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The Right to Arms and the American Philosophy of Freedom *Nelson Lund, JD, PhD*

Abstract

The Founders of our republic did not think an armed citizenry was the product of a childish infatuation with guns or a response to life on the frontier, and the philosophers who guided them can help us to see why the right to arms continues to deserve its place in our fundamental law. The U.S. Constitution, including the Second Amendment, is a device designed to frustrate the domineering tendencies of the politically ambitious, and the right to keep and bear arms is a vital element of the liberal order that our Founders handed down to us. The Second Amendment also plays an important role in fostering the kind of civic virtue that resists the cowardly urge to trade liberty for an illusion of safety. Armed citizens take responsibility for their own security, thereby exhibiting and cultivating the self-reliance and vigorous spirit that are ultimately indispensable for genuine self-government.

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.

—Constitution of the United States,
Amendment II

The right to keep and bear arms is a vital element of the liberal order that our Founders handed down to us. They understood that those who hold political power will almost always strive to reduce the freedom of those they rule and that many of the ruled will always be tempted to trade their liberty for empty promises of security. The causes of these political phenomena are sown in the nature of man.

The U.S. Constitution, including the Second Amendment, is a device designed to frustrate the domineering tendencies of the politically ambitious. The Second Amendment also plays an important role in fostering the kind of civic virtue that resists the cowardly urge to trade liberty for an illusion of safety. Armed citizens take responsibility for their own security, thereby exhibiting and cultivating the self-reliance and vigorous spirit that are ultimately indispensable for genuine self-government.

While much has changed since the 18th century, for better and for worse, human nature has not changed. The fundamental principles of our regime and the understanding of human nature on which those principles are based can still be grasped today. Once grasped, they can be defended. Such a defense, however, demands an appreciation of the right to arms that goes beyond the legalistic and narrowly political considerations that drive contemporary gun-control debates.

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Regrettably, too many American opinion leaders, forgetting or rejecting the reasons that justify this right, have been extremely uncomfortable with the Second Amendment. The progressive left, for example, has largely been united in promoting restrictions on civilian access to firearms. Lawyers as well, who Tocqueville famously thought could serve America as a kind of democratic aristocracy,¹ have largely been hostile to gun rights. Until 2008, federal judges—our most elite corps of attorneys—had never once sustained a Second Amendment challenge to a government regulation; state courts, for their part, had generally upheld gun regulations under legal tests that practically gave legislatures a blank check;² and the organized bar has lobbied for decades in favor of more restrictive controls on firearms.³

Conservative intellectuals have offered little resistance to conventional elite opinion. Two prominent and able pundits, for example, have attacked the Constitution itself. Appalled by what he calls toleration of the carnage resulting from the uncontrolled private ownership of guns, George Will wants to see the “embarrassing” Second Amendment repealed:

The Bill of Rights should be modified only with extreme reluctance, but America has an extreme crisis of gunfire.... Gun control advocates who want to square their policy preferences with the Constitution should squarely face the need to deconstitutionalize the subject by repealing the embarrassing amendment.⁴

Similarly, Charles Krauthammer laments that “[u]nless you are prepared to confiscate all existing firearms, disarm the citizenry and repeal the

Second Amendment, it’s almost impossible to craft a law that will be effective.”⁵ Which is exactly what he thinks should be done: “Ultimately, a civilized society must disarm its citizenry if it is to have a modicum of domestic tranquility of the kind enjoyed in sister democracies like Canada and Britain.”⁶ For that reason, he supports *ineffective* gun regulations because they will “desensitize the public to the regulation of weapons in preparation for their ultimate confiscation.”⁷

Most of the credit for preserving the liberty to keep and bear arms belongs to the obstinate resistance of ordinary people who have remained defiantly stubborn in the face of elites—progressive and conservative alike—who fear and distrust an armed citizenry.

The Second Amendment will not be repealed through a constitutional amendment any time soon. Most of the credit for preserving the liberty to keep and bear arms belongs to the obstinate resistance of ordinary people who have remained defiantly stubborn in the face of elites—progressive and conservative alike—who fear and distrust an armed citizenry. The National Rifle Association is probably the largest genuinely grassroots organization in the nation, and its members vote their beliefs.

Despite persistent elite enthusiasm for disarmament schemes, both the law and public policy

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1. Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), vol. 1, pt. 2, chap. 8, pp. 251-258.
 2. See Adam Winkler, “Scrutinizing the Second Amendment,” *Michigan Law Review*, Vol. 105, No. 4 (February 2007), pp. 683-733.
 3. See American Bar Association, Standing Committee on Gun Violence, American Bar Association, “Policy,” www.americanbar.org/groups/committees/gun_violence/policy.html (accessed September 14, 2016).
 4. George F. Will, “How Embarrassing: The Constitution Protects the Guns that Kill,” *Baltimore Sun*, March 21, 1991, http://articles.baltimoresun.com/1991-03-21/news/1991080067_1_militia-gun-ownership-gun-control (accessed September 19, 2016).
 5. Charles Krauthammer, “The Roots of Mass Murder,” *The Washington Post*, December 20, 2012, https://www.washingtonpost.com/opinions/charles-krauthammer-the-roots-of-mass-murder/2012/12/20/e4d99594-4ae3-11e2-b709-667035ff9029_story.html?utm_term=.71acc47e7eb1 (accessed September 19, 2016).
 6. Charles Krauthammer, “Disarm the Citizenry. But Not Yet,” *The Washington Post*, April 5, 1996, https://www.washingtonpost.com/archive/opinions/1996/04/05/disarm-the-citizenry-but-not-yet/8efbb5da-fd5e-48c9-8a83-0fb41c728338/?utm_term=.11166a82e007 (accessed September 19, 2016).
 7. *Ibid.*
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have moved in the opposite direction during recent decades. Two developments stand out.

- In the 1980s, a tiny group of lawyers began to publish scholarly analyses debunking the dismissive interpretation of the Second Amendment that dominated courts in the 20th century. Notably, almost none of this pioneering scholarship was carried out by professional academics in the law schools.⁸
- In 1987, Florida became the first jurisdiction with large urban population centers to enact a statute permitting almost all law-abiding adults to obtain a concealed-carry license. Notwithstanding near-hysterical prophecies from many police chiefs and other putative experts, violent crime went down instead of up, and license holders almost never misused their weapons.⁹ Florida's successful experiment soon spread to other states, and social scientists have yet to find evidence of adverse effects on public safety.¹⁰ It is now harder than it once was to stampede legislatures into enacting feel-good gun-control measures that do nothing to reduce crime.

Progressive elites have not surrendered in the face of observable facts and reasoned analysis, as we can see from their reflexive demands for new gun regulations in response to almost every well-publicized shooting. Although the right to arms has not been under much political pressure recently, that could change, especially as an increasingly white-collar population loses touch with our cultural traditions of hunting and self-reliance. The vagaries of partisan elections could also restore the Democratic Party to the dominance it once enjoyed, and gun control is an important agenda item for the leadership of that party.

With or without such political shifts, the legal landscape could change dramatically and perhaps

very quickly. Two recent U.S. Supreme Court decisions (discussed below) are at best a small step toward a jurisprudence that could durably protect the right to arms against hostile political spasms. Progress toward a settled body of case law protecting this constitutional right could easily be arrested and quite possibly reversed with just one new appointment to the Court.

Scholarship proving that a robust right to arms is enshrined in the original meaning of the Constitution will not stop the courts from interpreting the Second Amendment into oblivion. Showing that restricting the rights of law-abiding citizens has yet to contribute to public safety will not prevent politicians from claiming that new and even more restrictive laws are all we need.

Many Americans, and not just those on the left, misunderstand the liberal principles on which the right to keep and bear arms rests. As we have seen, even well-educated political conservatives can vigorously deny the value of the Second Amendment, and the silence of many other conservative intellectuals suggests a widespread ignorance about its continuing importance. Merely acknowledging that this right is part of America's tradition will not keep the tradition alive. Scholarship proving that a robust right to arms is enshrined in the original meaning of the Constitution will not stop the courts from interpreting the Second Amendment into oblivion. Showing that restricting the rights of law-abiding citizens has yet to contribute to public safety will not prevent

8. See Nelson Lund, "Outsider Voices on Guns and the Constitution," review of Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (Westport, CT: Praeger Publishers, 1998), *Constitutional Commentary*, Vol. 17, Issue 3 (Winter 2000), pp. 701-720.

