# "WOLVES AND GRIZZLIES AND BEARS, OH MY!": EXPLORING HISTORICAL AND CONTEMPORARY CONTEXTS FOR JUSTICE KENNEDY'S FOUNDING ERA APPLICATION OF THE PERSONAL RIGHT TO BEAR ARMS

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## INTRODUCTION

During the oral argument of *District of Columbia v. Heller*,[1] counsel for the District contended that the Second Amendment protected only a militia's use of arms, not an individual's right to keep or carry them.[2] Justice Anthony Kennedy asked counsel, somewhat skeptically, if the right to keep and bear arms "had nothing to do with the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that?"[3] Counsel for the District replied, "[t]hat is not the discourse that is part of the Second Amendment . . . ."[4]

The Supreme Court, of course, ultimately disagreed with the District's arguments, finding that the Second Amendment confirms a personal right to keep and bear arms apart from militia service.[5] After analyzing the textual elements of the Second Amendment, Justice Scalia, writing for the majority, stated, "we find that they guarantee the individual right to possess and carry weapons in case of confrontation."[6] Surely that is true, but what kinds of confrontation? Apart from military uses of weapons, there is a large body of literature concerning the Second Amendment's protection of an individual's

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1 District of Columbia v. Heller, 554 U.S. 570 (2008).

2 Transcript of Oral Argument at 14, *Heller*, 554 U.S. 570 (No. 07-290).

3 *Id.* at 8.

4 *Id.*

5 *Heller*, 554 U.S. at 625.

6 *Id.* at 591.

right to self-defense against criminal attack,[7] and much has been written on the use of firearms in conflicts with Indian tribes.[8]

This article, following up on Justice Kennedy's insight, explores a particular kind of confrontation that has received less attention: confrontation by animals. Those confrontations were part of everyday life for settlers during colonial times and the early Republic.[9] If you asked the ordinary farmer or settler for what purpose he used his musket or rifle most frequently, the answer probably would have been "to hunt, to protect my family, and to shoot varmints that destroy my crops and livestock."

It is sometimes rightly said by pro-gun advocates that "the Second Amendment is not about hunting."[10] These advocates tend to focus on the role of firearms in defending against criminal attacks and in resisting tyranny, which are the central, critical purposes of the right to keep and bear arms.[11] The role of firearms in those contexts is to protect human life and freedom.[12] But what if firearms were necessary to protect human life against animal attacks? Or against depredations by animals that threatened the very survival of settler families by destroying their food supplies? What if hunting was necessary to obtain enough food to eat, rather than simply a sport, as it is commonly viewed today? What if hunting was the only way for people on the frontier to procure cash income needed to buy the necessities of life that subsistence hunting, trapping, fishing, and farming could not provide? The people who settled and built the United State likely had a very different view

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7 *See generally* Daniel E. Feld, Annotation, *Federal Constitutional Right to Bear Arms*, 37 A.L.R. Fed. 696 (1978); Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585 (2012); Ryan Notarangelo, *Hunting Down the Meaning of the Second Amendment: An American Right to Pursue Game*, 61 S.D.L. REV. 201 (2016).

8 *See generally* Ann E. Tweedy, *"Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things Like That?" How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687, 693 (2011); Adam Crepelle, *Shooting Down Oliphant: Self-Defense as an Answer to Crime in Indian Country*, 22 LEWIS & CLARK L. REV. 1283, 1287 (2018).

9 Nic Butler, *South Carolina's War Against Beasts of Prey, 1693-1790*, CHARLESTON CNTY. PUB. LIBR. (Oct. 9, 2020), https://www.ccpl.org/charleston-time-machine/south-carolinas-war-against-beasts-prey-1693-1790.

10 As one such advocate has recently observed:

> [T]he Second Amendment is not, and never has been, concerned with the protection of hunting or sport shooting. It is concerned with the protection of something much more fundamental . . . . An armed citizenry is the best and most natural defense against threats to individual rights, whetherthose threats stem from a tyrannical government, a foreign army, an anarchic mob, or an individual criminal.

Amy Swearer, *These 10 Examples Are why Americans Need the Second Amendment*, THE NAT'L INT. (Sep. 13, 2020), https://nationalinterest.org/blog/reboot/these-10-examples-are-why-americans-need-second-amendment-168776.

11 *Id.*

12 *Id.*

of interactions with wild animals than we now have in our protected, supermarket-fed condition.

One very early nineteenth century settler in "the West"[13] summarized succinctly some of the major uses of rifles against animals:

> Let none think we western people follow rifle shooting, however, for mere sport . . . . The rifle procures, at certain seasons, the only meat we ever taste; it defends our homes from wild animals and saves our corn fields from squirrels and our hen-roosts from foxes, owls, opossums and other "varments." With it we kill our beeves and our hogs, . . . do all things in fact, of the sort with it, where others use an axe, or a knife . . . . The rifle is a woodman's lasso. He carries it everywhere . . . .[14]

Thus, hunting game and killing large domestic animals for food; defending against wild animal attacks; and protecting crops and domesticated animals from depredations by wild creatures: these are some of the more crucial purposes for which colonists and early settlers possessed and used firearms in their daily lives, apart from self-defense against attacks by other humans and protecting the community from invasion or other group violence.

It is difficult for us to imagine how sparsely settled the American colonies were—especially the frontier. The first census taken in the newly established Republic in 1790 reported 3,893,635 individuals.[15] The census included whites, free black persons, slaves, and all other persons.[16] As can be seen from the census returns, the populations of the very largest cities were only in the low tens of thousands.[17] The populace as a whole was overwhelmingly rural or lived in very small towns.[18] Under these circumstances, firearms were ubiquitous tools in the ongoing war by settlers against animals who sometimes attacked humans and very frequently

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13 "The West" was the State of Indiana just after statehood in 1816. *Indiana*, HIST. (Mar. 1, 2022), https://www.history.com/topics/us-states/indiana.

14 ROBERT CARLTON (BAYNARD RUSH HALL), THE NEW PURCHASE, OR SEVEN AND A HALF YEARS IN THE FAR WEST 208 (James Albert Woodburn ed., Princeton 1916) (1843).

15 THOMAS JEFFERSON, OFF. OF THE SEC'Y OF STATE, RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 4 (Philadelphia, 1793), https://www2.census.gov/library/publications/decennial/1790/number_of_persons/1790a-02.pdf.

16 *Id.* This census included the thirteen original states plus Vermont, Kentucky, and the District of Maine. *Id.*

17 The City of Philadelphia had 28,522 residents, and, with suburbs, the total was 41,520. *Id.* at 45. The City of New York had 32,328 residents. *Id.* at 37. Boston proper had 18,038 residents, though all of Suffolk County had 44,875. *Id.* at 23. The Town of Baltimore (including "precincts") had 13,503 persons. *Id.* at 47. In South Carolina, the parishes of St. Phillip's and St. Michael's, reported together as the District of "Charlestown," had 16,359 residents. *Id.* at 54. The Marshal reporting the returns for North Carolina stated that the populations of towns had not been provided to him separately from the counties in which they were situated, but that he "[was] satisfied that not one town in North-Carolina contains more than 2[,]000 inhabitants." *Id.* at 53.

18 The largest city in Virginia, the most populous state, was Richmond, which had 3,761 inhabitants. *Id.* at 50. Thepopulation of the entire state was 747,610. *Id.* at 4.

destroyed livestock and crops.[19] They were also essential to feed the early settlers through hunting, whether for immediate consumption or for trade.

