

PISTOLS, CRIME, AND PUBLIC: SAFETY IN EARLY AMERICA

CLAYTON E. CRAMER¹ & JOSEPH EDWARD OLSON²

There is a vigorous debate under way about the scope of the Second Amendment. What are the limits of that right? What “arms” does it protect? Does it protect an individual right to possess and perhaps to carry firearms? The District of Columbia, in its attempt to defend its 1976 gun control law, has argued that the widespread possession of handguns (“pistols”) represents an especially serious public safety hazard, and that even if *arguendo*, the Second Amendment protects an individual right, it would not extend to pistols, which the District of Columbia characterizes as “uniquely dangerous weapons” that present “unique dangers to innocent persons.”³

This paper examines what was likely the Framers’ original public meaning of the Bill of Rights provision that protects “the right of the people to keep and bear arms,” *with no apparent limitations concerning handguns*. We do so by examining what the history of pistols in early America tells us about foreseeable technological developments.

I. GUNS, ARMS, FIRE-ARMS, PISTOLS: SOME DEFINITIONS

A few definitions are appropriate because there have been a few subtle changes in the meaning of some of the terms over the last two centuries. “Gun” had a more restricted meaning in the eighteenth century than it does today, referring in some contexts to privately owned cannon,⁴ but most often to what today we call long guns:

1. B.A. (History with Distinction), Sonoma State University; M.A. (History), Sonoma State University.

2. B.A., University of Notre Dame (Liberal Studies); J.D. (*with distinction*), Duke University; LL.M, University of Florida. Professor of Law, Hamline University School of Law.

3. Petition for Writ of Certiorari at 22–23, *District of Columbia v. Heller*, No. 07-290 (U.S. Sept. 4, 2007).

weapons designed to be fired with two hands with either smoothbore or rifled barrels. The smoothbore weapons included fowling pieces, blunderbusses, and muskets, all of which could—and often did—fire either shot or lead balls. The only real distinction between a fowling piece and a musket was that muskets were of larger caliber and were intended for more powerful charges of gunpowder, thus being capable of firing a lead ball that would be deadly at a greater distance. Blunderbusses,⁵ with their characteristic belled muzzles, were short-range antipersonnel weapons that put an enormous quantity of shot in a broad pattern—the “assault weapon” of their day in terms of lethality and the number of persons that they could kill or wound.



Eighteenth Century Blunderbuss⁶

That “gun” did not include “pistol”⁷ is demonstrated by the number of statutes that include both “gun” and “pistol” on a list of arms. For example, Colonial statutes requiring churchgoers to be armed in South Carolina (1743)⁸ and Georgia (1770)⁹ distinguish between “a gun” and a pair of pistols. Perkin & Coutty of Philadelphia advertised in 1781 that they made firearms “in all its

5. An eighteenth century “blunderbuss” is the equivalent of a twentieth century shotgun but often of very large bore diameter.

6. Photograph courtesy of the Idaho Historical Museum and the J. Earl Curtis Exhibition at the Old Idaho Penitentiary.

7. An eighteenth century “pistol” is the equivalent of a twentieth century handgun.

8. 7 DAVID J. MCCORD, STATUTES AT LARGE OF SOUTH CAROLINA 417–19 (A. S. Johnson 1840), available at <http://www.claytoncramer.com/primary/militia/SCStatAtLarge7-417.jpg>; <http://www.claytoncramer.com/primary/militia/SCStatAtLarge7-418.jpg>; <http://www.claytoncramer.com/primary/militia/SCStatAtLarge7-419.jpg>.

9. 19 ALLEN D. CANDLER, THE COLONIAL RECORDS OF THE STATE OF GEORGIA 137–40, (Chas. P. Byrd9 Tc[0137 Tf8.0 87Aj70.1(G)2O68N4 vTwften able aat

gunpowder to generate gas to discharge projectiles). For example, Massachusetts purchased 948 small arms in the first months of the Revolution for which we have both a count and a price.¹⁶ Of these, some are explicitly identified as firearms, while others are simply referred to as “arms” or “small arms.” Firearms (n = 341, standard deviation = 0.21841) had an average purchase price of 1.680 pounds

2008]

SAFETY IN EARLY AMERICA

703

II. PISTOL RR

him a gun or a *pair of horse-pistols* . . . with at least six charges of gun-powder and ball.” Those who failed to do so would be fined twenty shillings—a week’s wages for many colonists.²⁵ (Georgia adopted a very similar statute in 1770.)²⁶