9. In Florida, the revocation rate for firearms violations over nearly three decades has been 0.0003 percent. Even the police have higher rates of firearms violations (and higher overall crime rates) than permit holders have. See Crime Prevention Research Center, "Concealed Carry Revocation Rates by Age," August 4, 2014, p. 4, <http://crimeresearch.org/wp-content/uploads/2014/08/Concealed-Carry-Revocation-rates-by-age.pdf> (accessed September 14, 2016).

10. See, for example, John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws*, 3rd ed. (Chicago: University of Chicago Press, 2010).

politicians from claiming that new and even more restrictive laws are all we need.

People who do not understand why they should defend the right to arms are not likely to be its most effective defenders. For too long, conservative intellectuals have given insufficient attention to a principled defense of this right. Alexis de Tocqueville, a favorite among conservative thinkers, warned against democracy's drift toward new and softer forms of despotism. The left wants us to believe that resistance is futile, and conservatives need to overcome the effete sensibility that abhors "America's frontier infatuation with guns."¹¹ The Founders of our republic did not think an armed citizenry was the product of a childish infatuation or a response to life on the frontier, and the philosophers who guided them can help us to see why the right to arms continues to deserve its place in our fundamental law.

The Right to Arms in the Constitution

In order to understand the meaning and value of the right to keep and bear arms, it is neither necessary nor sufficient to address the wide range of legal questions raised by the text of the Second Amendment. Nonetheless, it is important to have a basic understanding of its history and the current state of the law.

The fundamental importance of the right to arms was not an American discovery. Like our own charter of individual liberties, the English Bill of Rights protected the right to keep and bear arms.¹² William Blackstone (1723–1780), the leading authority on English law for Americans of the Founding generation, called it one of the indispensable auxiliary rights "which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property."¹³ This right, he said, is rooted in "the natural right of resistance and self-preservation, when the sanctions of

society and laws are found insufficient to restrain the violence of oppression."¹⁴ Blackstone made no distinction between the violence of oppression that results from government's failure to control common criminals and the oppression that government itself may undertake.

The Constitution proposed by the Philadelphia Convention contained no express protection of the right to arms or of many other fundamental rights. The new government was to be one of limited and enumerated powers, and most of the Framers thought there was no need to expressly protect rights that the federal government would not be empowered to infringe.

With respect to arms, however, there was a special problem. The federal government was given almost plenary authority to create a standing army (consisting of full-time paid troops) and to regulate and commandeer the state-based militias (which comprised most able-bodied men). Anti-Federalists strongly objected to this massive transfer of power from the state governments, which threatened to deprive the people of their principal defense against federal usurpation. Federalists responded that fears of federal oppression were overblown, in part because the American people were already armed and would be almost impossible to subdue through military force.¹⁵

Implicit in the debate between Federalists and Anti-Federalists were two shared assumptions: All agreed that the proposed Constitution would give the new federal government almost total legal authority over the army and militia, and nobody argued that the federal government should have any authority to disarm the citizenry. Federalists and Anti-Federalists disagreed only about whether the existing armed populace could adequately deter federal oppression.

The Second Amendment conceded nothing to the Anti-Federalist desire to sharply curtail the military

11. Krauthammer, "Disarm the Citizenry. But Not Yet."

12. Bill of Rights, 1 Wm. & M., 2d Sess., c. 2, December 16, 1689, in University of Chicago and Liberty Fund, *The Founders' Constitution*, Bill of Rights, Document 1, http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss1.html (accessed September 19, 2016). Like other provisions in the English Bill of Rights, the right-to-arms provision constrained only the executive, not the legislature, but the right it protected was one belonging to individuals.

13. William Blackstone, *Commentaries on the Laws of England*, 1765, bk. 1, p. *136.

14. *Ibid.*, p. *139.

15. See, for example, James Madison, *Federalist* No. 46, January 29, 1788, in University of Chicago and Liberty Fund, *The Founders' Constitution*, Article 1, Section 8, Clause 12, Document 25.

power of the federal government, which would have required substantial changes in the original Constitution. Instead, it merely aimed to prevent the new government from disarming American citizens through its power to regulate the militia. Congress might have done so, for example, by ordering that all weapons be stored in federal armories until they were issued for use in performing military or militia duties.¹⁶

The Second Amendment conceded nothing to the Anti-Federalist desire to sharply curtail the military power of the federal government. Instead, it merely aimed to prevent the new government from disarming American citizens through its power to regulate the militia.

Unlike many people in our time, the Founding generation would not have been puzzled by the text of the Second Amendment. It protects a “right of the people”: i.e., a right of the individuals who are the people.¹⁷ It was not meant to protect a right of state governments to control their militias; that right had already been relinquished to the federal government. A “well regulated Militia” is, among other things, one that is not inappropriately regulated. A federal regulation disarming American citizens would have been considered every bit as inappropriate as one abridging the freedom of speech or prohibiting the free exercise of religion. The Second Amendment forbids the inappropriate regulation of weapons, just as the First Amendment forbids inappropriate restrictions on speech and religion.

In the decades after our Founding, the Supreme Court of the United States held that the Bill of Rights constrains only the federal government, not

the states,¹⁸ and Congress refrained from enacting laws that might have violated the Second Amendment. State governments did adopt some regulations, which met with mixed responses from state courts applying their state constitutions.¹⁹

During Reconstruction, Congress focused its attention on one particularly obnoxious practice: the attempted disarmament of freedmen in states that had belonged to the Confederacy. After the passage of several federal statutes aimed at addressing this and other forms of racial discrimination, the nation adopted the Fourteenth Amendment. One of its clauses provides: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” There is considerable historical evidence, though it is not absolutely conclusive, that the Privileges or Immunities Clause was meant to protect the individual liberties in the Bill of Rights from infringements by state and local governments. The Supreme Court, however, rejected this interpretation in an early case.²⁰

During the 20th century, both state and federal governments became more aggressive in their regulation of weapons, just as they did in regulating many other areas of life. Congress, for example, enacted a series of statutes imposing onerous taxes, regulations, and supply restrictions on certain disfavored weapons, including short-barreled shotguns, ordinary rifles with a harmless “military” appearance, and large-capacity magazines. Congress also imposed lifetime firearms disabilities on felons (including people convicted of nonviolent crimes like tax evasion and insider trading) and created nominally gun-free zones around schools and on large parcels of federally controlled property, including the national parks. States and localities went farther. Some, for example, imposed complete bans on the possession of handguns, and many made it virtually impossible for law-abiding citizens to carry a gun for self-protection.

16. See Nelson Lund, “Promise and Perils in the Nascent Jurisprudence of the Second Amendment,” *Georgetown Journal of Law & Public Policy* (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2675323 (accessed September 15, 2016).

17. This is the same term used in the First and Fourth Amendments to identify rights of individuals.

18. *Barron v. Baltimore*, 32 U.S. 243 (1833). The states were therefore left free to regulate weapons, speech, religion, and countless other matters as they saw fit.

19. For a discussion of the principal cases, see Nelson Lund, “The Second Amendment, *Heller*, and Originalist Jurisprudence,” *UCLA Law Review*, Vol. 56, No. 5 (June 2009), pp. 1359-1362.

20. *United States v. Cruikshank*, 92 U.S. 542 (1876).