In *Heller*, the Supreme Court emphasized that constitutional rights "are enshrined with the scope they were understood to have when the people adopted them."[20] The experience of the Founders with wild animals—both as threats to survival and as a source of needed sustenance—provides compelling evidence that, to the Founding generation, the Second Amendment could not possibly have been understood to be a home-bound right. This historical evidence is dispositive as a matter of constitutional doctrine. But the Founding-era's experience is not wholly foreign to modern life. Today, firearms are still useful and necessary tools in confrontations with wild animals and for hunting. This article proceeds in four parts. Part I addresses the defense against wild animal attacks on humans. Part II discusses the use of firearms to repel the predation of animals on livestock and farmland. Part III examines the use of firearms for subsistence hunting. Part IV then addresses hunting animals for livelihood. The article ends with a short conclusion.

## I. DEFENSE AGAINST WILD ANIMAL ATTACKS ON HUMANS.

### A. Colonies and Early Republic.

One of the most serious predators against both humans and domesticated animals was the wolf.[21] Although we are now inclined to consider wolves as endangered and limited to living in parts of the West, in early colonial times wolves were ubiquitous throughout the continent.[22] For three centuries or more, wolves were regarded as dangerous, destructive creatures to be eliminated.[23] "Many and long were the efforts of our fathers to extirpate wolves, which often preyed on their flocks," wrote one historian about early Massachusetts.[24] Sometimes they were shot with firearms, sometimes they were trapped, and sometimes they were caught with hooks, concealed in meat or fat, that when "wolfed down" would lodge in their throats.[25] Yet, as late as 1723, nearly a century after the war against wolves began in Massachusetts, "[w]olves were so abundant and so near the meeting

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19 Butler, *supra* note 9.

20 District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008).

21 Gordon Harris, *Killing Wolves*, HIST. IPSWICH, https://historicipswich.org/2021/04/25/killing-wolves/ (last visited Apr. 5, 2022).

22 ROBERT H. BUSCH, THE WOLF ALMANAC 19 (1995).

23 Harris, *supra* note 21.

24 JOSEPH B. FELT, HISTORY OF IPSWICH, ESSEX, AND HAMILTON 42 (Cambridge, Charles Folsom, 1834).

25 Harris, *supra* note 21.

house, that parents would not suffer their children to go and come from worship without some grown person."[26]

Accordingly, the colonies often instituted bounties on wolves and other predators.[27] "One of the first laws instituted by the Massachusetts Bay Colony was a bounty on wolves, and in early Ipswich, a rather disconcerting aspect of entering the Meeting House was the sight of wolfheads nailed to the door."[28] An enactment by the Town of Ipswich, Massachusetts, in 1642 provided in part, "[w]hosoever kills a wolf is to have the skin, if he nail the head up at the meeting-house and give notice to the constables."[29] Between 1642 and 1715, Ipswich enacted atleast five laws placing bounties on wolves or otherwise directing townspeople to assist in reducing their number.[30] The bounties paid were often high and in addition to the bounties paid by Massachusetts Bay Colony.[31]

South Carolina passed a series of laws, beginning in 1693 and extending to shortly after American independence, that paid bounties on wolves, panthers,[32] bears, and bobcats.[33] South Carolina's protracted war on wild predators:

> targeted indigenous animals that preyed on imported domesticated livestock and whose presence in the wilderness discouraged planters from pushing west ward into the interior of the colony and state. Although colonial-era planters sustained losses from a variety of native species, they consistently identified panthers, wolves, bears, and bobcats as the principal and most dangerous offenders.[34]

Over time, these bounties were largely successful in eliminating dangerous predators.

Writing in the early nineteenth century of wild quadrupeds in seventeenth century Massachusetts, one historian observed, "[t]hese, of course, were far more abundant, when our ancestors came hither, than they were subsequently. Not a few of them, whose habits were uncongenial with

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26 FELT, *supra* note 24.

27 Harris, *supra* note 21.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 The largest cats in the area covered by the colonies and early states were sometimes referred to as panthers or even as lions and tigers; in fact, they are cougars. Sam Ellis, *Cougars, Pumas, Panthers, and Mountain Lions: What's the Difference?*, FOREST WILDLIFE (Aug. 10, 2021), https://www.forestwildlife.org/cougars-pumas-panthers-mountain-lions-difference/.

33 Butler, *supra* note 9.

34 *Id.*

nearness to populous regions, have entirely deserted our territory. Such are the Beaver, Wild-cat, Wolf, Bear, Deer, and Moose."[35]

Although accounts of fatal wolf attacks on humans are rare, they do exist, including in early and colonial America. In Vermont, it was recounted that, "[s]oon after Bennington was settled, several young ladies returning on a winter's night from a quilting frolic, were pursued by a pack of wolves."[36] They sought refuge in some trees, and:

> [H]ad hardly secured themselves among the lower branches, before the fierce animals were howling beneath them. Suddenly the limb on which one of the party, Caroline Mason by name, was standing, broke beneath her weight, and she fell screaming among the hungry beasts below, which quickly tore her in pieces and devoured her.[37]

The noted naturalist, John J. Audubon, described an attack that occurred in early Kentucky.[38] Two young men set off across a cane brake during winter to visit some females of their acquaintance.[39] Due to the dense nature of the habitat, they prudently took their axes with them.[40] All was dark except a few feet of snow-covered ground immediately before them.[41] Then "along and frightful howl burst upon them, and they were instantly aware that it proceeded from a troop of hungry and perhaps desperate wolves."[42] After a brief pause, they resumed their pace hastily "with their axes in their hands prepared for an attack."[43]

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35 FELT, *supra* note 24.

36 S. R. HALL, THE GEOGRAPHY AND HISTORY OF VERMONT 161 (Montpelier, C.W. Willard, 2d ed. 1868). Accounts such as this one, written down long after the events are said to have occurred, are difficult or even impossible to verify. They may be factual, or they may be simply oral tradition or even legend. The fact that people believed them to be true, however, gives credence to the idea that wolves did actually attack humans in early times and sometimes killed them. As discussed later in this Article, verified wolf attacks, including fatal ones, occur even in modern times. *See* discussion *infra* Part I. B.

37 HALL, *supra* note 36.

38 John Ensminger, *Audubon's Dogs: Hunting in the American South Before the Civil War*, DOG L. REP. (Feb. 1, 2012, 8:49 AM), http://doglawreporter.blogspot.com/2012/02/audubons-dogs-hunting-in-american-south.html.

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.* Axes are "arms" under the Second Amendment. *See* District of Columbia v. Heller, 554 U.S. 570, 582 (2008). As Heller explains, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Id.* This prima facie protection is only defeated if it can be shown that a particular bearable arm is not "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. No such showing can be made for axes, neither at the Founding nor today. *See, e.g.*, State v. Kessler, 614 P.2d 94, 98 (Or. 1980) (explaining that, at the Founding, "[t]he term 'arms' was not limited to firearms, but included several hand carried weapons commonly used for defense" such as hatchets).

> Suddenly, the foremost man was assailed by several wolves which seized on him, and inflicted terrible wounds with their fangs on his legs and arms, and as they were followed by many others as ravenous as themselves, several sprung at the breast of his companion, and dragged him to the ground. Both struggled manfully against their foes, but in a short time one of [them] had ceased to move; and the other, reduced in strength and perhaps despairing of aiding his unfortunate comrade or even saving his own life, threw down his axe, sprang on to the branch of a tree, and speedily gained a place of safety amid the boughs. Here he passed a miserable night, and the next morning the bones of his friend lay scattered aroundon the snow, which was stained with his blood. Three dead wolves lay near, but the rest of the pack had disappeared . . . sliding to the ground, [he] recovered the axes and returned home to relate the terrible catastrophe.[44]

Bears also attacked humans, sometimes fatally. A near-contemporary account of a bear attack in New Hampshire in 1784 reveals how dangerous bears can be:

> An affecting instance of a child falling a prey to one of them, happened at Moultonborough, in the month of August, 1784. A boy of eight years old, son of a Mr. Leach, was sent to a pasture, toward the close of the day, to put out a horse, and bring home the cows. His father being in a neighbouring field, heard a cry of distress, and running to the fence, saw his child lying on the ground, and a bear standing by him. He seized a stake, and crept along, with a view to get between the bear and the child. The bear took the child by the throat, and drew him into the bushes. The father pursued till he came up, and aiming a stroke at the bear, the stake broke in his hand; and the bear, leaving his prey, turned upon the parent, who in the anguish of his soul, was obliged to retreat and call for help. Before any sufficient help could be obtained, the evening was so far advanced, that a search was impracticable. The night was passed by the family in the utmost distress. The neighbours assembled, and at break of day, renewed the pursuit. The child's hat, and the bridle, which he had dropped, were found, and they tracked his blood about forty rods, when they discovered the mangled corps[e]. The throat was torn, and one thigh devoured. Whilst they were standing round the body, the bear rose from behind a log. Three guns were fired at the same instant, which dispatched him . . . .[45]

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[44] II JOHN JAMES AUDUBON & JOHN BACHMAN, THE QUADRUPEDS OF NORTH AMERICA 128-29 (New York, V.G. Audubon, 1852) (relating an incident that occurred several decades before publication of the book).