The only examples of laws that treat pistols differently from other arms suggest that pistols were regarded as either *less* dangerous than long guns, or perhaps, that they enjoyed some protected status as weapons of self-defense. In January of 1776, the Maryland Revolutionary government ordered those not prepared to associate with the Revolutionary cause to turn over their firearms for the use of the militia—with one notable exception. The counties were told to order all freemen to “deliver up to the committee of observation for this county, all fire-arms, if he hath any, *except pistols*.”²⁷ Even with all the concerns about Loyalists who might take advantage of the arrival of British troops to cause mischief, there was apparently no need to disarm them of their pistols.²⁸ A similar exception—allowing those not entirely trusted with long guns to nevertheless possess pistols—occurred in Maryland as late as 1781.²⁹

Arlan K. Gilbert’s examination of post-Revolutionary gunpowder manufacturing mentions an incident that suggests that the carrying of handguns was not particularly restricted in Maryland.

An earlier explosion occurred on October 17, 1783, in the yard of a Mrs. Clement in Baltimore, where some gunpowder had been placed to dry. Three boys, two of them Negroes, went into the yard to clean their pistols. One of them carelessly fired his pistol near the powder, causing it to blow up. One boy was killed and the other two seriously injured.³⁰

A Boston ordinance from 1786 that prohibited *storing* a variety of loaded weapons in buildings makes no apparent distinctions between different categories of weapons. The ordinance prohibited

25. MCCORD, *supra* note 8, at 417–19 (emphasis added).

26. CANDLER, *supra* note 9, at 137–40.

27. 78 ARCHIVES OF MARYLAND 75, 110 (Baltimore, James Lucas & E. K. Deaver and Annapolis, Jonas Green), available at <http://aomol.net/megafile/msa/speccol/sc2900/sc2908/000001/000078/pdf/am78--75.pdf>; <http://aomol.net/megafile/msa/speccol/sc2900/sc2908/000001/000078/pdf/am78--110.pdf>.

28. *Id.*

29. 203 ARCHIVES OF MARYLAND 278 (Baltimore, James Lucas & E. K. Deaver and Annapolis, Jonas Green), available at <http://aomol.net/megafile/msa/speccol/sc2900/sc2908/000001/000203/pdf/am203--278.pdf>.

30. Arlan K. Gilbert, *Gunpowder Production in Post-Revolutionary Maryland*, MD. HISTORICAL MAGAZINE, Sept. 1957, at 188 n. 7.

percent of homes had a gun, and only ten percent of those homes had a *loaded* gun, the intersection of houses on fire and houses with loaded guns in them would have been very small indeed. The law also clearly considered the possession of firearms, cannon, and grenades to be unremarkable, and the carrying of loaded firearms a sufficiently common practice as to need no separate regulation—and no prohibition while walking the streets of Boston.³⁵

There also remains the question of whether *pistols* were included among “fire-arms” in this Boston ordinance. They certainly were not explicitly listed, and previous usage (such as the inventory of weapons turned over to General Gage) would arguably suggest that pistols were not included.

III. WHY WERE PISTOLS TREATED SO CAVALIERLY?

There are a number of possible explanations for why the Colonial and Revolutionary periods treated pistols like other firearms. One possibility is that pistols were relatively scarce and therefore might not have attracted particular regulatory attention. The evidence is very clear, however, that pistols were *not* scarce in the Colonial period, during the Revolution, or into the early Republic. Seventeenth century Colonial probate inventories reveal that while pistols were not as commonly owned as long guns, they were also not particularly rare. One analysis of all Plymouth Colony probate inventories through the 1670s found that, of 339 listed firearms, 13%³⁶ were pistols, and 54.5% of lead projectiles recovered from Plymouth Colony digs were pistol ammunition.³⁷

Ads offering pistols for sale appear throughout the Colonial period, although less commonly than ads for long guns. At least one ad offering guns for sale, including pistols, appears among the surviving issues of the *Boston Gazette* published in 1720.³⁸ Sampling *Boston Gazette* ads from the 1741–1742 period reveals at least two different merchants offering pistols for sale. One of the merchants, Samuel Miller, identified himself as a gunsmith.³⁹

35. *Id.*

36. 44 pistols out of 339 firearms.

37. Plymouth Archaeological Rediscovery Project, *Firearms in Plymouth Colony*, Tbls. 2 & 4 (2002), <http://plymoutharch.tripod.com/id73.html>.