During this period, the federal courts rejected every Second Amendment challenge brought before them. State laws remained immune under the Supreme Court's interpretation of the Constitution, notwithstanding the fact that most other provisions of the Bill of Rights were applied to the states under the Fourteenth Amendment's Due Process Clause.²¹ State courts, for their part, were generally very reluctant to invalidate weapons regulations under their state constitutions.²²

In 2008, the Supreme Court changed direction in *District of Columbia v. Heller*,²³ which invalidated a federal law that forbade nearly all civilians to possess a handgun in the nation's capital.²⁴ A 5–4 majority ruled that the language and history of the Second Amendment shows that it protects a private right of individuals to have arms for their own defense, not a right of the states to maintain a militia.²⁵

Two years later, in *McDonald v. City of Chicago*,²⁶ the Court struck down a similar handgun ban at the state level, again by a 5–4 vote. Four justices relied on judicial precedents under the Fourteenth Amendment's Due Process Clause, while Justice Clarence Thomas rejected those precedents in favor of reliance on the Privileges or Immunities Clause. All five members of the majority concluded that the Fourteenth Amendment protects the same individual right that is protected from federal infringement by the Second Amendment.²⁷

These decisions are significant but very narrow, for the Court technically ruled only that government may not ban the possession of handguns

by civilians in their homes. *Heller* also proposed a nonexclusive list of “presumptively lawful” regulations, including bans on the possession of firearms by felons and the mentally ill, bans on carrying firearms in “sensitive places” such as schools and government buildings, laws restricting the commercial sale of arms, bans on the concealed carry of firearms, and bans on weapons “not typically possessed by law-abiding citizens for lawful purposes.”²⁸ Many issues remain open, including questions about the right to bear arms for self-protection outside one's home, where the vast majority of violent crimes occur.

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21. This clause provides that no state shall “deprive any person of life, liberty, or property without due process of law.” For a brief review of the Supreme Court doctrine that has been used to apply Bill of Rights provisions to the states, see Nelson Lund and John O. McGinnis, “Lawrence v. Texas and Judicial Hubris,” *Michigan Law Review*, Vol. 102, No. 7 (June 2004), pp. 1557–1573.

22. For a review of the case law, see Winkler, “Scrutinizing the Second Amendment.”

23. 554 U.S. 570 (2008).

24. The only significant precedent before this time was *United States v. Miller*, 307 U.S. 174 (1939). The Court's short and ambiguous opinion declined to hold that short-barreled shotguns are protected by the Second Amendment.

25. The dissenters disagreed. They concluded that the Second Amendment protects only “the right of the people of each of the several States to maintain a well-regulated militia.” They also argued that even if the Second Amendment were mistakenly interpreted to protect an individual right to have arms for self-defense, it should at the very least allow the government to ban handguns in high-crime urban areas.

26. 561 U.S. 742 (2010).

27. The four dissenters maintained that the Court should not apply the Second Amendment to the states. For an analysis of their arguments, see Nelson Lund, “Two Faces of Judicial Restraint (Or Are There More?) in *McDonald v. City of Chicago*,” *Florida Law Review*, Vol. 63, No. 3 (May 2011), pp. 514–532.

28. *District of Columbia v. Heller*, 554 U.S. at 625–627 and note 26. For a detailed discussion of the Court's opinion, see Lund, “The Second Amendment, *Heller*, and Originalist Jurisprudence,” pp. 1359–1362.

Philosophic Basis of the Right to Keep and Bear Arms

The Second Amendment was not just a sop to Anti-Federalists who worried about an excessively powerful federal military establishment. Nor is it a dangerous residuum from a bygone era in which successful armed resistance to an oppressive government was a living memory. Today, as in the time of Blackstone and our Founding generation, it is an indispensable aid to securing the fundamental rights of personal security, personal liberty, and private property. If we relinquish it, we will take a significant step away from the Founding principles of our nation. When we permit the courts to erode it, we take a significant step away from genuine self-government. When conservative intellectuals disparage it, they facilitate the left's crusade against republican virtue and limited government.

A closer look at the principles summarized in the Declaration of Independence will help to clarify the philosophic basis of both our right to keep and bear arms and our corresponding duty to defend it:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed,—That whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.²⁹

The founding principle of liberal political theory is the unalienable right to life—or, more precisely, the right of self-preservation. It is derived directly from nature and universally acknowledged even by those who contend that political duties arise solely from convention or agreement. In order to understand

the logic that leads to the conclusions set forth in the Declaration, it is helpful to begin with Thomas Hobbes (1588–1679), who articulated the primacy of this right with unsurpassed audacity:

The RIGHT OF NATURE, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto.³⁰

This singular natural right implies for Hobbes a license in the state of nature to do anything whatever that might contribute to one's own preservation:

For every man is desirous of what is good for him, and shuns what is evil, but chiefly the chiefest of natural evils, which is death; and this he doth by a certain impulsion of nature, no less than that whereby a stone moves downward. It is therefore neither absurd nor reprehensible, neither against the dictates of true reason, for a man to use all his endeavours to preserve and defend his body and the members thereof from death and sorrows. But that which is not contrary to right reason, that all men account to be done justly, and with right. Neither by the word *right* is anything else signified, than that liberty which every man hath to make use of his natural faculties according to right reason. Therefore the first foundation of natural right is this, that *every man as much as in him lies endeavour to protect his life and members*.³¹

In a world of scarce resources, where everyone has the same natural right arising from the same natural aversion to death and sorrows, Hobbes saw a smoldering war of all against all as the necessary consequence. Reason therefore dictates to everyone an agreement to erect an absolute sovereign (consisting of one or more individuals) whose own interest

29. In the nature of things, first principles cannot be demonstrated. The signers of the Declaration accordingly “hold”—i.e., opine or assert—that these four propositions are both true and self-evident. They were well aware that all four had been challenged by serious philosophers, but they also knew that these principles were broadly accepted in America.

30. Thomas Hobbes, *Leviathan* (Clarendon: Oxford University Press, 1909), chap. 14, ¶ 1.

31. Thomas Hobbes, *De Cive*, in *Man and Citizen*, ed. Bernard Gert, (Hackett Publishing, 1972), bk.1, ¶ 7. Emphasis in original.

will be to maintain peace. Except for the right to resist an imminent threat to one's life,³² natural liberty must be completely relinquished in exchange for the protection offered by the peace that the sovereign enforces. Any sovereign who prevents a lapse into the state of nature is preferable to such anarchy. It follows, accordingly, that rational self-interested obedience is owed to one's sovereign, however that ruler came to power and however arbitrarily he or they may rule.

Although progressives do not advocate the abolition of periodic elections or all of the constitutional formalities that protect individual rights, they do promote a never-ending expansion of government control of the lives of the citizenry, including disarmament as a tool for keeping the peace.

In some important ways, this Hobbesian view of politics and government has been revived by the modern progressive left. Although progressives do not advocate the abolition of periodic elections or all of the constitutional formalities that protect individual rights, they do promote a never-ending expansion of government control of the lives of the citizenry, including disarmament as a tool for keeping the peace.³³ Notwithstanding a gauzy solicitude for certain fashionable "lifestyle freedoms" and for certain favored minority groups, the left ultimately refuses to recognize any principled limits on government power. When progressives get control of the levers of power—whether through the presidency, the legislature, or the courts—they consistently display their contempt for limits on government's power to coerce adherence to whatever the left's

agenda of the moment may be. The war on the right to keep and bear arms is only one example of a despotic spirit that has countless other manifestations.

John Locke (1632–1704), who is the true father of our Declaration of Independence, rejected the Leviathan state. He accepted Hobbes's essential claim that the preeminent human desire to avoid death and sorrows drives us to leave the state of nature by agreeing to the institution of political rule. At the same time, however, he identified a crucial error in the logic of Hobbes's argument. Because Hobbes plausibly thought that self-interest would prompt the sovereign to promote peaceable relations among its subjects, he concluded that it is always safer to trust the sovereign with absolute power than to risk a descent into anarchy or civil war. Locke acknowledged that sovereigns would endeavor to prevent their subjects from killing one another, as farmers do with their livestock, but he rejected the conclusion drawn by Hobbes and other defenders of absolute sovereignty:

They are ready to tell you that it deserves death only to ask after safety. Betwixt subject and subject, they will grant, there must be measures, laws, and judges, for their mutual peace and security; but as for the ruler, he ought to be absolute and is above all such circumstances; because he has more power to do hurt and wrong, it is right when he does it. To ask how you may be guarded from harm or injury on that side where the strongest hand is to do it, is presently the voice of faction and rebellion, as if when men, quitting the state of nature, entered into society, they agreed that all of them but one should be under the restraint of laws, but that he should still retain all the liberty of the state of nature, increased with power and made licentious by impunity. This is to think that men are so foolish that they take care to avoid what mischiefs may be done them

32. "A covenant not to defend myself from force by force is always voyd." Hobbes, *Leviathan* (Oxford University Press, 1909), chap. 14, ¶ 30.

