scrutiny.[107]

The court adopted a version of this two-step approach in the *National Rifle Association of America* opinion.[108]

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[100] *Chester*, 628 F.3d at 680 (citation omitted) (internal quotations marks omitted).

[101] *Id.*

[102] *Id.*

[103] 701 F.3d 974 (4th Cir. 2012).

[104] *Id.* at 981.

[105] 700 F.3d 185 (5th Cir. 2012).

[106] *Id.* at 194.

[107] *Id.*; *see also* United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 375 (2012) ("We find this two-pronged approach appropriate and, thus, adopt it in this Circuit."); Heller v. Dist. of Columbia, 670 F.3d 1244, 1252 (D.C. Cir. 2011) ("We accordingly adopt, as have other circuits, a two-step approach to determining the constitutionality of the District's gun laws."); Ezell v. City of Chicago, 651 F.3d 684, 704 (7th Cir. 2011) (applying two-part approach); *Chester*, 628 F.3d at 680 ("[A] two-part approach to Second Amendment claims seems appropriate under *Heller*."); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010) (applying two-part approach suggested in *Heller*); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) ("As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges."). *But see* United States v. Skoien, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc) (eschewing the two-step framework and resisting the "'levels of scrutiny' quagmire," but applying intermediate scrutiny to a categorical restriction).

[108] *Nat'l Rifle Ass'n of Am., Inc.*, 700 F.3d at 194.

In *National Rifle Association of America*, the court agreed with the "prevailing view that the appropriate level of scrutiny 'depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.'"[109] "[A] 'severe burden on the core Second Amendment right of armed self-defense should require a strong justification,' but 'less severe burdens on the right' and 'laws that do not implicate the central self-defense concern of the Second Amendment[] may be more easily justified.'"[110] In *Heller*, the D.C. Circuit stated that "a regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify."[111] The *National Rifle Association of America* opinion argued that "the analysis turns on 'the character of the Second Amendment question presented'—that is, 'the nature of a person's Second Amendment interest [and] the extent to which those interests are burdened by government regulation.'"[112]

> A regulation that threatens a right at the core of the Second Amendment—for example, the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family—triggers strict scrutiny. A less severe regulation—a regulation that does not encroach on the core of the Second Amendment—requires a less demanding means-ends showing. This more lenient level of scrutiny could be called "intermediate" scrutiny, but, regardless of the label, this level requires the government to demonstrate a "reasonable fit" between the challenged regulation and an "important" government objective."[113]

Intermediate scrutiny requires the government to demonstrate that the regulation is reasonably adapted to a substantial governmental interest. "This 'intermediate' scrutiny test must be more rigorous than rational basis review, which *Heller* held 'could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right' such as 'the right to keep and bear arms.'"[114] In *Heller*, Justice Antonin Scalia opined that "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no

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[109] *Id.* at 195 (quoting *Chester*, 628 F.3d at 682).
[110] *Id.* (quoting *Chester*, 628 F.3d at 682).
[111] *Heller*, 670 F.3d at 1257.
[112] *Nat'l Rifle Ass'n of Am., Inc.*, 700 F.3d at 195 (quoting *Masciandaro*, 638 F.3d at 470).
[113] *Id.* (citations omitted).
[114] *Id.* (quoting *Heller*, 554 U.S. at 628 n.27).

effect."[115]

Furthermore, the Seventh Circuit in *Ezell v. City of Chicago*[116] stated that "[i]f the government cannot establish this—if the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected—then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights."[117]

> *McDonald* emphasized that the Second Amendment "limits[,] but by no means eliminates," governmental discretion to regulate activity falling within the scope of the right. Deciding whether the government has transgressed the limits imposed by the Second Amendment—that is, whether it has "infringed" the right to keep and bear arms—requires the court to evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve. . . . [T]he rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right.[118]

Some courts assess the validity of a law based on a historical analysis. This approach was used by the First Circuit in a challenge to a federal law prohibiting, with exceptions, access to handguns by juveniles:

> We have evaluated this prohibition in light of the state laws of the nineteenth century regulating juvenile access to handguns on the ground that their possession can pose a serious threat to public safety. We have evaluated evidence that the founding generation would have regarded such laws as consistent with the right to keep and bear arms. Therefore, we have concluded that this law, with its narrow scope and its exceptions, does not offend the Second Amendment.[119]

These cases, however, do not preclude an as-applied Second Amendment challenge to a firearm law.[120] Such a challenge could be used even in a presumptively constitutional felon-in-possession-of-a-firearm case. Courts recognize that the possession-of-a-firearm-by-a-felon

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[115] *Heller*, 554 U.S. at 628 n.27.