38. BOSTON GAZETTE, May 30, 1720.

39. See BOSTON GAZETTE, Nov. 17, 1741; BOSTON GAZETTE, Dec. 8, 1741; BOSTON GAZETTE, Feb. 2, 1742; BOSTON GAZETTE, May 11, 1742; BOSTON GAZETTE, May 18, 1742;

2008]

SAFETY IN EARLY AMERICA

707

Similarly, merchants offered pistols for sale in the *South*

imported guns. “He likewise makes guns and *pistols* as any gentleman shall like”⁴⁹

Pocket pistols also appear to have been carried by those out exploring the natural wonders of America. A 1772 account of a natural bridge in Virginia includes the following description of the echo characteristics of the area: “after this I fired a Pocket *Pistol* under the Arch, the Report of which was louder than a Swivel [a type of small mounted artillery used on ships].”⁵⁰

Although pistols were usually imported before the Revolution (typically from Britain), they were also made in America. Medad Hills made a pair of pistols for William Smith in 1771.⁵¹ Surviving pistols that were apparently made in Colonial America also include a pistol owned by Peter Grubb, who made gun barrels for the Lancaster Committee of Safety during the Revolution. The lock is apparently English-made, but the rest of the pistol appears to have been made in Pennsylvania—perhaps by I. Perkins of Philadelphia or by Grubb himself.⁵² While the makers of other pistols are uncertain, William

were fairly common. They comprised nearly one-fifth (18.5%) of the 3,423 firearms surrendered.⁵⁷

On May 30, 1775, the New York Provincial Congress recommended “to the Inhabitants of this Colony in general, immediately to furnish themselves with necessary Arms & Ammunition.”⁵⁸ On August 22, 1775, it ordered cavalymen to provide themselves with a horse, saddle, “a case of *pistols* . . . one pound of gunpowder and 3 lbs. of sizeable bullets, . . . and a carbine.” Like the infantry, cavalymen were to “be provided . . . with 1 lb of pow[d]er and 3 lbs of bullets.” While not explicit as to who would provide the gunpowder and bullets, it is clear that every man aged sixteen to fifty was to “furnish himself” with either a long gun or “a case of pistols.”⁵⁹

On May 2, 1787, the Continental Congress ordered the public auction of a collection of military odds and ends: “413 old militia Arms . . . 365 old militia gun barrels . . . 985 old gun locks . . . 2000 damaged muskets . . . 700 *pistols* . . . 1194 damaged muskets . . . 1066 damaged carbines . . . 4446 damaged musket barrels,” and a bit more than thirteen tons of damaged powder.⁶⁰ Pretty clearly, the government believed that there was a market for pistols, and it did not suffer from modern fears of selling surplus handguns to the population.

John Nicholson, a gunsmith, offered a variety of firearms for sale in November of 1781, including “*Pistols* . . . upon the most reasonable terms.”⁶¹ Edward Pole advertised his “Military Laboratory” where “Owners and Commanders of Armed Vessels may be supplied, for either the use of Small Arms or Cannon, at the shortest notice, with ever species of Military Stores.” Among the items for sale included “Musket’s [sic] and *pistol’s* [sic].” That Pole’s

57. FROTHINGHAM, *supra* note 14, at 94–95.

58. 15 BERTHOLD FERNOW, DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 5 (AMS Press, Inc. 1969) (1887).

59. *Id.* at 42–43. A “case” of pistols ordinarily contained two handguns. A letter dated May 21, 1775 from a committee in Tryon County, co

customers included civilians is suggested by the offering of “Musket cartridges in blank, for the exercise of the militia.”⁶²

In 1785, Anthony Desverneys, Jr. of South Carolina advertised that he “continues to make and repair all sorts of guns, *Pistols* and generally everything that belongs to the Gunsmith’s Business.”⁶³

and 1797 described how in the back country, “[t]he people all travel on horseback, with *pistols* and swords.”⁶⁹

When Aaron Burr was tried for his criminal conspiracy to detach the Southwest into its own country, one of the pieces of evidence used against him was a meeting between a Mr. Blannerhassett and a number of other conspirators—all of them armed. Burr’s defense attorney argued that gun ownership was the norm in the early Republic:

If there were evidence of a merely friendly meeting, it would be the same as if there were no assemblage. If they were to give evidence that Blannerhassett and some of those with him were in possession of arms, as people in this country usually are, it would not be sufficient of itself, to prove that the meeting was military.