33. The fourth self-evident truth listed in the Declaration of Independence implies that the American people have the right to follow the advice of Krauthammer, Will, and others by repealing the Second Amendment and disarming the citizenry. Legally, of course, this right is beyond question. That does not mean, however, that doing so would be any more consistent with the spirit of the Declaration than instituting a Hobbesian despotic sovereign would be. The signers of the Declaration expressly stated that revolution is not merely a right, but a *duty* in the face of "a Design to reduce [a people] under absolute Despotism." Repeal of the Second Amendment would by itself fall short of justifying revolution, but it would sacrifice a fundamental freedom in a vain effort to effect the safety and happiness of the populace. Those who profess allegiance to the principles of the Declaration have a duty to oppose such an error. That duty applies equally to a formal constitutional amendment and to an insidious gutting of the right to arms by legislatures and courts.

by polecats or foxes, but are content, nay, think it safety, to be devoured by lions.³⁴

Locke lays the theoretical basis for rejecting Hobbes's political conclusions by denying that the exercise of self-interested reason necessarily leads to a war of all against all. On the contrary, he maintains, reason dictates natural laws that include a duty to refrain from harming others in their life, health, liberty, or possessions.³⁵ This duty, in turn, implies a right in everyone to enforce the natural law by punishing those who offend against it.³⁶

This is not merely an abstract feature of Locke's political argument. Adam Smith (1723–1790), who rejected Locke's social contract theory,³⁷ derived the same claim about natural right and natural duty from his analysis of human psychology:

Among equals each individual is naturally, and antecedent to the institution of civil government, regarded as having a right both to defend himself against injuries, and to exact a certain degree of punishment for those which have been done to him. Every generous spectator not only approves of his conduct when he does this, but enters so far into his sentiments as often to be willing to assist him. When one man attacks, or robs, or attempts to murder another, all the neighbors take the alarm, and think that they do right when they run, either to revenge the person who has been injured, or to defend him who is in danger of being so.³⁸

This fundamental agreement between Locke and Smith illustrates why it is a specific understanding of natural right and natural duty, not social contract theories like those in Hobbes and Locke, that provides the central and all too easily forgotten foundation of political liberalism. This understanding of correlative rights and duties is implicitly echoed

in the structure of the Second Amendment, which is the constitutional provision that most directly reflects the most fundamental element of our liberal political order.

The key disagreement between Smith, Locke, and the American Founders on one hand and Hobbes and the modern progressive left on the other lies in their views about the alienability of the right to enforce the most fundamental natural duties. In supporting what the Declaration of Independence calls the “unalienable” rights to life, liberty, and the pursuit of happiness, Locke reasoned that:

He, that, in the state of nature, would take away the freedom that belongs to anyone in that state must necessarily be supposed to have a design to take away everything else, that freedom being the foundation of all the rest; as he that, in a state of society, would take away the freedom belonging to those of that society or commonwealth must be supposed to design to take away from them everything else, and so be looked on as in a state of war....

Thus a thief, whom I cannot harm but by appeal to the [civil] law for having stolen all that I am worth, I may kill when he sets on me to rob me but of my horse or coat; because the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defense and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case where the mischief may be irreparable.³⁹

For Locke, the same reasoning that establishes the right to kill a robber establishes the right to overthrow a predatory ruler. Prudence should no doubt

34. John Locke, *Two Treatises on Government*, “Second Treatise of Government,” ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), ch. 4 ¶ 93.

35. *Ibid.*, chap. 2, ¶ 6.

36. *Ibid.*, ¶ 8.

37. Adam Smith, *The Glasgow Edition of the Works and Correspondence of Adam Smith, Volume 5: Lectures on Jurisprudence*, ed. Ronald L. Meek, David Daiches Raphael, and Peter Stein (Cambridge, UK: Oxford University Press, 1978), pp. 402–404.

38. Adam Smith, *The Theory of Moral Sentiments*, ed., D.D. Raphael and A.L. Macfie (Indianapolis: Liberty Fund, 1982), pp. 123–124.

39. Locke, “Second Treatise of Government,” chap. 3 ¶¶ 18–19.

regulate the exercise of both rights, as the Declaration of Independence acknowledges with respect to revolution,⁴⁰ but they have exactly the same source. This is the point that Blackstone made when he traced the right to arms to “the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”⁴¹ In Locke, as in Blackstone, the violence of oppression may come either from the government or from criminals whom the government fails to deter. The same fundamental right of self-preservation authorizes the use of lethal force against both.

Consistently with Locke and Blackstone, the Second Amendment links the right of self-defense against criminals with the right of self-defense against the threat of tyranny. The “right of the people to keep and bear Arms” is one that can be exercised by an individual to protect his own life and liberty or collectively to resist the imposition of despotism. In an echo of Locke’s insistence that there are natural duties along with natural rights, the Second Amendment also refers to the well-regulated militia as an institution necessary to the security of a free state.⁴² Unlike the armies of the time, which were made up of paid volunteers, the militia tradition entailed a legal *duty* of able-bodied men to undergo unpaid militia training and to fight when called upon to do so.

The American militia fell into desuetude at an early date, largely because of a recognition that effective military readiness requires full-time attention to the arts of war.⁴³ Today, moreover, state-based militia organizations would be much less capable of providing a credible counterweight to federal military power than they were in the 18th century.

Nevertheless, the spirit that underlay traditional militia institutions, which imposed a duty of armed

defense in behalf of one’s community, has not been completely effaced from our law. A federal statute, for example, continues to include almost all able-bodied men from 17 to 45 years of age in the militia.⁴⁴ As recently as World War II, members of this “unorganized militia” brought their own weapons when called for home defense in the aftermath of Pearl Harbor.⁴⁵ Similarly, modern conscription laws continue to reflect the assumption that those who are capable of fighting in defense of our society have a duty to do so.

Consistently with Locke and Blackstone, the Second Amendment links the right of self-defense against criminals with the right of self-defense against the threat of tyranny.

For several decades, we have relied entirely on volunteers to meet the nation’s military needs, and our professional forces have proved to be more effective than the conscripts who served in Vietnam. Something may have been lost from the social fabric when military service became an option rather than a duty, but the unnecessary use of conscription is hard to square with liberal principles or with our traditions, as Tocqueville recognized.⁴⁶ Unless there are momentous and unforeseeable changes in our society, America neither will nor should attempt to restore the 18th century institution of the organized militia or the peacetime service obligations imposed during the Cold War.

Steps could be taken, however, to reinvigorate the militia spirit by encouraging every citizen to become

40. “Prudence, indeed, will dictate that Governments long established should not be changed for light or transient Causes.”

41. Blackstone, *Commentaries*, bk. 1, p. *139.

42. Use of the word “necessary” in the Second Amendment does not imply that a well-regulated militia is absolutely indispensable any more than such an implication can be found in the Necessary and Proper Clause, art. I, ¶ 8, cl. 18. For a classic analysis of the Article I provision, see Chief Justice Marshall’s opinion in *McCulloch v. Maryland*, 17 U.S. 316, 413–415 (1819).

43. Those responsible for conducting our Revolutionary War were well aware that this was already true at the time, which is why the Constitutional Convention was unwilling to hobble the new federal government with a prohibition on standing armies. For further detail, see Nelson Lund, “The Past and Future of the Individual’s Right to Arms,” *Georgia Law Review*, Vol. 31, No. 1 (Fall 1996), pp. 1–76, esp. pp. 30–34. Today’s National Guard is an integrated component of the federal armed forces, not a militia of the kind favored by the founding generation.

44. 10 U.S.C. § 311.

45. See Don B. Kates, Jr., “Handgun Prohibition and the Original Meaning of the Second Amendment,” *Michigan Law Review*, Vol. 82, Issue 2 (November 1983), pp. 204–273, esp. p. 272, note 284.

46. See, for example, Tocqueville, *Democracy in America*, vol. 1, pt. 2, chap. 6, p. 214; vol. 1, pt. 2, chap. 8; vol. 2, pt. 3, chap. 23, p. 623.

at least minimally proficient in the use of small arms, perhaps as a condition of receiving a high school diploma.⁴⁷ The purpose of doing so would not be to prepare everyone for military service, but to foster the sense of self-reliance and personal efficacy that genuinely free citizens require. Such training might also have significant practical benefits, especially in our new age of terrorism. The desirability of imposing such a requirement may be open to debate as a policy matter, but it would be very much in the spirit of our nation's founding principles.