[45] III JEREMY BELKNAP, THE HISTORY OF NEW HAMPSHIRE 111-12 (Boston, Belknap & Young, 1812). Belknap also recounts an instance of a fatal bear attack on a child in 1731 at a new plantation on the Suncoock River. *Id.*

It can only be guessed how many attacks were prevented by a timely shooting of a bear, as opposed to this example in which guns were employed too late to save innocent human life.

Bears east of the Mississippi were black bears, smaller and less dangerous than the grizzly bears encountered by Lewis and Clark on their expedition West in 1804-06.[46] Members of that expedition, including Meriwether Lewis himself, were attacked by grizzlies.[47] In one instance, private Hugh McNeal was dispatched by Lewis to check on some cached supplies and equipment.[48] He ended up using a firearm to defend himself in an unusual way:

> McNeal returned with his musquet broken off at the breach, and informed me that on his arrival at willow run he had approached a white bear within ten feet without discover[ing] him the bear being in the thick brush. The horse took the alarm and turning short threw him immediately under the bear; this animal raised himself on his hinder feet for battle, and gave him time to recover from his fall, which he did in an instant and with his clubbed musquet he struck the bear over the head and cut him with the [trigger-] guard of the gun and broke off the breach,the bear stunned with the stroke fell to the ground and began to scratch his head with his feet; this gave McNeal time to climb a willow tree which was near at hand and thus fortunately made his escape. The bear waited at the foot of the tree until late in the evening before he left him . . . .[49]

On another occasion, it took an extraordinary number of shots into a grizzly to keep him from killing or mauling members of the party: "[s]ix good hunters of the party fired at a Brown or Yellow Bear Several times before they killed him, and indeed he had like to have defeated the whole party, he pursued them separately as they fired on him, and was near catching several of them . . . ."[50] As Lewis described the incident:

> [H]e pursued two of them separately so close that they were obliged to throw aside their guns and pouches and throw themselves into the river altho' the bank was nearly twenty feet perpendicular; so enraged was this animal that he plunged into the river only a few feet behind the second man

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46 *See generally* Joseph A. Musselman, *Grizzly Bear Encounters*, DISCOVER LEWIS & CLARK, https://lewis-clark.org/sciences/mammals/bears/grizzly-bear-encounters/ (last visited Apr. 5, 2022).

47 *Id.* Sometimes grizzlies were referred to in the journals of Lewis and Clark as white bears, yellow bears, or brown bears, but it is now known that all are of the same species, with only differences in coloration. *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

> he had compelled to take refuge in the water, when one of those who still remained on shore shot him through the head and finally killed him.[51]

When the carcass of the bear was butchered, it was discovered that eight bullets had entered his body from different directions before he was killed by the head shot.[52]

The abundance of dangerous games (and humans) in America's early years can be judged by an episode involving Daniel Boone.[53] In 1780, Boone and his brother Neddie were part of a disastrous battle under the command of George Rogers Clark against Indians north of the Ohio River.[54] Returning to Kentucky, Daniel and Neddie, traveling separately from the main force to hunt for meat, paused near a stream to rest and water their horses.[55] Hearing a rustling in the bushes, Daniel spotted a bear and shot it with his rifle.[56] The bear lumbered off into a thick copse of trees to die, Daniel followed after it.[57] While he was dressing the carcass, he heard rifle shots, and saw four or five Shawnee Indians dancing over Neddie's corpse, which they then beheaded.[58] Alerted by an Indian dog to Daniel's presence, the Indians pursued him through the thick cane brake but ultimately abandoned the chase.[59] Daniel ran twenty miles to Boone's Station to round up a posse.[60] When they returned to the site of the killing, they found a panther gnawing on Neddie's headless torso.[61] An attack by Indians, shooting a bear, and a panther eating a man's remains—all in one spot! The frontier was a hazardous place and firearms were an absolute necessity for survival.

About four years after Indiana was admitted to the Union in 1816, Baynard Rush Hall and several family members began settling in a very large, newly opened tract in the state called "the New Purchase."[62] Hall described how the houses were separated by distances of one to ten miles, and detailed some of the abundant animal life encountered in the open areas between:

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51 *Id.*

52 Musselman, *supra* note 46.

53 *See generally* BOB DRURY & TOM CLAVIN, BLOOD AND TREASURE: DANIEL BOONE AND THE FIGHT FOR AMERICA'S FIRST FRONTIER 316 (2021).

54 *See* Larry Holzwarth, *The Events that Led to the Last Battle of the American Revolution*, *American History* (Feb. 1 2020), https://historycollection.com/the-events-that-led-to-the-last-battle-of-the-american-revolution/6/; *see also* DRURY & CLAVIN, *supra* note 53.

55 DRURY & CLAVIN, *supra* note 53.

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 DRURY & CLAVIN, *supra* note 53, at 321.

62 CARLTON, *supra* note 14.

> The unentered and unsettled tracts between, were our commons, called the Range—used for hunting, swine-feeding, and the like. The range had, however, inhabitants innumerable:—viz, deer, wolves, foxes—blue, gray, and black—squirrels ditto, ground-swine, vulgarly called ground-hogs, and wild turkeys, wild ducks, wild cats . . . oppossums too . . . snakes, with and without rattles, of all colours, from copper to green and black, and of all sizes . . . the neighbours' hogs, so wild and fierce, that when pork-time arrives, they must behunted and shot, like other independent beasts.[63]

Feral hogs were destructive and dangerous to humans, then as now. At times, Hall relates, the wild hog:

> [B]ecomes wholly savage, and loses all reverence for corn-cribs and swill-tubs . . . . [O]ur semi-wild boar is a fellow something different in look, and rather worse to encounter, when saucy or angry, than the vile mud-hole wallower of the Atlantic![64] If one would understand the wild-boar hunts of Cyrus, or the feudal barons—go, get acquainted with the semi-wild fellow of the Purchase.[65]

One animal was unique because it presented a danger to human life, but rarely preyed on livestock: the rattlesnake.[66] As an English visitor to New England recounted in 1630:

> This Countrey being verie full of Woods and Wildernesses, doth also much abound with Snakes and Serpents of strange colours and huge greatnesse: yea there are some Serpents called Rattle Snakes, that haue Rattles in their Tayles that will not flye from a Man as others will, but will flye upon him and sting him so mortally, that he will dye within a quarter of an houre after . . . .[67]

Rattlesnakes—including the Eastern timber rattler—were unique to the New World, and they were much loathed and feared by settlers from Europe encountering them for the first time.[68]

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63 *Id.* at 101.

64 Presumably, this refers to domesticated pigs along the Atlantic seaboard. *See generally* Jason Detzel, *A Brief History of the Pig in the United States*, CORNELL COLL. OF AGRIC. & LIFE SCIS. (Oct. 7, 2019), https://smallfarms.cornell.edu/2019/10/a-brief-history-of-the-pig-in-the-united-states/.

