

Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition

David B. Kopel

Christopher C. Little

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Second Amendment Commons](#)

Recommended Citation

David B. Kopel, & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 Md. L. Rev. 438 (1997)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol56/iss2/5>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

COMMUNITARIANS, NEOREPUBLICANS, AND GUNS: ASSESSING THE CASE FOR FIREARMS PROHIBITION

DAVID B. KOPEL*
CHRISTOPHER C. LITTLE**

INTRODUCTION	439
I. THE COMMUNITARIAN NETWORK AND DOMESTIC DISARMAMENT	441
A. <i>The Communitarian Agenda</i>	441
B. <i>The Communitarian Movement</i>	443
C. The Case for Domestic Disarmament	445
II. THE FEASIBILITY AND COMMUNITARIAN IMPLICATIONS OF DOMESTIC DISARMAMENT	450
A. <i>Guns and Other Dangerous Items</i>	454
1. <i>Noncompliance of Law Enforcement Personnel</i>	456
2. <i>Resistance</i>	458
3. <i>Overwhelming and Ruining the Criminal Justice System</i>	460
4. <i>"Nasty Things May Happen": Armed Resistance</i>	461
B. <i>Country, Court, and the Crisis of Legitimacy</i>	469
C. <i>Summary</i>	474
III. VIRTUE AND COMMUNITY MILITIAS	476
A. <i>The Militia and Republicanism</i>	477
B. <i>Toward Well-Regulated Militias</i>	487
1. <i>What "A Well-Regulated Militia" Is Not</i>	487
2. <i>The Civilian Marksmanship Program</i>	490
3. <i>Other Marksmanship and Safety Training Programs</i> .	491
4. <i>Using the Militia to Restore Order</i>	494
5. <i>Safety Education in Schools</i>	499
6. <i>Virtue Is Good</i>	501
IV. GUNS AND PUBLIC SAFETY	502
V. THE RIGHT GUARANTEED BY THE SECOND AMENDMENT: A CRITIQUE OF <i>DOMESTIC DISARMAMENT'S</i> LEGAL ANALYSIS .	510

* Research Director, Independence Institute, Golden, Colorado. B.A., Brown University; J.D., University of Michigan.

** Senior Fellow, Independence Institute. B.A., John Brown University; M.A., Denver Seminary.

The authors would like to thank Eugene Volokh, Don Kates, Joseph Olson, Glenn Harlan Reynolds, Bob Dowlut, Paul Blackman, and William Tonso for their helpful criticism. Errors are the authors' alone.

A.	<i>The Origins of the Second Amendment</i>	516
B.	<i>The United States Supreme Court and the Right to Keep and Bear Arms</i>	525
1.	Dred Scott v. Sandford <i>and Its Aftermath</i>	526
2.	United States v. Cruikshank.....	528
3.	Presser v. Illinois	530
4.	Miller v. Texas.....	531
5.	Robertson v. Baldwin	532
6.	United States v. Miller	532
7.	Lewis v. United States	537
8.	United States v. Verdugo-Urquidez.....	538
9.	<i>The Modern Fourteenth Amendment Cases</i>	539
C.	<i>Lower Federal Courts</i>	542
1.	Farmer v. Higgins	542
2.	Quilici v. Village of Morton Grove	544
	CONCLUSION	551

INTRODUCTION

It is high time for the federal government to outlaw gun possession by anyone except the police and the military, and to round up all firearms currently in private hands. Millions of Americans think so, but even the most aggressive of America's gun control groups have not been willing to advocate such a policy. Into the breach has stepped the Communitarian Network, arguably the most influential think tank in Washington. In a lengthy position paper, *The Case for Domestic Disarmament (Domestic Disarmament)*,¹ the Communitarian Network presents a forceful law-and-policy case for a gun-free America.

Domestic Disarmament is noteworthy because it is almost the only scholarly document arguing at length for confiscating all guns,² rather than merely outlawing the future production of certain "bad" guns (such as handguns and so-called "assault weapons").³ *Domestic Disarmament* is particularly important because it is a product of the Communitarian Network, the think tank that, far more than any other, has the ear of President Clinton and many other leading Democrats (and

1. AMITAI ETZIONI & STEVEN HELLAND, *THE CASE FOR DOMESTIC DISARMAMENT* (1992) [hereinafter *DOMESTIC DISARMAMENT*].

2. *Id.* at 9. *Domestic Disarmament* is willing to make some concessions to gun collectors and hunters. See *infra* note 47 and accompanying text.