[116] 651 F.3d 684 (7th Cir. 2011).

[117] *Id.* at 703.

[118] *Id.* (citations omitted).

[119] United States v. Rene E., 583 F.3d 8, 16 (1st Cir. 2009).

[120] *See* United States v. Pruess, 703 F.3d 242, 247 (4th Cir. 2012) (acknowledging that an as-applied challenge to the Second Amendment could succeed).

statute[121] may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent, and whose convictions are old.[122] The harshness of a felony conviction for a regulatory offense requiring no criminal intent has been acknowledged, and the court opined that "application for a Presidential pardon would seem to be justified."[123] But a pardon is a matter of discretion whereas the right to keep and bear arms is a positive right.

C. *Modern Arms Are Protected by the Second Amendment*

What arms are protected? Legislative proposals have been made to ban certain modern firearms, usually semiautomatics. The Second Amendment remains an obstacle to these proposals. The *Heller* Court stated the following:

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the *Second Amendment*. We do not interpret constitutional rights that way. Just as the *First Amendment* protects modern forms of communications and the *Fourth Amendment* applies to modern forms of search, the *Second Amendment* extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.[124]

These legislative proposals usually apply the label "assault firearm" or "assault weapon" to the class of firearms targeted for banning. They exploit ignorance according to a report from a firearm prohibition organization. "The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons."[125] Therefore, it is helpful to look at how firearms are categorized by experts rather than by politicians.

California enacted the first "assault weapon" ban. In California's statute, the term "assault weapon" became so elastic as to apply to a revolving firearm (shotgun) and even a single shot firearm (shotgun).[126] Precise definitions are necessary. An automatic (a machine gun) is a firearm design that feeds cartridges, fires, and ejects cartridge cases so long

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[121] 18 U.S.C. § 922(g)(1) (2006).
[122] United States v. Williams, 616 F.3d 685, 693 (7th Cir. 2010).
[123] United States v. Ruisi, 460 F.2d 153, 157 (2d Cir. 1972).
[124] *Heller*, 554 U.S. at 582 (emphasis added) (citations omitted).
[125] JOSH SUGARMANN, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA 26 (1988).
[126] CAL. PENAL CODE §§ 12276(c)(2), (3) (West 1991) (repealed 2012).

as the trigger remains fully depressed and there are cartridges in the feed system.[127] A semiautomatic is a repeating firearm requiring a separate pull of the trigger for each shot fired; it uses the energy of discharge to perform a portion of the operating or firing cycle (usually the loading portion).[128] The military definition of an assault rifle is thus: "Assault rifles are short, compact, selective-fire weapons that fire a cartridge intermediate in power between submachine gun and rifle cartridges. Assault rifles have mild recoil characteristics and, because of this, are capable of delivering effective full automatic fire at ranges up to 300 meters."[129] A submachine gun is a full automatic or selective-fire firearm chambered for a pistol cartridge.[130] An automatic rifle is a full automatic or selective-fire rifle chambered for a full power rifle cartridge.[131] Machine pistols differ from sub machine guns only in size; they are quite compact.[132]

Semiautomatic firearms are commonly possessed by law-abiding people.[133] For example, handgun manufacturing statistics for 1986 to 2009 from the Bureau of Alcohol, Tobacco, Firearms, and Explosives show that the majority of handguns manufactured in the United States are semiautomatic.[134] By 2009, revolvers made up only 22% of the handguns manufactured.[135] Semiautomatic firearms are not machine guns, and they are commonly possessed and used for lawful purposes, such as self-defense. Consequently, semiautomatic firearms are protected by the common-use test enunciated in *Heller*.

What test is applied by inferior courts to see which arms are protected? After the Supreme Court's *Heller* decision in 2008 came *Heller II* from the D.C. Circuit.[136] In *Heller II*, the court recognized a limitation on the right to keep and carry arms, namely that the sorts of arms protected are those in

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[127] GLOSSARY OF THE ASS'N OF FIREARM AND TOOLWORK EXAMINERS 2 (2d ed. 1985).

[128] *Id.* at 3.