65 CARLTON, *supra* note 14, at 101-02.

66 *See*, FRANCIS HIGGINSON, NEW-ENGLAND'S PLANTATION: WITH THE SEA JOURNAL AND OTHER WRITINGS 33 (Essex Book & Print Club 1908).

67 *Id.*

68 *See generally* Whitney Barlow Robles, *The Rattlesnake and the Hibernaculum: Animals, Ignorance, and Extinction in the Early American Underworld*, 78 WM. & MARY Q. 3, 7 (2021) (describing how European settlers attempted to wipe out the existence of rattlesnakes despite their uniqueness in the New World).

Rattlesnakes were also encountered in settled towns, not just in rural areas. In 1785, the town of Dorchester, Massachusetts, "voted to allow a bounty of 1*s*. 6*d*. for every rattle-snake killed in the town."[69] Bounties were offered by Massachusetts, and hunts were organized by towns: "[i]n 1680, a Massachusetts hunter could earn two shillings a day killing timber rattlesnakes, and beginning in 1740, Massachusetts chose one day each fall for a community-wide hunt, called a rattlesnake bee, which took place in towns across the state."[70]

Various methods were used to kill rattlesnakes, but firearms were certainly among them. An 1852 painting by artist George Catlin entitled "The Rattle Snakes Den (fountain of poison)," which is described by the artist as "[a] scene of my boyhood in the Valley of Wyoming [Pennsylvania]" strikingly depicts several men with guns shooting at a mass of rattlesnakes on a ledge outside their den.[71]

B. Modern Times.

Though attacks by predatory animals against humans are relatively rare in the United States today, they continue to occur.[72] Wolves were almost entirely killed off in the lower forty-eight states by the twentieth century until being reintroduced in certain national parks and forests in the latter part of that century.[73] Close human encounters with wolves, often involving aggression by the wolves, have been documented in Alaska and Canada, where they still exist in significant numbers.[74] A 2002 report by the Alaska Department of Fish and Game studied 80 such encounters between 1900 and 2001.[75] The report found that: "[t]hirty-nine cases contain elements of aggression among healthy wolves, [twelve] cases involve known or suspected rabid wolves, and [twenty nine] cases document fearless behavior among nonaggressive wolves . . . . Aggressive, nonrabid wolves bit people in [sixteen] cases; none of those bites was life-threatening, but in [six] cases the bites were severe."[76]

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69 DORCHESTER ANTIQUARIAN AND HIST. SOC'Y, THE HISTORY OF THE TOWN OF DORCHESTER, MASSACHUSETTS 351 (Boston, Ebenezer Clapp, Jr., 1859).

70 TED LEVIN, AMERICA'S SNAKE: THE RISE AND FALL OF THE TIMBER RATTLESNAKE, (2016).

71 George Catlin, *The Rattle Snakes Den (fountain of poison)* (illustration) (1852).

72 *See* Michael R. Conover, *Numbers of Human Fatalities, Injuries, and Illnesses in the United States Due to Wildlife*, 13 HUM.-WILDLIFE INTERACTIONS 264 (2019); *see also* Carl Borg, *Animal Attacks: The Most Deadly Animals in North America*, OUTFORIA (Mar. 8, 2022), https://outforia.com/animal-attacks/.

73 *E.g.*, *Wolf Restoration*, NAT'L PARK SERV., https://www.nps.gov/yell/learn/nature/wolf-restoration.htm (last visited Jan. 10, 2022).

74 MARK E. MCNAY, ALASKA DEP'T OF FISH AND GAME, A CASE HISTORY OF WOLF-HUMAN ENCOUNTERS IN ALASKA AND CANADA, at I (2002).

75 *Id.*

76 *Id.* at i.

In a number of instances, the encounters might have ended very differently for the humans involved but for the presence of firearms. For example, on April 26, 2000, at a logging camp in Icy Bay, Alaska, two boys, ages six and nine, were playing behind the school.[77] A wolf emerged from the nearby trees within three meters of the boys "in a crouched position, showing its teeth."[78] Although the boys initially did not move, when the wolf stepped closer:

> [T]he boys ran across an open gravel pad toward their homes. The younger boy was wearing oversized boots and was only able to stumble forward in a half run, eventually falling to the ground after traveling about 40 m[eters]. Once the boy fell, the wolf attacked, biting the boy in the buttocks and lower back, inflicting 19 lacerations and puncture wounds. When rescuers arrived seconds later throwing rocks and shouting, the wolf picked the boy up and attempted to carry and then drag him into the trees. Eventually, the wolf was separated from the boy when the wolf dropped the boy to regrip and a dog (male Labrador retriever) intervened between the wolf and the boy.
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> About 10 minutes later the father of the older boy entered the forest and blew on a predator call. The wolf emerged from the trees onto a trail about 80 m[eters] away and the man fired a single shot from his rifle killing the wolf.[79]

In January of 1982, near Duluth, Minnesota, a nineteen-year-old man was hunting hares in thick cover: "[h]e saw a movement ahead, and then he was attacked and knocked down by a wolf. He rolled on the ground with the animal, holding it away by grabbing its throat. The young man discharged his .22 rifle and the noise of the shot apparently frightened the wolf away."[80]

Another case involving a wolf attack against a young boy was stopped by a companion who killed the wolf with his rifle.[81] In the summer of 1976, Roy Lawrence and his seven-year-old son David were flown to a landing strip near the Salcha River in Alaska.[82] While Roy and pilot Ed Galvin were talking next to the airplane, David walked to the river to play in it.[83] He was about thirty meters away.[84] Roy's attention was caught by movement about fifty meters from his son, and Roy saw:

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77 *Id.* at 12.
78 *Id.*
79 *Id.*
80 MCNAY, *supra* note 74, at 16.
81 *Id.* at 16-17.
82 *Id.* at 16.
83 *Id.*
84 *Id.*

> [A] wolf running directly toward his son. Roy yelled at his son, telling him to lie down in the willows; David immediately complied. Having lost sight of the boy, the wolf stopped and stood on its hind legs looking over the brush in the boy's direction. In the meantime, Galvin withdrew his loaded rifle from the airplane and immediately shot the wolf twice, killing it a short distance from the boy.[85]

Bob Piorkowski and his wife lived on a remote homestead near the Tonzona River in Alaska.[86] One October evening in 1975, just before dark they heard their dog persistently barking near a hill not far from their cabin.[87] Thinking that game might be present, the couple took a rifle when they went to investigate.[88] As they approached the dog, they saw five wolves running down the hill taking long, leaping bounds.[89] Oddly, the wolves appeared focused on the couple rather than on the dog that stood a short distance away:

> Suddenly realizing that the wolves were attacking, Piorkowski brought his rifle level and fired from the hip, striking the lead wolf in the chest and killing it at point blank range directly in front of himself. He fired at a second wolf less than 10 m[eters] away, killing it as well. The other wolves retreated up the hill.[90]

A handgun, as well as a rifle, can serve to stop a wolf attack at short range, as this incident shows:

> Alex Lamont lived alone in a dugout cabin on the shore of Wien Lake, Alaska. Once each month, bush pilot Al Wright landed at Wien Lake to deliver Lamont's provisions. [In a supply run in 1969,] Wright received [two] dried and stretched wolf hides from Lamont who asked Wright to fly the hides to Fairbanks and collect the bounty. Lamont then told Wright that he had been attacked and bitten by one of the wolves about [two] weeks earlier. According to Lamont, he was walking near his camp when he saw the [two] wolves running toward him. As the wolves approached he drew a pistol and fired, killing the first wolf after it had grabbed him, torn through his pants, and inflicted a bite wound on his leg. The second wolf was nearby and Lamont shot it at close range. Wright reported that when he landed at Lamont's cabin, about [two] weeks after the incident, the bite wound had

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85 *Id.* at 16-17.
86 MCNAY, *supra* note 74, at 17.
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*

> mostly healed and that Lamont never suffered long-term ill effect from the bite.[91]

The outcome may have been very different had Lamont not had his pistol handy.