The Founders on Self-Defense

The Founding period saw almost no discussion of what we call gun control today. Before the Revolutionary War, the most prominent controversy arose from efforts to disarm the citizens of Boston during the run-up to Lexington and Concord. This was obviously not crime control in the usual sense, but an effort at political pacification in response to a political conflict. Even during this tumultuous period, however, we can see evidence of the principles governing ordinary civil life. One vivid example occurred after the so-called Boston Massacre in 1770.

When an agitated crowd of colonists assaulted a group of British soldiers with death threats, hand-thrown missiles, clubs, and a sword, the soldiers fired their weapons, killing four and wounding six. At the soldiers' trial for unlawful homicide, the only issue was whether the citizens or the soldiers were the aggressors.

One of the prosecutors emphasized that Bostonians had every right to arm themselves with lethal weapons as a defense against soldiers who had a record of abusive treatment. As counsel for the defendants, John Adams emphasized the soldiers' own right of self-defense, "the primary Canon of the Law of Nature," but he also acknowledged that the colonists had the right to arm themselves. Significantly, the court's charge to the jury pointed out a duty that would also have justified citizens in arming themselves that night: "It is the duty of all persons (except

women, decrepit persons, and infants under fifteen) to aid and assist the peace officers to suppress riots & c. when called upon to do it. They may take with them such weapons as are necessary to enable them effectually to do it."⁴⁸

This duty was not a mere abstraction. American colonies had laws requiring citizens to possess firearms and to carry them in certain circumstances.⁴⁹ Restrictions on the right to arms during the Founding period were limited to a few laws directed against distrusted political minorities like blacks, Indians, and British loyalists, and an occasional safety regulation dealing with such matters as the storage of gunpowder and the discharge of firearms in crowded places.⁵⁰

Throughout the Founding period, restrictions on guns were understood as a tool of political control.

Throughout this period, restrictions on guns were understood as a tool of political control. Hence the great debates about federal versus state authority over the militia, the dangers of standing armies, and the usefulness of private arms in deterring tyranny. The depth of thinking about this issue was reflected in some ways that may seem surprising today.

In 1790, for example, the Washington Administration sent Congress a proposal for regulating the militia that made participation mandatory and provided for the government to arm everyone who was enrolled. The bill went nowhere. Instead, the House took up a different bill that required each male citizen to arm himself and participate in the militia. During the debate, an amendment was offered that would have required the federal government to provide arms to those who could not afford to buy their own. The amendment was defeated. One Congressman was "against giving the general government a power of disarming part of the militia, by ordering the arms and accoutrements by them lent, to be

47. I am grateful to Stephen G. Gilles for helping me to conceptualize this suggestion.

48. Stephen P. Halbrook, *The Founders' Second Amendment: Origins of the Right to Bear Arms* (Chicago: Ivan R. Dee, 2008), p. 25.

49. See, for example, Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," p. 272, note 284.

50. See, for example, *District of Columbia v. Heller*, 554 U.S. at 631-634; Adam Winkler, *Gun Fight: The Battle over the Right to Bear Arms in America* (New York: W. W. Norton, 2011), pp. 115-116.

returned.”⁵¹ Another interpreted the Constitution to forbid the United States to furnish arms, “which would be improper, as they would then have the power of disarming the militia.”⁵²

In the course of the debate, Roger Sherman of Connecticut—a signer of the Declaration of Independence and delegate to the Federal Convention of 1787—drew the same tight link between individual and collective self-defense that Locke had emphasized:

[Sherman] conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, *by whomsoever made*. The particular states, *like private citizens*, have a right to be armed, and to defend, by force of arms, their rights, when invaded.⁵³

Even when this connection was not expressly articulated, Founding-era discussions consistently rooted the right to collective self-defense against political oppression in the more fundamental right of individual self-defense. Debates over the organization of armies and the militia treated the underlying right of individuals to possess arms as an unquestioned truth. Statesmen might reasonably have different views about whether it was more practical to require militiamen to arm themselves or to have the government provide them with weapons, but no one would have proposed giving any government a monopoly on the control of firearms.

The paucity of gun-control regulations during this period is one reflection of the utterly noncontroversial nature of the individual right to keep and bear arms, but it is not the only one. Nine early state

constitutions, for example, expressly protected the right of citizens to bear arms in defense of both themselves and the state.⁵⁴ Justice James Wilson interpreted Pennsylvania’s constitutional guarantee of the right to bear arms as a recognition of “the great natural law of self-preservation,” which affirmatively enjoins homicide when necessary in defense of one’s person or house.⁵⁵ Similarly, James Monroe included the right to keep and bear arms in a list of “human rights” that he wished to see protected in the federal Constitution.⁵⁶

There is no record from the Founding era of anyone’s denying that the Second Amendment protected an individual right or claiming that Second Amendment rights belonged only to state governments or their militia organizations.

The examples could be multiplied, but perhaps the most telling evidence is this: There is no record from the Founding era of anyone’s denying that the Second Amendment protected an individual right or claiming that Second Amendment rights belonged only to state governments or their militia organizations. Political debates about the best way to organize and distribute military power while preserving political liberty took place against a background assumption that the individual right to self-defense was simply unquestionable. The individual’s right to have arms for this purpose was accordingly also unquestioned. When the Supreme Court finally

51. Halbrook, *The Founders’ Second Amendment*, pp. 302–303.

52. *Ibid.*, p. 303.

53. Quoted in *ibid.*, p. 305. Emphasis added.

54. Vermont (1777) (“the people have a right to bear arms for the defence of themselves and the State....”); Pennsylvania (1790) (“The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.”); Kentucky (1799) (“the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned.”); Ohio (1802) (“the people have a right to bear arms for the defence of themselves and the State....”); Indiana (1816) (“the people have a right to bear arms for the defence of themselves, and the State....”); Mississippi (1817) (“Every citizen has a right to bear arms in defence of himself and of the State.”); Connecticut (1818) (“Every citizen has a right to bear arms in defence of himself and the state.”); Alabama (1819) (“every citizen has a right to bear arms in defence of himself and the state.”); Missouri (1820) (“[the people’s] right to bear arms in defence of themselves and of the State cannot be questioned.”).

55. James Wilson, *Lectures on Law*, pt. 3, chap. 4, in *Collected Works of James Wilson*, Vol. 2, ed. Mark David Hall and Kermit L. Hall (Indianapolis: Liberty Fund, 2007), p. 1142.

56. Kates, “Handgun Prohibition and the Original Meaning of the Second Amendment,” p. 226, note 91.

acknowledged that the inherent right of self-defense is central to the Second Amendment,⁵⁷ it was merely confirming what every American once understood. Millions still do, even if it is lost on a lot of intellectuals today.

Gun Control and Political Psychology

Modern proponents of civilian disarmament never tire of reminding us that society has changed since the 18th century. One significant development has been the creation of professional police forces. Unlike the professional military that has replaced the traditional militia, however, these bureaucratic organizations have proved unable to secure public safety. Nor should we wish for the kind of ubiquitous and intrusive police presence that could effectively eliminate violent crime. Relying on a professional military for national defense is both prudent and consistent with liberal principles, but complete reliance on the police for crime control is neither.

Although gun control was not employed to fight crime during our early history, the Founders were well aware of its use elsewhere. In Great Britain, for example, disarmament of commoners had frequently been justified as a means of enforcing the game laws, which served to protect wealthy aristocrats who enjoyed sport hunting from poachers who were trying to feed their families. Americans rejected such policies, and Blackstone himself had noted that “prevention of popular insurrections and resistance to the government, by disarming the bulk of the people...is a reason oftener meant than avowed.”⁵⁸ Then, as now, people with political power were prone to worry more about serving the selfish interests of the rulers than about protecting the people from oppression. If disarmament laws left the bulk of the people unable to resist oppression by the criminals in their midst, and indeed by the government itself, the rich and powerful had nothing to lose and something to gain.