3. This Article uses the term "assault weapons" as gun prohibition advocates use it. This usage, however, is a misnomer. For a critique of this misuse of the term, see David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381 (1994).

some Republicans).⁴ Moreover, *Domestic Disarmament* offers an entirely new vantage point from which to view the firearms issue—from the communitarian context, in which the individual's responsibilities to society are seen as more important than the unlimited exercise of rights.⁵

This Article evaluates and responds to *Domestic Disarmament* and the Communitarian Network's gun prohibition agenda. In addition to discussing *Domestic Disarmament*, this Article considers David C. Williams's *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*,⁶ which calls for a somewhat different communitarian approach to gun policy. Williams argues that (1) the Second Amendment poses no impediment to any form of gun control on individuals,⁷ and (2) in the long term, the government should revive the "well regulated Militia"⁸ and encourage citizen proficiency with arms and participation in communal defense organizations.⁹

Part I of this Article provides an overview of communitarianism and the Communitarian Network and summarizes the argument of *Domestic Disarmament*. Part II inquires into whether domestic disarmament is enforceable and what communitarian problems may be raised by enforceability issues. Part III sketches a variety of possible solutions to the American gun dilemma, including the communitarian militia proposals of Williams.¹⁰ Part IV briefly reviews the contribution that firearms ownership may make to public safety, and Part V closely scru-

4. See *infra* notes 33-35 and accompanying text.

5. Cf. The Communitarian Network, *The Responsive Communitarian Platform: Rights and Responsibilities*, reprinted in *RIGHTS AND THE COMMON GOOD: THE COMMUNITARIAN PERSPECTIVE* 11, 19 (Amitai Etzioni ed., 1995) [hereinafter *Platform*] (contending that "each member of the community owes something to all the rest, and the community owes something to each of its members").

6. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 *YALE L.J.* 551 (1991).

7. *Id.* at 587-88. Williams contends that an individual right to own arms was "a peripheral issue in the debates over the Second Amendment. This secondary status is critical because . . . under modern conditions an individual right to arms is positively counter-productive to the goals and ideals implicit in a collective right." *Id.*

8. The words "well regulated Militia" come from the text of the Second Amendment, which states in its entirety: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

9. Williams, *supra* note 6, at 607-08. Williams states: "The most obvious way to secure the functions served by the old militia would be to reconstitute a universal militia along republican lines." *Id.* at 607. As we detail below, Williams is not advocating the sort of independent militias that have been so much in the news recently. See *id.* at 607-14; see also *infra* notes 210-224 and accompanying text.

10. See *infra* notes 210-224 and accompanying text.

tinizes *Domestic Disarmament's* conclusion that the Second Amendment presents no barrier to firearms confiscation.¹¹

For too long, the American gun control debate has avoided the most fundamental issues. The progun and antigun lobbies both agree that there are "good" gun owners and "bad" gun owners; the main issues concern drawing a line between the two and determining what kinds of measures should be used to keep the two groups separate. In addition, the antigun lobbies argue that there are good guns (many types of rifles and shotguns) and bad guns (handguns and assault weapons) and that no gun control policy should deprive good Americans of their good guns.¹² Nevertheless, none of the major policy groups participating in the American gun debate argues, as does the Communitarian Network, that America's gun policy should be modeled on Japan's, in which communitarian values prevail, guns are almost entirely prohibited, and gun violence is rare.¹³ By forcefully raising the issue of whether any Americans should have guns at all, the Communitarian Network performs a great service by inviting inquiry into the most fundamental premises of the American gun control debate. In this Article, the authors hope to advance the inquiry begun by *Domestic Disarmament*.

I. THE COMMUNITARIAN NETWORK AND DOMESTIC DISARMAMENT

A. *The Communitarian Agenda*

The Communitarian Network is a public policy think tank founded upon the philosophy of sociologist Amitai Etzioni, a professor of American Studies at George Washington University.¹⁴ Dr. Etzioni is joined by a number of like-minded academics, many of whom

11. DOMESTIC DISARMAMENT, *supra* note 1, at 6, 29-38.

12. Cf. Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488, 500 (1992) ("Licenses should be granted only for those weapons that are particularly suited to hunting or some other valid purpose, and only to individuals who have passed a background check. This would allow 'honest citizens' the privilege of owning a hunting weapon, and possibly, a licensed handgun for self-defense.").

13. See DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? 20-23 (1992) (discussing gun possession and gun-related crime in Japan).