One of the most shocking instances of wolf predation on humans in the United States is quite recent. In 2010, a female teacher in Alaska went out jogging after her school duties were over.[92] Candice Berner, originally from Pennsylvania, had been hired by a local school district to teach students in several Alaska communities.[93] She was 32 years old, weighed approximately 115 pounds, and was physically fit.[94] On March 8, 2010, she spent the day working with school children at the Chignik Lake community and told co-workers that she planned to jog on the only road that led from the community to a nearby river.[95] Her last known location was the school office, where she faxed her timesheet to the district office at 5:10 p.m.[96]

At 6:00 p.m. that day, while it was still light, four men were traveling the road by snowmobile when:

> [t]he lead member of the party noticed bloody snow in the road and downhill from the road. He walked down the hill and discovered a human body. He and the other three members of the party left the body and traveled back to Chignik Lake to report what they had found . . . .[97]

Residents came to guard the body, but as the night wore on, all but one of these residents returned to the settlement to get warmer clothing.[98] The one who remained used his snow mobile light to scan the brush for wolves.[99] When a wolf emerged from the brush onto the trail, he also left the site.[100] When he and other residents returned, "the body had been dragged further down the hill and more of the body had been consumed."[101]

A thorough investigation revealed that Candice Berner had most likely reversed course to run back to Chignik Lake after the wolves came upon her.[102] Evidence—including converging wolf tracks, blood, lost and torn

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91 *Id.* at 17-18.

92 LEM BUTLER ET AL., ALASKA DEP'T OF FISH AND GAME, FINDINGS RELATED TO THE MARCH 2010 FATAL WOLF ATTACK NEAR CHIGNIK LAKE, ALASKA 7, 39 (2011).

93 *Id.* at 7.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 BUTLER ET AL., *supra* note 92, at 7.

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.* at 18.

mittens, and depressions in the snow—showed that she fell or was knocked down by the wolves, rose and traveled another ten feet, and was pulled down again about thirty feet from where she died:

> The tracks move downhill away from the road after this second depression. The human tracks that led away from the second roadside depression suggest that the deceased initially struggled and crawled as she moved away from the road, but during the second half of this movement the human tracks change and indicate that she was pulled downhill. The extent of blood in the snow suggests that she was severely wounded at this point. This group of tracks led to a point where it is presumed she died . . . in a small clearing. This presumed location of death was marked with extensive snow melt ([three] feet in diameter) and a large blood stain. Additionally, even though her body was subsequently moved by animals from this site, there were no further signs of struggle.[103]

DNA evidence was collected from her body, and the DNA:

> [F]rom the bite marks on the deceased was identified as wolf DNA. At least two wolves left DNA on the body and clothing. One of these wolves (2010-037), an adult female in excellent body condition, was killed on March 26 near the location where the attack occurred. Samples from this wolf were most prevalent . . . .[104]

Had Candice Berner carried a handgun when she went on her jog, she might well be alive today.

Fatalities from wolf attacks in North America are now rare, because the numbers of wolves and the extent of their range have been drastically limited by the campaigns against them beginning in the earliest colonial times.[105] Though the population of Wolves in the United States is growing with their reintroduction into the west. But the fact that they can kill remains, and the centuries-long use of firearms by settlers and pioneers to eliminate them becomes more understandable when we realize that fact.

Bears, too, continue to attack and sometimes kill human beings in America. In 2020, Patrick Madura, forty-three, from Elgin, Illinois, was on a multi-day backpacking trip in the Great Smoky Mountains in North Carolina.[106] "He booked a campsite in the park 'for the night of September

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103 *Id.* at 10.

104 BUTLER ET AL., *supra* note 92, at 17.

105 Douglas Main, Grey Wolves to be Reintroduced to Colorado in Unprecedented Vote, NAT'L GEOGRAPHIC (Nov. 5, 2020), https://www.nationalgeographic.com/animals/article/Colorado-approves-gray-wolf-reintroduction.

106 Mark Price, *Bear Attack Killed Camper Found Dead in Great Smoky Mountains Last Year, Park Reveals*, CHARLOTTE OBSERVER (Aug. 19, 2021, 6:19 PM), https://www.charlotteobserver.com/news/state/north-carolina/article253600168.html.

8' and was found dead three days later, the site said."[107] Arriving at the site, "'park law enforcement rangers and wildlife officers observed a bear actively scavenging on the remains and promptly euthanized the bear,'"[108] which was determined to weigh 231 pounds. It was the second fatal attack by a bear in the park's history, though mauling and other non-fatal attacks occur more often.[109]

## II. USE OF FIREARMS TO STOP PREDATION BY WILD ANIMALS ON CROPS AND LIVESTOCK.

### A. Colonies and Early Republic.

Today, it is easy to underestimate the need to eliminate animals that preyed on livestock or destroyed crops. But as described in a modern paper on wildlife management, the early settlers had ample reasons to "make war" on wildlife.[110] "In these early years, starvation was a very real concern of these colonists, any threat to their subsistence, particularly predation of livestock, was very serious indeed. By destroying predators that threatened their livestock, the Puritans were trying to protect an important source of food upon which their lives depended."[111]

One of the principal means used to eliminate or reduce the number of these undesirable predators was the payment of bounties for killing them.[112] The early colonists would already have been familiar with the use of bounties because they were common in England before and after colonization of North America.[113] As early as 1532, a statute by Henry VIII placed a bounty of two pence per dozen on "crows, rooks, and choughs."[114] This statute recited that "innumerable Number of Rooks Crows and Choughs do daily breed and

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107 *Id.*

108 *Id.*

109 Two months before the coroner's report in the Madura case, in the same park, "a bear attacked and seriously hurt a 16-year-old Tennessee girl" who was camping with her family. *Id.* According to officials, the attack occurred shortly after midnight, when the girl was sleeping in a hammock. *Id.* "Park rangers ultimately killed the bear, noting it repeatedly returned to the campsite during their investigation. The girl was hospitalized for 'multiple injuries including lacerations to the head,' officials said." *Id.*

110 MICHAEL R. CONOVER & DENISE O. CONOVER, HISTORICAL FORCES SHAPING AMERICANS' PERCEPTIONS OF WILDLIFE AND HUMAN-WILDLIFE CONFLICTS 2 (1997).

111 *Id.*

112 *E.g.*, *id.*

113 Matthew Cragoe & Briony McDonagh, *Parliamentary Enclosure, Vermin and the Cultural Life of English Parishes1750-1850*, 28 CONTINUITY & CHANGE 27 (2013).

114 Act Made and Ordained to Destroy Choughs Crows and Rooks 1532, 24 Hen. 8 c. 10 (Eng.), *in* III JOHN RAITHBY, THE STATUTES AT LARGE, OF ENGLAND AND OF GREAT BRITAIN, FROM MAGNA CARTA TO THE UNION OF THE KINGDOMS OF GREAT BRITAIN AND IRELAND 133-34 (London, G. Eyre & A. Strahan, 1811). A chough is a European bird (Pyrrhocoraxpyrrhocorax) of the crow family. *Chough*, BIRDFACT, https://birdfact.com/birds/chough (last visited Apr. 6, 2022).

increase throughout this Realm . . . and do yearly destroy devour and consume a wonderful and marvellous great Quantity of Corn and Grain of all Kinds," both during planting and at harvest.[115] The statute predicted that if they are allowed to increase they "will undoubtedly be the Cause of the great Destruction and Consumption" of grain sown, "to the great Prejudice Damage and Undoing" of "Tillers Husbands and Sowers of the Earth . . . ."[116] By 1566, parishes were enjoined under the Act for the Protection of Grain to "take up arms against a long list of 'vermin,'" including "[v]arious bird species, foxes, hedgehogs, otters, moles, polecats and badgers," each with a specified bounty.[117]