[129] HAROLD E. JOHNSON, SMALL ARMS IDENTIFICATION AND OPERATION GUIDE—EURASIAN COMMUNIST COUNTRIES 105 (1976); *see also* GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 67 (1991) (explaining that assault rifles have intermediate power for firing ammunition); Keith R. Fafarman, *State Assault Rifle Bans and the Militia Clauses of the United States Constitution*, 67 IND. L.J. 187, 187 n.2 (1991) (describing the characteristics of assault rifles); Eric C. Morgan, *Assault Rifle Legislation: Unwise and Unconstitutional*, 17 AM. J. CRIM. L. 143, 146–47 (1990) (discussing the emergence of rifles during the Second World War that have longer effective ranges with more manageable levels of recoil).

[130] IAN V. HOGG & JOHN WEEKS, MILITARY SMALL ARMS OF THE 20TH CENTURY 13, 69 (5th ed. 1985).

[131] *Id.* at 158–59.

[132] *See id.* at 11, 31, 40, 53, 67 (discussing different types of machine pistols).

[133] Rinzler v. Carson, 262 So.2d 661, 666 (Fla. 1972).

[134] U.S. DEP'T OF JUSTICE BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES 2011, at 11 (2011), *available at* http://www.atf.gov/publications/firearms/121611-firearms-commerce-2011.pdf.

[135] *Id.*

[136] Heller v. Dist. of Columbia, 670 F.3d 1244, 1247–48 (D.C. Cir. 2011).

common use at the time for lawful purposes like self-defense.[137] The *Heller II* court stated this limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons.[138] Where the prohibitions apply only to particular classes of weapons, the court must also ask whether the prohibited weapons are typically possessed by law-abiding citizens for lawful purposes. If not, then they are not protected by the Second Amendment.

In *Heller II*, the court noted "[w]e are not aware of evidence that prohibitions on either semi-automatic rifles or large-capacity magazines are longstanding and thereby deserving of a presumption of validity."[139] Consequently, the presumption that a "longstanding" regulation does not abridge the Second Amendment would not apply. The court further held the following:

> We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in "common use," as the plaintiffs contend. Approximately 1.6 million AR-15s alone have been manufactured since 1986, and in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market. As for magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000. There may well be some capacity above which magazines are not in common use but, if so, the record is devoid of evidence as to what that capacity is; in any event, that capacity surely is not ten.[140]

Nevertheless, based upon the record presented, the *Heller II* court declined to announce with certainty that these firearms are commonly used or are useful for self-defense or hunting, and, therefore, declined to hold that the prohibitions of certain semi-automatic rifles and magazines holding more than ten rounds meaningfully affect the right to keep and bear arms.[141] The court chose not to resolve that question, however, because even assuming they do impinge upon the right protected by the Second Amendment, the court held that intermediate scrutiny is the appropriate standard of review and the prohibitions survive that

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[137] *Id.* at 1260.
[138] *Id.* at 1252.
[139] *Id.* at 1260.
[140] *Id.* at 1261.
[141] *Id.* at 1260–61.

standard.[142] This holding rejects what the Supreme Court held in *Heller*. The Supreme Court labeled as frivolous the claim that only those arms in existence in the eighteenth century are protected by the Second Amendment.

Judge Kavanaugh in his dissent in *Heller II* argued that "[w]hether we apply the *Heller* history- and tradition-based approach or strict scrutiny or even intermediate scrutiny, D.C.'s ban on semi-automatic rifles fails to pass constitutional muster. D.C.'s registration requirement is likewise unconstitutional."[143]

Heller II is a reminder that, while the Constitution promises the people a right to keep and bear arms that will not be infringed, some courts will ignore the Constitution's language and the holdings from the Supreme Court so as to reach what they feel is the desired result.

V. CONCLUSION

The Second Amendment expressly guarantees a "right to keep and bear arms." Based on the criminological evidence, there are lower court decisions that do not meet the substantial relationship test that the courts have established and claim to follow. The criminological studies show that the goals of the government are either illegitimate or without substantial relationship between the goals and the legislation. Hence, it is not surprising that Professor Johnson, in *Firearms Policy and the Black Community*, concludes that the average law-abiding gun owner, regardless of skin color, poses no threat.

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[142] *Id.* at 1261–63.

[143] *Id.* at 1285 (Kavanaugh, J., dissenting).