Americans did not agree that government exists primarily to protect the wealthy and the well-born from their social inferiors. They also understood why disarmament laws make no sense at all as a tool for controlling violent crime. The classic statement

came from Cesare Beccaria (1738–1794), an Italian political philosopher who had a significant influence on the American Founders:

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty—so dear to men, so dear to the enlightened legislator—and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man.⁵⁹

The most reliable social science available today is consistent with the straightforward wisdom offered by Beccaria more than two centuries ago. The literature is large, and controversial with respect to some of the details, but the most important conclusions cannot be seriously disputed: Nearly all murders are committed by men with a history of violent criminal behavior. Convicted felons are legally prohibited from possessing firearms, but criminals ignore this and other gun regulations, just as they ignore the laws against robbery, rape, and murder. In recent decades, the number of legally owned guns has increased substantially, and the number of civilians authorized to carry weapons in public has skyrocketed, while the rate of violent crime has gone down very dramatically. Jurisdictions with the most draconian gun controls often have the highest crime

57. *District of Columbia v. Heller*, 554 U.S. at 628.

58. Blackstone, *Commentaries*, bk. 2, p. *412.

59. Cesare Beccaria, *On Crimes and Punishments*, trans. Henry Paolucci (Indianapolis: Bobbs-Merrill, 1963). On Beccaria's influence in America, see John D. Bessler, *The Birth of American Law: An Italian Philosopher and the American Revolution* (Durham, NC: Carolina Academic Press, 2014).

rates; and attempts to restrict the use of guns, or particular disfavored guns, by the general population have never been shown to reduce violent crime.⁶⁰

Nonetheless, we see persistent efforts to compromise liberal principles and endanger the lives of law-abiding citizens by restricting their access to an essential means of self-defense. The principal roots of these efforts deserve to be called what they are: cowardice and authoritarianism.

The authoritarian impulse is most conspicuous among elite proponents of gun control.

The vast majority of these people are quite well insulated from the threat of criminal violence. They reside in low-crime neighborhoods and work in well-protected office buildings. They live, work, and vacation with peaceable individuals who are very much like themselves. At the pinnacle of the ruling class, proponents of gun control like Barack Obama, George W. Bush, and Bill and Hillary Clinton have squads of heavily armed bodyguards who will protect them for the rest of their lives.⁶¹ And most people in the upper middle class can safely advocate the disarmament of their less fortunate fellow citizens without fear that such regulations will have any significant effect on themselves.

When gun-control advocates do think they may encounter threats to their own safety, their behavior often does not match their political rhetoric.

Former Chief Justice Warren Burger, for example, who had been known to answer a knock at his door by appearing with a gun in his hand, also said, “If I were writing the Bill of Rights now there wouldn’t be any such thing as the Second Amendment.”⁶² Senator Edward M. Kennedy, for decades a leading supporter of severe restrictions on the private possession of firearms, inadvertently revealed his own reliance on guns when his private bodyguard was charged with carrying illegal weapons in the Capitol.⁶³

In 1994, Congress enacted a statute, supported by many politically appointed police chiefs, that banned the sale of certain so-called assault weapons. Although the advertised rationale was that these arms do not have legitimate civilian purposes, the law created an exception for retired police officers, who could hardly have any more need for such weapons than other law-abiding citizens.⁶⁴

It is typical rather than exceptional for those who exert political power, whether by holding office themselves or by influencing those who do, to design laws that will not have much adverse impact on themselves and to get exceptions for themselves if the laws do begin to pinch. Countless examples can be found in areas as diverse as campaign finance regulation, health care, and environmental regulation. As a group, lawyers may be the worst

60. For reviews of the literature, see, for example, Lott, *More Guns, Less Crime*; Don B. Kates and Carlisle Moody, “Heller, McDonald, and Murder: Testing the More Guns = More Murder Thesis,” *Fordham Urban Law Journal*, Vol. 39, Issue 5 (2012), pp. 1421-1447; James B. Jacobs, *Can Gun Control Work?* (New York: Oxford University Press, 2002); Gary Kleck, *Point Blank: Guns and Violence in America* (New York: Aldine de Gruyter, 1991); John R. Lott, Jr., *The War on Guns* (New York: Regnery, 2016).

61. In 1994, President Clinton promoted a new statute that banned the sale of certain so-called assault weapons. When the law expired 10 years later, several studies, including one commissioned by the Bush Justice Department, found that the law had had no discernable effect on crime rates. President Bush nonetheless advocated its renewal. Congress declined the invitation, but both Barack Obama and Hillary Clinton have urged that the ban be reinstated. See Pub. L. 103-322, 103rd Cong., September 13, 1994, Title XI, Subtitle A, http://library.clerk.house.gov/reference-files/PPL_%20103_322_ViolentCrime_1994.pdf (accessed September 19, 2016); Eric Lichtblau, “Irking N.R.A., Bush Supports the Ban on Assault Weapons,” *The New York Times*, May 8, 2003, <http://www.nytimes.com/2003/05/08/us/irking-nra-bush-supports-the-ban-on-assault-weapons.html?pagewanted=all> (accessed September 19, 2016); Katie Pavlich, “White House: Reinstating ‘Assault’ Weapons Ban to Prevent Terrorism Is Common Sense,” *Townhall*, December 8, 2015, <http://townhall.com/tipsheet/katiepavlich/2015/12/08/white-house-suggests-1990s-assault-weapon-ban-be-reinstated-n2091021> (accessed September 19, 2016); Kelly Riddell, “Hillary Clinton Proposes Assault Rifle Ban, Limits on High-Capacity Magazines,” *The Washington Times*, December 15, 2015, <http://www.washingtontimes.com/news/2015/dec/15/hillary-clinton-proposes-assault-rifle-ban-limits-/> (accessed September 19, 2016).

62. MacNeil/Lehrer NewsHour, December 16, 1991, LEXIS, Nexis Library, Arcnws File; “Guns and the Law,” *Phoenix Gazette*, February 22, 1990, p. A10.

63. United Press International, “Kennedy Bodyguard Arrested for Possessing Machine Guns,” *Orlando Sentinel*, January 15, 1986, http://articles.orlandosentinel.com/1986-01-15/news/0190180113_1-submachine-guns-bodyguard-uzi (accessed September 19, 2016); Elsa Walsh, “Bodyguard’s Gun Charges to Stand,” *The Washington Post*, October 16, 1987, p. C2, <https://www.highbeam.com/doc/1P2-1348981.html> (accessed September 19, 2016).

64. 18 U.S.C. 922(v)(4)(C). The advertised rationale was a canard: The banned rifles were defined by certain cosmetic features, and a great many functionally indistinguishable civilian rifles were unaffected by the ban.

offenders because they often stand to profit from the laws they promote: Some get paid to administer the regulations, others get paid to help their clients cope with regulatory burdens, and some take turns doing both. When it comes to gun control, however, it is hard to see much personal benefit for our elites beyond the sheer joy of exercising the will to power over people they regard as intellectually and morally backward.

When it comes to gun control, it is hard to see much personal benefit for our elites beyond the sheer joy of exercising the will to power over people they regard as intellectually and morally backward.

As a crime-control measure, restricting access to weapons by law-abiding citizens is a proven failure. To his credit, the conservative Charles Krauthammer candidly declares that he wants to impose useless regulations that will desensitize the public in order to prepare the way for total confiscation. Many other gun-control advocates are simply more politic (or duplicitous). Once they achieve their real goal, we will see a lot more of what existing regulations have already accomplished: The most vulnerable people—especially women, minorities, and elderly people who live in low-rent locales—will increasingly be at the mercy of predatory men who either will have illegal weapons or will not need to use guns against their physically weaker victims. There will also be a demand for ever bigger and more intrusive police bureaucracies. Many elite

proponents of gun control probably do not much care about the first effect, safe as they are and will be in their cocoons of privilege. Bigger bureaucracies, for their part, are always the default solution for those who expect to control them.

Like some on the left, Krauthammer no doubt believes that total disarmament will make us all safer. On what evidence could he believe this? Rather than explain how criminals will be disarmed, he points to Canada and Great Britain as models.⁶⁵ Neither nation, however, is the gun-free paradigm of domestic tranquility that he imagines.