But in the Colonies, the farmer "had to deal with new predators—wolves, wildcats, and black bears—all native to America."[118] One historian of the period has observed that "[w]olves presented the greatest danger" for they preyed especially on "cattle that roamed abroad" which were "easier to kill than the fleet deer. Every colony offered bounties for them."[119]

All the settlers' domesticated animals—cattle, hogs, sheep, goats, chickens, horses—were brought from England (the only domesticated animal that the Indians possessed was the dog).[120] The colonists did not take kindly to the ravages of predators, especially wolves, on these animals, which were a major source of both sustenance and income.[121] "Cattle and swine received a lasting welcome through the seventeenth century up and down the coast."[122] Cattle especially provided a cash income.[123] "Indeed, cattle raising can be called the first major industry for all American farmers."[124] In the Chesapeake Bay colonies, "cattle were 'the most secure commodity of wealth,' more valuable than land."[125]

In Connecticut in the winter of 1742-43, a young man who went on to become a General in the Revolutionary War, Israel Putnam,[126] went to great lengths to shoot a predatory wolf, which had caused massive death and damage to livestock:

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115 RAITHBY, *supra* note 114, at 133.

116 *Id*.

117 Cragoe & McDonagh, *supra* note 113, at 29.

118 DAVID FREEMAN HAWKE, EVERYDAY LIFE IN EARLY AMERICA 40 (1988).

119 *Id*.

120 *Id*. at 38.

121 *Id*.

122 *Id*. at 39.

123 *Id*.

124 HAWKE, *supra* note 118, at 39.

125 *Id*.

126 General Putnam was said to have issued the famous order at the Battle of Bunker Hill, "Don't fire until you see the whites of their eyes." Harry Schenawolf, *American Legend General Israel Putnam & His Disappearing Act at the Battle of Bunker Hill, June 17, 1775*, REVOLUTIONARY WAR J. (Feb. 5, 2019), http://www.revolutionarywarjournal.com/american-legend-general-israel-putnam-his-disappearing-act-at-the-battle-of-bunker-hill-june-17-1775/.

> A she-wolf caused Putnam and some of the other settlers great loss by preying upon their sheepfolds. She had repeatedly eluded the hunters, although they were successful in killing most of her young . . . . One night when prowling over Putnam's farm, she killed seventy of his sheep and goats, and lacerated many of the lambs and kids. In this exigency he and five Pomfret men arranged a continuous pursuit by agreeing to hunt alternately in pairs. Fortunately, a light snow had fallen and the course of the wolf could be easily traced.[127]

The next morning, a young man "discovered the den into which the wolf had been driven by the bloodhounds."[128] Many persons, "armed with guns and supplied with material for smoking her out" hastened to her narrow, deep den amidst boulders on a steep, craggy hillside.[129] "The whole day was spent by Putnam and his neighbours in attempting to dislodge the animal, but the dogs—one of them Putnam's own hound—which were sent into the den returned frightened and badly wounded and would not go in again."[130]

Putnam finally decided to go in and shoot the wolf himself.[131] He crawled inside the two-foot-square entrance, where the den descended obliquely for about fifteen feet, and then ran horizontally for another ten feet to a gradual ascent.[132] He took his gun and a smoking torch with him.[133] In "no place could a person raise himself from his hands and knees."[134] He had a rope tied around his feet so that the assembled men could pull him out of the den at a signal.[135] Confronting the wolf, who was "howling, rolling her eyes, and snapping her teeth" he "fired at her just as she was evidently about to spring upon him."[136] After the smoke had cleared, he went back in, grasped the dead wolf's ears, gave the signal, "and was drawn out, dragging his victim into the presence of the astonished and exultant people."[137]

There was no inconsistency between using guns to protect against attacks by humans and to protect against animal depredations on livestock or crops. Thomas Jefferson, in a letter to Peter Minor, urged Minor to accept on behalf of Minor's son a device that allowed shot and powder to be conveniently carried together.[138] Of the son, Jefferson wrote:

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127 WILLIAM FARRAND LIVINGSTON, ISRAEL PUTNAM: PIONEER, RANGER, AND MAJOR-GENERAL, 1718-1790, at 11-12 (1901).

128 *Id.* at 12.

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.* at 13.

133 LIVINGSTON, *supra* note 127, at 13.

134 *Id.* at 13.

135 *Id.*

136 *Id.*

137 *Id.* at 13-14.

138 Letter from Thomas Jefferson to Peter Minor (July 20, 1822) (on file at https://founders.archives.gov/ documents/Jefferson/98-01-02-2966).

> I presume he is a gun-man, as I am sure he ought to be, and every American who wishes to protect his farm from the ravages of quadrupeds and his country from those of biped invaders. I am a great friend to the manly and healthy exercises of the gun.[139]

Wolves were not the only large quadrupeds to prey on livestock. Panthers (or, more properly, cougars) also killed or injured domestic animals.[140] A female resident of the Wyoming Valley in Pennsylvania, described the abundance of wild animals and a close-up instance of predation by a cougar in the year 1775:

> Father and brothers hunted beaver, bears, deer, raccoons, wild turkeys, etc., and we were in comfortable circumstances. Game was abundant at this period; we often saw wolves, bears, and deer swimming the river. One night a ferocious animal entered the yard, and so wounded one of the young cattle that it was found necessary to kill it. Father and brothers seized their guns when they heard the disturbance, but the savage beast bounded off just in time to save himself; they saw him escape, and, as near as they could judge from a mere glance, it was a panther.[141]

Often times the destruction of crops was caused by animals far less formidable than wolves, bears, or cougars, but which could nevertheless cause great damage due to sheer numbers.[142] Peter Kalm, an eminent Swedish naturalist, visited the colonies in the mid-1700s and reported that squirrels:

> [F]requently do a great deal of mischief in the plantations, but particularly destroy the maize. For they climb up the stalks, cut the ears in pieces and eat only the loose and sweet kernel which lies quite in the inside. They sometimes come by hundreds upon a maize-field, and then destroy the whole crop of a countryman in one night.[143]

This havoc wreaked by squirrels on corn crops was so severe that "[t]he government, in most of the North American colonies, has therefore been obliged to offer a certain premium to be paid out of the common treasury, for the head of a squirrel."[144] Pennsylvania offered a bounty of "three pence for each squirrel head," and many people "especially young men, left all other employment, and went into the woods to shoot squirrels."[145] Kalm found it

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139 *Id.*

140 *See* GEORGE PECK, WYOMING: ITS HISTORY, STIRRING INCIDENTS, AND ROMANTIC ADVENTURES 149 (New York, Harper & Brothers, 1858).

141 *Id.*

142 PEHR KALM, TRAVELS INTO NORTH AMERICA 75 (John Reinhold Forster trans. 1770).

143 *Id.*

144 *Id.* at 250.

145 *Id.* at 250-51.

"inconceivable" how much money had been paid out for squirrel bounties.[146] In 1749, in Pennsylvania alone, when the responsible officials met to tally up the accounts, it was found (according to a man who had examined the accounts) that "eight thousand pounds of Pennsylvania currency, had been expended in paying these rewards."[147] That's about 640,000 squirrels in one year, in a sparsely populated colony!

B. Modern Times.

Even though most twenty-first century Americans do not need to worry personally about animal depredations on their livestock or crops—because they don't have any—there are still destructive creatures that can do great damage to farmers' or ranchers' property in rural areas.[148] These are sometimes known as "nuisance species."[149] In order to be hunted or trapped, most wild species are subject to seasons, bag limits, and other regulations. Nuisance species quite frequently are not subject to those regulations.[150] In Virginia, for example, coyotes are considered a nuisance species because of their disposition to kill or mutilate farm animals.[151] A no kill permit is required from the state wildlife management agency, and there is a "continuous open season" year-round on coyotes.[152]

In Ohio, there are limits on the kinds of long guns (i.e., shotguns and rifles) that can be used to take most game animals, and generally game animals must be taken during daylight hours.[153] There are also specified seasons for most animals.[154] But, coyotes may be hunted (with certain exceptions) with any kind of rifle or handgun; they may be taken all year; there is no limit on the number of coyotes that may be killed; they may be hunted at night; and night vision equipment is expressly allowed for that purpose.[155]

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146 *Id.* at 250.