Arms are not necessarily military weapons. Rifles, shot guns and fowling pieces are used commonly by the people of this country in hunting and for domestic purposes; they are generally in the habit of pursuing game. In the upper country every man has a gun; a majority of the people have guns everywhere, for peaceful purposes. Rifles and shot guns are no more evidence of military weapons than pistols or dirks used for personal defence, or common fowling pieces kept for the amusement of taking game. It is lawful for every man in this country to keep such weapons.⁷⁰

crimes reported that, “two Men, unknown, were lately at Mr. Rush’s, a Gun smith, enquiring for six Pair of Pocket Pistols, to make up twelve Pair, having as they said, got the six Pair at some other Place.”⁷⁸

An account from the *Pennsylvania Gazette* in 1765 reprints a report from Boston:

Last Wednesday Evening, just after seven o’Clock, as a Man was going over Boston neck, he was stopped by a Fellow, who presenting a Pistol to his Breast, bid him deliver, swearing he would send a *Brace* of Balls thro’him instantly if he refused; but the Man replying he had but 3 Pistareens about him, he ordered him to go about his Business, and then ran of—doubtless apprehending a Pursuit, as there were a Number of People hastening towards them. He was a little Fellow, had on a surtout Coat, wore his Hat slapped before, and had a Pair of *Pistols*.⁷⁹

Other examples are available in which robbers were described as using pistols or as being taken into custody while armed with pistols.⁸⁰ Much like today, pistols also appeared in offenses that might be categorized as crimes of passion.⁸¹

As noted above, accidental deaths appear as well and are expressed as tragic—but not shocking—occurrences:

Monday Evening last a very melancholy Accident happen’d in this City, when a young Gentleman having been on board the Clinton Privateer, then going out, had a *Pair of Pistols* given him; which on his coming on Shore he carried into a Publick House, among some of his Acquaintance, where one of them was found to be loaded; upon which several Attempts were made to discharge it; but it missing Fire, he sat down in order to amend the Flint; in doing of which, the Pistol unhappily went off, and shot Mr. Thomas Cox, Butcher, through the Head, in such a Manner that some of his Brains came out, and he fell down dead without speaking a Word.⁸²

Pistols appear repeatedly among the South Carolina Regulators and the criminals to whom they administered frontier justice in the 1760s.⁸³ Foolish persons engaged in duels appear in newspaper

78. PA. GAZETTE, Aug. 31, 1749.

79. PA. GAZETTE, Feb. 7, 1765 (emphasis added).

80. PA. GAZETTE, Dec. 10, 1751; PA. GAZETTE, Mar. 5, 1783; PA. GAZETTE, July 2, 1783.

81. S.C. GAZETTE,

accounts, and the presence of pistols was not cause for surprise.⁸⁴ Nor was there any surprise when pistols appear in the hands of the law-abiding citizenry. For example, Rev. Whitfield is described as preaching in Massachusetts where “he was attended by many Friends with Muskets and Pistols on Account of the Indians.”⁸⁵

Pistols also appear in the hands of non-militia members who engage in guerilla warfare against the British at the start of the Revolution. “Samuel Whittemore, aged eighty years,” upon seeing British soldiers marching towards Concord, prepared himself by oiling “his musket and pistols and sharpening his sword.” When the soldiers returned,

Whittemore had posted himself behind a stone wall, down Mystic Street about four hundred and fifty feet The distance seemed an easy range for him, and he opened fire, killing the soldier he aimed at. They must have discovered his hiding place from the smoke-puff, and hastened to close in on him. With one *pistol* he killed the second Briton, and with his other fatally wounded a third one. In the meantime, the ever vigilant flank guard were attracted to the contest, and a ball from one of their muskets struck his head and rendered him unconscious. They rushed to the spot, and clubbed him with their muskets and pierced him with their bayonets until they felt sure he was dead Whittemore lived eighteen more years, dying in 1793 at the age of ninety-eight.⁸⁶

Enough pistols were present in private hands in Pennsylvania in 1774 for the legislature to include handguns in a law regulating New Year’s Day festivities. This statute made it illegal for:

[A]ny person or persons shall, on any thirty-first day of December, or first or second day of January, in every year, wantonly, and without reasonable occasion, discharge and fire off any *handgun*, *pistol*, or other firearms, or shall cast, throw or fire any squibs, rockets or other fireworks, within the inhabited parts of this province⁸⁷