Our neighbor to the north, for example, has one of the highest rates of gun ownership in the world.⁶⁶ Great Britain has indeed attempted to disarm the civilian population, but she has not succeeded. After handgun confiscation was instituted in 1997, handgun crime increased by almost 40 percent in the following two years and had doubled by 2009, thanks to suppliers in the international black market.⁶⁷ In this supposedly tranquil society, moreover, crimes that armed victims might prevent occur at very high rates. Assault rates are more than double the U.S. rates in England and Wales and about six times higher in Scotland. Robbery rates are higher in England and Wales than in the United States, and burglaries of occupied dwellings are much more common.⁶⁸

Canada and Great Britain do have lower rates of homicide than the United States, but this is because of cultural and demographic factors, not gun laws. As the late James Q. Wilson pointed out, “the rate at which Americans kill each other *without* using guns by relying instead on fists, knives, and blows to the head is three times higher than the non-gun homicide rate in England.”⁶⁹ Krauthammer has nothing to say about countries like Switzerland

65. See Krauthammer, “The Roots of Mass Murder.”

66. David B. Kopel, *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* (Amherst, NY: Prometheus Books, 1992), p. 136.

67. Joyce Lee Malcolm, “The Soft-on-Crime Roots of British Disorder,” *The Wall Street Journal*, August 16, 2011, <http://www.wsj.com/articles/SB10001424053111903918104576502613435380574> (accessed September 19, 2016).

68. David B. Kopel, “The Costs and Consequences of Gun Control,” *Cato Institute Policy Analysis* No. 784, December 1, 2015, p. 15 (citing statistics from the United Nations Office of Drugs and Crime), <http://www.cato.org/publications/policy-analysis/costs-consequences-gun-control> (accessed September 19, 2016).

69. James Q. Wilson, “Criminal Justice,” in *Understanding America: The Anatomy of an Exceptional Nation*, ed. Peter H. Schuck and James Q. Wilson (New York: Public Affairs, 2009), p. 479. Emphasis in original. For additional detail on gun control in Canada and Great Britain, see Joyce Lee Malcolm, *Guns and Violence: The English Experience* (Cambridge, MA: Harvard University Press, 2002); Kopel, *The Samurai, the Mountie, and the Cowboy*, chaps. 3–4.

and Iceland, very peaceful nations with large civilian arsenals.⁷⁰ Nor does he mention our southern neighbor, Mexico, which has extremely repressive gun-control laws along with a murder rate approximately three to four times higher than that of the United States.⁷¹

If the regulatory elite's authoritarian agenda promises more of what has already proved to be a failure, the moral effects on the general population are likely to be even worse. Much of the propaganda against guns is calculated to foster cowardice, passivity, and irresponsible reliance on the government. This is the effect that should most worry Americans who are committed to our nation's founding principles. A few examples may help to illustrate the point.

Many police chiefs have been warning people for years that firearms are useless for self-defense because criminals will take them away and turn the guns on the victims. They never produce evidence to support this theory, and they obviously disregard it themselves: They carry guns on and off duty and lobby for the right to do so after they have retired. Nor can one imagine they would actually try to grab a gun that someone was pointing at them. The police

know very well that this sort of thing almost never happens outside of the movies.⁷² In the real world, robbery victims are less likely to be injured if they defend themselves with a gun than if they passively comply with the robber's demand.⁷³

One can easily imagine why law enforcement bureaucrats would want to discourage crime victims from displaying courage and self-reliance. It is harder to see why the victims of crime should allow themselves to be tricked into mistaking cowardice for prudence.

Even U.S. military leaders have succumbed to the kind of magical thinking that afflicts so many supporters of gun control. Major Nidal Hasan was able to shoot dozens of servicemembers at Fort Hood in Texas because the Army had helpfully provided him with a "gun free zone." Rather than treat the incident as vivid confirmation of Beccaria's irrefutable analysis, the Department of Defense called it an "isolated and tragic case" and classified the massacre as a case of "workplace violence."⁷⁴

Six years later, Muhammad Youssef Abdulazeez opened fire at two "gun free" military recruiting stations in Chattanooga, Tennessee, killing four Marines and one sailor and wounding several other people.⁷⁵

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70. See Philip Alpers and Marcus Wilson "Iceland—Gun Facts, Figures and the Law," University of Sydney, Sydney School of Public Health, GunPolicy.org, August 29, 2016, <http://www.gunpolicy.org/firearms/region/iceland> (accessed September 19, 2016); United Nations Office on Drugs and Crime, *Global Study on Homicide 2011: Trends, Contexts, Data*, http://www.unodc.org/documents/data-and-analysis/statistics/Homicide/Globa_study_on_homicide_2011_web.pdf (accessed September 19, 2016); Kopel, *The Samurai, the Mountie, and the Cowboy*, chap. 8.
71. See David B. Kopel, "Mexico's Gun-Control Laws: A Model for the United States?" *Texas Review of Law & Politics*, Vol. 18, No. 1 (2013), pp. 27-95; NationMaster, "Crime > Violent Crime > Murder Rate per Million People: Countries Compared," <http://www.nationmaster.com/country-info/stats/Crime/Violent-crime/Murder-rate-per-million-people> (accessed September 19, 2016); United Nations Office on Drugs and Crime, *Global Study on Homicide 2011*.
72. See Kleck, *Point Blank*, p. 122.
73. *Ibid.*, p. 124.
74. NBC News, "Military Calls Fort Hood Shooting 'Isolated' Case," November 5, 2009, http://www.nbcnews.com/id/33691553/ns/us_news-military/#:VoQpcFlel8l (accessed September 19, 2016); Allen G. Breed and Ramit Plushnick-Masti, "Terror or Workplace Violence? Hasan Trial Raises Sensitive Issue," *Arizona Daily Star*, August 11, 2013, http://tucson.com/news/national/terror-act-or-workplace-violence-hasan-trial-raises-sensitive-issue/article_be513c51-a35d-5b4f-b3a0-13654f019ea6.html (accessed September 19, 2016). The Army's Chief of Staff helpfully opined that one thing worse than the massacre would be "if our diversity becomes a casualty." Tabassum Zakaria, "General Casey: Diversity Shouldn't Be Casualty of Fort Hood," Reuters, November 8, 2009, <http://blogs.reuters.com/talesfromthetrail/2009/11/08/general-casey-diversity-shouldnt-be-casualty-of-fort-hood/> (accessed September 19, 2016). The conduct of the unarmed men who lost their lives trying to stop the rampage stood in sharp contrast to the political correctness and moral cowardice of their leaders.
75. In this case, two of the servicemembers apparently were armed, in violation of regulations, and they provided cover for a number of people who managed to escape. Some of those who got away did not just hide in safety, choosing instead to clear a nearby park filled with children. David Larter, "Sources: Navy Officer, Marine Fought to Take Out Chattanooga Gunman," *Navy Times*, July 21, 2015, <http://www.navytimes.com/story/military/2015/07/21/sources-navy-officer-marine-shot-chattanooga-gunman/30426817/> (accessed September 19, 2016); Richard Fausset, Richard Pérez-Peña, and Matt Apuzzo, "Slain Troops in Chattanooga Saved Lives Before Giving Their Own," *The New York Times*, July 22, 2015, <http://www.nytimes.com/2015/07/23/us/chattanooga-tennessee-shooting-investigation-mohammad-abdulazeez.html> (accessed September 19, 2016); Gina Harkins, "Chattanooga Shooting Investigation: Marine Shielded His Daughter from Terrorist's Rampage," *Marine Corps Times*, September 25, 2015, <https://www.marinecorpstimes.com/story/military/2015/09/25/chattanooga-shooting-investigation-marine-recruiter-shielded-daughter-from-muhammad-youssef-abdulazeez-rampage/72586592/> (accessed September 19, 2016).
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The Marine Corps ruled out arming its recruiters on the bizarre rationale that their job primarily involves interactions with the public.⁷⁶

These incidents, like almost all civilian massacres, took place in designated “gun free zones.”⁷⁷ Last year, a similar incident occurred in San Bernadino, California, in one of those government buildings that the Supreme Court has called “sensitive places” where the Second Amendment is presumptively inapplicable.⁷⁸ Syed Rizwan Farook and Tashfeen Malik killed 14 people and seriously injured 22. The police arrived within four minutes, but by that time, it was over. President Obama had a ready response, calling once again for “common sense” gun safety laws.⁷⁹ Similarly, *The New York Times* published a front-page editorial—the first in almost a century—with a familiar refrain: “Are these atrocities truly beyond the power of government and its politicians to stop? That tragically has been the case as political leaders offer little more than platitudes after each shootout, while the nation is left to numbly anticipate the next killing spree.”⁸⁰