147 *Id.*

148 *See generally* Admin. in Animal Husbandry, *The Top 10 Predators on the Farm*, BEGINNINGFARMERS.ORG (Apr. 6, 2015), https://www.beginningfarmers.org/the-top-10-predators-on-the-farm/.

149 *E.g.*, *Coyotes*, VA. DEP'T OF WILDLIFE RESOURCES (last visited Jan. 10, 2022), https://dwr.virginia.gov/wildlife/nuisance/coyotes/.

150 *E.g.*, *id.*

151 *Id.*

152 *Id.*

153 *See generally* OHIO DEP'T OF NAT. RESOURCES, DIV. OF WILDLIFE, OHIO HUNTING AND TRAPPING REGULATIONS 2021-22 (2021) (describing state hunting regulations effective from September 2021 to August 2022).

154 *Id.*

155 *Id.* at 24-25.

As recently as 2022, angry moose have terrorized Alaskan Iditarod sled teams.[156] A large bull moose spent an hour stomping the sled dogs of a rookie Iditarod musher.[157] The moose was undeterred when the musher emptied her entire gun into it, and only stopped when a friend came to the rescue with a high-powered rifle.[158] This musher is among many others who have faced an Alaskan moose attack.[159]

Feral hogs, wild pigs, or wild boars—the terms are more or less interchangeable—have spread like wildfire over the southern United States in recent decades.[160] Particularly, the population of these wild beasts has exploded in Texas.[161] As described in a recent Texas state report:

> From 1982 to 2016, the wild pig population in the United States increased from 2.4 million to an estimated 6.9 million, with 2.6 million estimated to be residing in Texas alone. The population in the United States continues to grow rapidly due to their high reproduction rate, generalist diet, and lack of natural predators. Wild pigs have expanded their range in the United States from 18 States in 1982 to 35 States in 2016.[162]

The damage they cause to farmers and ranchers is enormous:

> Most damage caused by wild pigs is through either rooting or the direct consumption of plant and animal materials. Rooting is the mechanism by which wild pigs unearth roots, tubers, fungi, and burrowing animals. They use their snouts to dig into the ground and turn over soil in search of food resources, altering the normal chemistry associated with nutrient cycling within the soil.[163]

Direct consumption of crops is probably the least of the damage they cause: "Trampling of standing crops and damage to soil from rooting and wallowing activities account for [ninety to ninety-five percent] of crop damage, in some cases," according to the Texas report.[164] One feral hog can cause at least one thousand dollars in damages to agriculture in just a single night.[165] Indeed, the total annual damage to agriculture from feral hogs has

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156 Associated Press, *Moose Attacks Iditarod Sled Team, Injures 4 Dogs*, N.Y. POST (Feb. 9, 2022, 3:32 AM), https://nypost.com/2022/02/09/moose-attacks-iditarod-rookie-bridgett-watkins-sled-team-injures-4-dogs/.

157 *Id.*

158 *Id.*

159 *Id.* Similar attacks have occurred in the area since 1985. *Id.*

160 John C. Kinsey, *Ecology and Management of Wild Pigs*, TEX. PARKS & WILDLIFE (2020), https://tpwd.texas.gov/huntwild/wild/nuisance/feral_hogs/.

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

been estimated at over two billion dollars per year.[166] The damage caused by the hog infestation has also invaded a number of urban areas and is not limited to rural crop damage.[167]

Part of the problem is that wild pigs have few natural predators, so their population tends to increase rapidly.[168] Accordingly, humans have stepped in, generally, with firearms. Hunting of wild pigs is encouraged by most states though, so far, the population has kept expanding.[169]

Modern firearms technology is helping, however:

> [I]t may be most efficient for hunters to shoot pigs at night under the cover of darkness. Night vision optics and the recent increase in use of sound suppressed rifles has greatly enhanced the success of this method. Using this type of equipment allows individuals to remove large portions of wild pig populations, whole sounders in some cases, at one time in large open terrain. Night shooting ishighly effective in agricultural fields . . . .[170]

So, just as our forebears found it necessary to shoot animals that destroyed crops, so we find ourselves needing to do just that in the twenty-first century.

## III. USE OF FIREARMS FOR SUBSISTENCE HUNTING.

### A. Colonies and Early Republic.

In the early colonial period, birds were so abundant that several accounts describe bringing down numerous birds with a single discharge of shot. One visitor to Plymouth Colony in 1623 observed that "[h]ere are eagles of many sorts, pigeons, innumerable turkeys, geese, swans, duck, teel, partridge divers sorts, and many others fowl, [so] that one man at six shoots hath killed 400."[171] Around 1628, the chief trading agent for the Dutch West India Corporation reported in a letter that:

> Of the birds, there is a kind like starlings, which we call "maize thieves," because they do so much damage to the maize. They fly in large flocks, so

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166 Kinsey, *supra* note 160.

167 Fifty-six of the fifty-eight counties in California have wild pigs, and the majority of the damage is occurring in suburbs of the east bay such as Lafayette. Thomas Fuller, *The Rampaging Pig of the San Fransisco Bay Area*, N.Y. TIMES (Feb. 2, 2022), https://www.nytimes.com/2022/02/01/us/pigs-san-francisco-california.html. Prior to the Covid-19 pandemic, the city spent $110,000 on the damage caused by the pigs. *Id.* Additionally, the pigs have begun to threaten water sources to Oakland, Piedmont, Alameda, and Hayward. *Id.*

168 Kinsey, *supra* note 160.

169 *Id*.

170 *Id.*

171 JOHN PORY ET AL., THREE VISITORS TO EARLY PLYMOUTH 28 (Sydney V. James, Jr. ed. 1963).

> that they flatten the corn in any place where they alight, just as if cattle had lain there. Sometimes we take them by surprise and fire amongst them with hail-shot, immediately that we have made them rise, so that sixty, seventy, and eighty fall all at once, which is very pleasant to see.[172]

In colonial times, many animals were hunted for their meat that we seldom think of today. Buffalo (or bison) were present in huge numbers along the frontier that opened in the latter part of the eighteenth century.[173] One buffalo trail on the Kentucky border "was as easy to follow as a modern turnpike, running thirty feet across and pounded two feet deep by the hooves of millionsof buffalo."[174] "To North American woodsmen of the 1700s, the buffalo was a lumbering commissary."[175] Not only were the buffalo skins useful to serve as blankets, heavy winter garments and shoe-pacs, or to make a rude shelter or hide boat, but its "meat was rich in sustaining protein, with the triple delicacies of the animal's tongue, hump, and marrow being themost prized culinary rewards."[176]

On the frontier, many pioneers lived almost entirely off meat from game they had killed; others practiced agriculture and kept some livestock but still relied heavily on firearms to feed themselves and their families. An early visitor to the frontier in Indiana captured the distinction by dividing the people he found there into four classes, the first two of which relied heavily on hunting and firearms.[177] The first class consisted of:

> The hunters, a daring, hardy, race of men, who live in miserable cabins, which they fortify in times of War with the Indians . . . . They are unpolished, but hospitable, kind to Strangers, honest and trustworthy. They raise a little Indian corn, pumpkins, hogs, and sometimes have a Cow or two . . . . But their rifle is their principal means of support. They are the best marksmen in the world, and such is their dexterity that they will shoot an apple off the head of a companion . . . . This class cannot be called first Settlers, for they move every year or two.[178]

The second class comprised the: "[f]irst settlers;—a mixed set of hunters and farmers. They possess more property and comforts than the first

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172 *Id*. at 78.