14. See Mike Capuzzo, *Idea Man*, PHILA. INQ., June 16, 1992, at E1, available in LEXIS, News Library, Philing File ("As the father of Communitarianism—he coined the word in 1990—Etzioni is being called an innovator."). For a statement by Etzioni about the Communitarian Network, see Amitai Etzioni, *Preface: We, the Communitarians*, in RIGHTS AND THE COMMON GOOD: THE COMMUNITARIAN PERSPECTIVE iii (Amitai Etzioni ed., 1995) [hereinafter *We, the Communitarians*].

enjoy close connections to the Washington political establishment.¹⁵ The Communitarian Network's mission is to address what it considers the baneful societal effects of an imbalance between individual rights and social responsibilities.¹⁶ The United States, argue communitarians, has become a place where responsibilities no longer accompany rights to the extent they once did, resulting in a fragmented society in which irresponsibility, selfishness, and violent crime run rampant.¹⁷ These socially deleterious effects of an unrestrained individualism must therefore be reversed through the advocacy and implementation of new policies designed to further the common good.¹⁸ The Communitarian Network's slogan is "strong rights presume strong responsibilities."¹⁹

Communitarians also argue that parents should forsake consumerism, personal advancement, and greed.²⁰ Workplace reforms such as paid parental leave and flex schedules should be mandated.²¹ Additionally, communitarians propose making it more difficult for couples with children to divorce.²² Advocacy of an increased emphasis on moral education in the nation's schools is another element of the communitarian message.²³ Schools should "teach those values Americans share,"²⁴ such as "the values of civility, sharing, and responsibility to the common good."²⁵

The Communitarian Network also advocates a number of other public policy ideas to increase public virtue and advance the common good. Included among these are campaign finance restrictions and a heightened emphasis on the importance of voting, jury duty, and paying taxes.²⁶ Among the most controversial proposals are the implementation of widespread sobriety checkpoints,²⁷ less privacy for HIV

15. See *We, the Communitarians*, *supra* note 14, at iii.

16. See *id.* at iv ("We adopted the name 'communitarian' to emphasize that the time had come to attend to our responsibilities to our communities.").

17. See *id.* (lamenting that "many Americans are rather reluctant to accept responsibilities").

18. See *id.* at iv-v.

19. DOMESTIC DISARMAMENT, *supra* note 1, at i. For a concise statement of the Communitarian Network's objectives, see *Platform*, *supra* note 5. This and other materials may be obtained from The Communitarian Network, 2130 H Street, N.W., Suite 714J, Washington, D.C., 20052 (1-800-245-7460).

20. See *Platform*, *supra* note 5, at 14.

21. See *id.*

22. See *id.* at 15.

23. See *id.* at 15-16.

24. *Id.* at 15.

25. *Id.* at 16.

26. See *id.* at 17-18.

27. See *id.* at 10.

carriers,²⁸ and mandatory organ harvesting from deceased persons who had not expressly forbidden the government from appropriating their organs.²⁹

B. *The Communitarian Movement*

The Communitarian Network does not exhibit the scholarly indifference of the ivory tower. "Like a scientist in a laboratory," writes the *Philadelphia Inquirer*, Professor Etzioni "has a three-step formula for changing society. Step One, create the message. Step Two, spread the message. Step Three, organize a grassroots movement."³⁰ The Communitarian Network has created an activist arm to implement its ideas on a grassroots level: the American Alliance for Rights and Responsibilities. There is also a communitarian journal, *The Responsive Community*. The journal's subtitle includes the communitarian mantra "rights *and* responsibilities."³¹ The communitarians have written several books.³²

Professor Etzioni's movement has especially piqued the media's interest because the communitarians exercise a great deal of influence on the Clinton Administration.³³ Indeed, candidate Clinton's "New Covenant" speech was drafted in part by communitarian philos-

28. See *id.* at 20-21.

29. See *Mandatory Organ Donation Sought*, N.Y. TIMES, Dec. 23, 1992, at C1, available in LEXIS, News Library, NYT File.

30. Capuzzo, *supra* note 14.

31. See *We, the Communitarians*, *supra* note 14, at v. The journal began publishing in 1991. See *id.*

32. A number of those books are cited elsewhere in this Article. See also, e.g., ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985) (discussing American individualism and community commitment); *COMMUNITY IN AMERICA: THE CHALLENGE OF Habits of the Heart* (Charles H. Reynolds & Ralph V. Norman eds., 1988) [hereinafter *COMMUNITY IN AMERICA*] (contributing to the ideas developed in BELLAH ET AL., *supra*).