84. S.C. GAZETTE, Sept. 6, 1735.

85. PA. GAZETTE, Aug. 15, 1745.

86. FRANK WARREN COBURN,

2008]

SAFETY IN EARLY AMERICA

715

Could the small town nature of Colonial and Revolutionary America have played a part in framing a Second Amendment lacking a negative reference to handguns? America really only had three cities of any notable size in 1791: Philadelphia, New York, and Boston—none of which would even be a large town by current standards. Could the Framers simply not have envisioned the dangers that handguns might create in a city of several hundred thousand inhabitants? No. Many of the Framers had spent time in London and

| | | | | | |
|----------------|-----------------------|-------|-------|-------|---------|
| 716 | WILLAMETTE LAW REVIEW | | | | [44:699 |
| Projected | 1020.97 | 219.7 | 38.77 | 51.69 | |
| std.dev. | 2.39 | 1.08 | 0.62 | 0.49 | |
| Years covered | 116 | | | | |
| Incidents/Year | 8.8 | 1.89 | 0.33 | 0.45 | |

V. TECHNOLOGY MARCHES ONWARD

One argument for treating the Second Amendment's protection as obsolete is that the technology of firearms has advanced so dramatically since 1791—a modern pistol provides so much destructive potential—that the Framers, were they present today, would recognize the absurdity of allowing ordinary law-abiding persons to possess or carry such a weapon. Alternatively, those with a mirthful spirit suggest that the Second Amendment should protect only the type of weapons available in 1791 when the states ratified the Second Amendment.

It is certainly true that firearms technology has advanced since 1791—but *not as much as some would like to think*. Repeating, magazine-fed firearms date back to at least the 1600s;⁸⁹ concealable “pepperbox” handguns capable of firing five to seven shots without reloading were in use by the end of the eighteenth century;⁹⁰ and there are some indications that multibarrel handguns were in development as early as the seventeenth century.⁹¹ Several multibarrel repeating firearms survive from the late seventeenth century, and at least one six shot flint-lock pistol survives from the first half of the eighteenth century.⁹² Additionally, some British soldiers were issued magazine-fed repeating guns as early as 1658.⁹³

2008]

SAFETY IN EARLY AMERICA

717

shots could be discharged without physically *reloading* the gun. The tripod-mounted flintlock revolver had a barrel 2 feet, 9 inches long and a bore of 1.2 inches.⁹⁵ It was fitted with a removable “pre-loaded” cylinder that held eleven charges and was rotated by hand. Each shot required an independent decision to fire and a separate pull of the trigger. Several examples were manufactured and, in a demonstration

soon merged into the regular infantry.⁹⁹ Thus, breech-loading, repeating rifles were more than just imaginable in 1791.

The next development in repeating firearms would take place in pistols.



An Allen & Thurber Pepperbox, Early Nineteenth Century¹⁰⁰

The development of the percussion ignition system in 1816 encouraged further development of the pepperbox by making revolving handguns more practical—the concept of a repeating handgun was certainly known in 1791, if still unrefined. Even the development of the modern revolver by Samuel Colt did not suddenly render the pepperbox obsolete; Americans continued to use pepperboxes for self-defense for several decades after Colt's invention,¹⁰¹ and there are indications from medico-legal texts published as late as 1895 that pepperboxes were not just curiosities.¹⁰²

99. Lance Klein, *This Barbarous Weapon*, <http://www.11thpa.org/ferguson.html> (originally posted on [http://www.nmlra.orhanr\(r\)ywent](http://www.nmlra.orhanr(r)ywent) of the [www.11thpa.org/fergusr\(r\)yw](http://www.11thpa.org/fergusr(r)yw)

2008]

SAFETY IN EARLY AMERICA

719

Even with respect to single shot pistols, the technological advance is less dramatic than it first appears. Pocket pistols of the Revolutionary-era were often surprisingly compact, such as this example owned by Paul Revere.



Paul Revere's Pocket Pistol¹⁰³

Being so compact, those who were expecting trouble might carry two, four, or even six single shot pistols on their belt. This was such a sufficiently common practice that pistols were often sold (or stolen) in pairs¹⁰⁴—sometimes as a “case of pistols” or a “brace of pistols.”¹⁰⁵

720

WILLAMETTE LAW REVIEW

[44:699

technological change may render certain applications of 1791 concepts out of date—but if this is true, then the courts should treat the *entire* Bill of Rights in a consistent way.