173 DRURY & CLAVIN, *supra* note 53, at 124.

174 *Id*.

175 *Id.* at 115.

176 *Id*. at 115-16.

177 ELIAS PYM FORDHAM, PERSONAL NARRATIVE OF TRAVELS IN VIRGINIA, MARYLAND, PENNSYLVANIA, OHIO, INDIANA, KENTUCKY; AND OF A RESIDENCE IN THE ILLINOIS TERRITORY: 1817-1818, at 125-26 (Frederic Austin Ogg ed. 1906).

178 *Id*.

class . . . . They [sell] out when the Country begins to be well settled, and their cattle cannot be entirely kept in the woods."[179]

Though the animals pursued, and the quantities of game taken varied from time to time and place to place, there is no doubt that game furnished a substantial—sometimes critical—portion of the food for hunters, farmers, and dwellers in rural areas in colonial times and the early Republic. Possessing the means (i.e., firearms) to kill game could mean the difference between life and death on the frontier.

B. Modern Times.

Hunting for meat on which to subsist persisted for many people well into the twentieth century and can still form an important part of the diet of people who might otherwise have trouble buying enough high-quality protein.[180]

In his autobiography, noted big game hunter, firearms developer, and gun writer, Elmer Keith, described life with his wife and two children in the mid-1930s at their homestead near the North Fork of the Salmon River in Idaho.[181] Money was scarce in that area during the Great Depression, so Mrs. Keith raised turkeys and gardened, and the family canned a lot of salmon for consumption over the winter.[182] But, as Keith relates, hunting provided the family with meat for the winter:

> [When] fall came, we had to lay in our meat. At that time on the North Fork the winters were quite cold and steady. I had a good screened meat house to hang our elk and deer in. They'd freeze hard as a rock. We'd go out and saw off what we wanted, and eat when it was needed. We had natural refrigeration.[183]

Indeed, research shows that when hunters were asked in 2013 to provide the single most important reason why they hunted, the largest group—thirty-five—said "for the meat."[184] This was more than a fifty percent increase from the twenty-two percent who had given "for the meat" as their primary motivation in 2006.[185] Among the probable reasons for this emphasis on

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179 *Id.*

180 ELMER KEITH, "HELL, I WAS THERE!" 148 (1979).

181 *Id.*

182 *Id.*

183 *Id.*

184 F. Riehl, *New Research Shows Hunters Increasingly Motivated by the Meat*, AMMOLAND (Oct. 18, 2013), https://www.ammoland.com/2013/10/new-research-shows-hunters-increasingly-motivated-by-the-meat/#axzz7PglxCvyY. A survey was conducted asking respondents to select the most important reason from a list of alternatives, such as "being with family and friends, being close to nature, for the sport/recreation, for the meat, or for a trophy." *Id.*

185 *Id.*

hunting for meat is that as a result of the recession that began in 2008, "more Americans likely turned to hunting as a way of obtaining relatively inexpensive venison and other meat to put food on the family table."[186]

## IV. MARKET HUNTING AS A SOURCE OF INCOME.

### A. Colonies and Early Republic.

In 1753, at age nineteen, Daniel Boone still participated in farming at his parents' house in North Carolina.[187] But once the harvest was in, he set "out for the frontier to spend his days and nights slipping through the hardwoods tracking prey . . . ."[188] In the deep North Carolina forests he found "deer, bear, and elk so plentiful—over thirty thousand deerskins were exported from the colony in 1753—that a stealthy hunter's biggest challenge was fending off wolves and panthers as he dressed the carcasses."[189] When black bears foraged in the fall to seek hibernation weight, "a rifleman with Boone's skill could fell enough of the *Ursus americanus* to cache a season's worth of fatback bear meat, salted to make bear bacon."[190] Legend had it that Bear Creek, which ran through the Boone property, "acquired its name from the ninety-nine bears that Boone had killed along its banks over the course of a single autumn."[191]

Bears and other game in such quantities were obviously no longer taken solely for sustenance. Boone at that point had become "a full-time market hunter, jouncing his peltry-laden wagon along the rough road to the 'trading town' of Salisbury," some twenty miles away.[192]

"Long hunters," men who went on long journeys to hunt along the frontier, collected deerskins to be sold when they returned.[193] One party of twenty hunters in what later became Tennessee killed "deer by the hundreds" and feasted on buffalo marrow.[194] When they returned to their camp, they found that their equipment and spare ammunition had been stolen by Indians, who also "destroyed over five hundred dressed deerskins."[195]

As suggested by this figure of five hundred skins for a single hunting party, deerskins were a major commodity that could be collected by colonial

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186 *Id.*
187 DRURAY & CALVIN, *supra* note 53, at 38.
188 *Id.*
189 *Id.*
190 *Id.*
191 *Id.*
192 *Id.*
193 DRURAY & CALVIN, *supra* note 53, at 38.
194 *Id.*
195 *Id.*

hunters and sold to merchants for export to England.[196] Figures from "Charles Town" ("Charleston") in South Carolina are suggestive of the scale of this trade.[197] Deerskins were the most valuable commodity exported from that port until rice became the staple crop of South Carolina.[198] "Between 1699 and 1715 the average importation by English merchants amounted to 54,000 skins annually."[199] The peak was the year after Christmas 1706, which saw 121,335 deerskins shipped from Charles Town alone.[200] Of course, many other ports shipped deerskins to England as well.[201]

Why was this important? Many settlers in the hinterland and on the frontier had no other means to obtain cash money. They might have been self-sufficient in agricultural produce and game for family consumption, but money was needed to buy agricultural implements, tools, nails, knives, cooking utensils and pots, woven cloth, salt, and many other necessities—not to mention "luxuries" such as sugar—that allowed a family to advance to a level above mere subsistence. And hunting for the market with firearms often was the only window of opportunity to procure a commodity that could be sold for cash needed to purchase such items.[202]

## V. CONCLUSION

"[O]ne doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home."[203] The history recounted in this article confirms the truth of this statement. Wild animals were both a threat and a potential bounty for the earliest Americans. The need for protection from animal attack alone demonstrates the existence of a Second Amendment right to carry firearms outside the home. As Charles Sumner recounted in his famous "Bleeding Kansas"speech, "[t]he rifle has ever been the companion of the pioneer and, under God, his tutelary protector against . . . the beast of the forest."[204] Not only that, but "at least one article in our National

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196 Matt Richards, *The History of Brain Tan*, TRADITIONAL TANNERS, https://braintan.com/articles/history/history.html (last visited Apr. 6, 2022). Depending on time and place, deerskins were collected and sold to merchants by colonial hunters, Indians, or both. *Id.*

197 *See* W.O. Moore, Jr., *The Largest Exporters of Deerskins from Charles Town, 1735-1775*, 74 S.C. HIST. MAG. 144, 147-50 (1973).

198 *Id*. at 144.

199 *Id*.

200 *Id*.

201 *Id*. at 145.

202 Martha A. Zierden & Elizabeth J. Reitz, *Animal Use and Urban Landscape in Colonial Charleston, South Carolina, USA*, 13 INT'L J. HIST. ARCHAEOLOGY 327, 333 (2009).

203 Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012).

204 District of Columbia v. Heller, 554 U.S. 570, 609 (2008) (quoting Charles Sumner, *The Crime Against Kansas*, *in* AMERICAN SPEECHES: POLITICAL ORATORY FROM THE REVOLUTION TO THE CIVIL WAR 553, 606-07 (Ted Widmer ed. 2006)).

Constitution must be blotted out, before the complete right to it can in any way be impeached."[205] While the need for firearms to protect against wild animals may not be as acute for most Americans today as it was at the Founding, it still persists, it is just one of the many reasons why our forebears were wise to enshrine the right to keep and bear arms—including the right to bear arms *in public*—in our Nation's Constitution.

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[205] *Id.*