It is true that many politicians have nothing to offer but platitudes, but *The Times* called for “firm action” without explaining exactly what that firm action would be. This is worse than trite because the usual gun-control nostrums would not have prevented this shooting. If editorial writers in Manhattan are left numb by such incidents, that is preferable to the numbness that will spread throughout the nation if the government succeeds in desensitizing the population in preparation for total civilian disarmament.⁸¹

The time is gone when Americans universally supported gun rights, but the American spirit of independence has not disappeared. The servicemembers who fought back at Fort Hood and the Chattanooga recruiting station exhibited that spirit. Many millions of Americans “cling to their guns,” as President Obama disdainfully remarked,⁸² and frequently use those guns to defend their lives and the lives of others. Armed citizens have stopped countless crimes, and mass murderers exhibit a pronounced preference for operating in “gun free zones.”⁸³ The

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76. One ray of hope, apart from the bravery exhibited by the enlisted servicemen, came when several state governors, in a faint but valuable reminder of the Founding generation’s attachment to their state-based militias, immediately authorized National Guard recruiters to be armed. Reuters, “Three U.S. States Move to Arm National Guard Offices,” July 18, 2015, <http://news.yahoo.com/florida-national-guard-centers-moved-armories-safety-194352870.html> (accessed September 19, 2016); Elisha Fieldstadt, “Governors Authorize National Guard to Be Armed After Chattanooga Attack,” NBC News, July 19, 2015, <http://www.nbcnews.com/storyline/chattanooga-shooting/governors-order-national-guardsmen-be-armed-after-chattanooga-attack-n394476> (accessed September 19, 2016).
77. See, for example, Crime Prevention Research Center, “The Myths About Mass Public Shootings: Analysis,” October 9, 2014, <http://crimeresearch.org/wp-content/uploads/2014/10/CPRC-Mass-Shooting-Analysis-Bloomberg2.pdf> (accessed September 19, 2016).
78. *District of Columbia v. Heller*, 554 U.S. at 626.
79. Byron Tau, “In Grim Ritual, Barack Obama Again Calls for Stricter Gun Control After Mass Shooting,” *The Wall Street Journal*, December 2, 2015, <http://blogs.wsj.com/washwire/2015/12/02/in-grim-ritual-barack-obama-again-calls-for-stricter-gun-control-after-mass-shooting/> (accessed September 19, 2016).
80. Editorial, “The Horror in San Bernadino,” *The New York Times*, December 2, 2015, <http://www.nytimes.com/2015/12/03/opinion/the-horror-in-san-bernardino.html> (accessed September 19, 2016).
81. See Krauthammer, “The Roots of Mass Murder.” After this essay was written, Omar Mateen killed 49 people and wounded even more in another “gun free” zone in Orlando, Florida. Somewhat surprisingly, the initial political debate focused primarily on measures aimed at keeping guns out of the hands of terrorists like Mateen rather than on banning the particular weapons he used. At the time of this writing (June 2016), it is not clear whether sensible measures designed to stop terrorists without violating the rights of law-abiding citizens will attract a political consensus.
82. Ed Pilkington, “Obama Angers Midwest Voters with Guns and Religion Remark,” *The Guardian*, April 14, 2008, <http://www.theguardian.com/world/2008/apr/14/barackobama.uselections2008> (accessed September 19, 2016). Approximately 40 percent of American households have guns. See, for example, L. Hepburn, M. Miller, D. Azrael, and D. Hemenway, “The US Gun Stock: Results from the 2004 National Firearms Survey,” *Injury Prevention*, Vol. 13, Issue 1 (February 2007), pp. 15–19, <http://injuryprevention.bmj.com/content/13/1/15.full.pdf+html> (accessed September 19, 2016); Pew Research Center, “Section 3: Gun Ownership Trends and Demographics,” in “Perspectives of Gun Owners, Non-Owners: Why Own a Gun? Protection Is Now Top Reason,” March 12, 2013, pp. 14–17, www.people-press.org/2013/03/12/section-3-gun-ownership-trends-and-demographics/#profile-guns (accessed September 19, 2016).
83. For data involving mass murders, see, for example, Lott, *The War on Guns*, pp. 5–7, 122–127; Kopel, “The Costs and Consequences of Gun Control,” p. 18.
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invisible deterrent effect of armed citizens cannot be measured directly, but it undoubtedly exists.⁸⁴

Whatever the exact magnitude of this crime prevention effect may be, law-abiding citizens who arm themselves are exhibiting the moral temper appropriate to a free people. They do not regard their lives and safety as a gift from the government. Nor do they think they should wait for the government to come along and save them when their lives or the lives of other innocent people are threatened. When that spirit is finally squashed, bureaucratic government will continue to expand, violent crime will continue to plague our most vulnerable citizens, and genuine self-government—both personal and political—will become ever more illusory.

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Conclusion

No observer of American life is more respected by conservative intellectuals than Alexis de Tocqueville. Describing the new form of oppression that he saw emerging in democratic societies, Tocqueville imagined a future power, “immense and tutelary,” presiding over a mass of self-absorbed individuals:

[This power] is absolute, detailed, regular, far-seeing, and mild. It would resemble paternal power if, like that power, it had for its object preparing men for manhood; but it only seeks, on the contrary, to keep them fixed irrevocably in childhood; it likes citizens to enjoy themselves, provided that they think only of enjoying themselves. It willingly works for their happiness; but it wants to be the unique agent and sole arbiter of that happiness; it provides for their security, foresees and provides for their needs, facilitates their pleasures, conducts their principal affairs, directs their industry, regulates their estates, divides their inheritances; can it not take away from them entirely the trouble of thinking and the pain of living?⁸⁵

A thousand illustrations of Tocqueville’s prescience can be found in the agenda of the progressive left. Conservative intellectuals complain constantly and rightly about the erosion of individual liberty by bureaucratic government, about the enervating effects of the nanny state, and about the suffocating atmosphere of euphemisms and repressed resentment imposed by the political correctness police. But few of these pundits raise their voices against infringements of the right of self-defense, which is the core principle on which our liberal republic was founded. Some even actively urge the government to regulate that right into irrelevance by depriving us of the tools needed for its exercise.

Whatever else has contributed to the decay of America’s republican spirit, forgetfulness or ignorance about the philosophy underlying our free institutions are among the least excusable failings that public intellectuals can display. Our most fundamental liberty now depends too much on lawyers and judges construing legal texts and on associations like the NRA, which many conservatives regard as just another special-interest lobby that sometimes serves as a convenient political ally.

84. The largest and most sophisticated econometric study of concealed-carry laws concluded that liberalizing these regulations produced lower rates of violent crime. See Lott, *More Guns, Less Crime*. Lott’s findings about the magnitude of the effect have been challenged by other researchers, but none of his critics has shown that liberalization has caused higher crime rates. Apart from the general deterrence effect that Lott tried to measure, there is no doubt that armed citizens frequently use their guns for self-defense, usually without firing them. Even this, however, is notoriously difficult to measure. Estimates by reputable scholars range from 80,000 to 2.5 million defensive uses per year. See Michael R. Rand, *Guns and Crime: Handgun Victimization, Firearm Self-Defense, and Firearm Theft 1-2* (1994); Gary Kleck and Marc Gertz, “Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun,” *Journal of Criminal Law & Criminology*, Vol. 86, Issue 1 (Fall 1995), pp. 150-187, esp. p. 184, Table 2, “Prevalence and Incidence of Civilian Defensive Gun Use, U.S., 1988-1993.”

85. Tocqueville, *Democracy in America*, vol. 2, pt. 4, chap. 6, p. 663. I have slightly altered the translation.

Conservatives should pay more attention to the views of John Locke, William Blackstone, and every one of our Founding fathers. Their philosophy was not infected by some silly romanticism about guns or an outmoded frontier mentality. It was based on the reality of human nature and on reason.

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