33. See Capuzzo, *supra* note 14; see also R.A. Zaldivar, *Clinton Embraces Communitarianism*, DENV. POST, Feb. 7, 1992, at A24 (revealing striking parallels between several of President Clinton's speeches and certain proposals found in communitarian literature).

Communitarian rhetoric frequently emanates from the Clinton Administration. For example, the President called for "community policing networks so that they'll know their neighbors and they'll work with people not simply to catch criminals but to prevent crime in the first place. We want to put more power in the hands of local communities" President William J. Clinton, Radio Address to the American People (Oct. 23, 1993), in 29 WKLY. COMP. PRES. DOC. 2157 (1993) (also available at various White House sites on the Internet). President Clinton also stated that America's Founders "wrote a fairly radical Constitution with a radical Bill of Rights, giving a radical amount of individual freedom to Americans." Remarks by the President in MTV's "Enough Is Enough" Forum on Crime (MTV television broadcast, Apr. 19, 1994) [hereinafter Remarks by the President in MTV's "Enough Is Enough"] (responding to the second viewer question). That "radical" amount of freedom that the government, in Clinton's view, "gave" to the American people was

opher William Galston.³⁴ Dr. Etzioni opines that President Clinton is a communitarian to the core.³⁵

Communitarians insist that they are not majoritarians and that any scheme to further the cause of community rights must be constitutionally sound.³⁶ Critics, however, accuse them of being disingenuous. Many skeptics charge that communitarians are actually apostles of a new statism and that the Communitarian Network is misleading

based on the assumption that "people would basically be raised in coherent families, in coherent communities, and they would work for the common good." *Id.* Today,

[w]hen personal freedom's being abused, you have to move to limit it. That's what we did in the announcement I made last weekend on the public housing projects, about how we're going to have [warrantless, suspicionless, random, unannounced] weapon sweeps [in the homes of public housing tenants] and more things like that to try to make people safer in their communities.

Id.

In his book, *Earth in the Balance*, Vice President Al Gore wrote: "The emphasis on the rights of the individual must be accompanied by a deeper understanding of the responsibilities to the community that every individual must accept if the community is to have an organizing principle at all." AL GORE, *EARTH IN THE BALANCE* 277 (1992). He further asserted that "we have tilted so far toward individual rights," and that this alleged imbalance has caused both the community and the ecology to suffer. *Id.* at 278.

In an interview with *Parade* magazine, First Lady Hillary Rodham Clinton complained: "We have not done a good job in expecting people to exercise their rights responsibly and to be held accountable." Dotson Rader, 'We Are All Responsible,' *PARADE*, Apr. 11, 1993, at 4, 4. During a commencement speech to the graduating class of the University of Pennsylvania, she asked: "How do we create a new spirit of community given all the problems that we are so aware of? Regrettably, the balance between the individual and the community, between rights and responsibilities, has been thrown out of kilter over the last years." Robert Pear, *Hillary Clinton Gives Plea for Unity at Penn.*, N.Y. TIMES, May 18, 1993, at A17, available in LEXIS, News Library, NYT File. "The spirit of community," the phrase used by Mrs. Clinton, happens to be the title of a book on communitarianism by Etzioni. See AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: THE REINVENTION OF AMERICAN SOCIETY* (1993) [hereinafter *THE SPIRIT OF COMMUNITY*].

Secretary of Housing and Urban Development Henry Cisneros was one of the original endorsers of the *Platform*. See *Platform*, *supra* note 5.

34. See Paul Starobin, *Snow Drifted but Not This Conversation*, NAT'L J., Jan. 20, 1996, at 125, available in LEXIS, News Library, Ntjnl File. University of Maryland political philosopher and communitarian writer William Galston has served as a White House domestic policy aide and is a part-time speech writer for Clinton. See *id.* The broad themes of President Clinton's 1996 State of the Union speech and his 1996 reelection campaign were shaped in part by a January 7, 1996 private White House conference between the President and a group of academics. See *id.* The conference was arranged by Galston at the White House's request, and the academic participants included Amitai Etzioni. See *id.*

35. See Zaldivar, *supra* note 33; see also William A. Galston, *Clinton and the Promise of Communitarianism*, CHRON. HIGHER EDUC., Dec. 2, 1992, at A52 (arguing that journalists have noted communitarian strands in the President's public utterances). It therefore came as no surprise when an issue of *The Communitarian Reporter* stated that the White House was apparently "seeking to move along communitarian lines." Amitai Etzioni, *To Stay the Communitarian Course*, COMMUNITARIAN REP., Fall 1992, at 1 [hereinafter *To Stay the Communitarian Course*].

36. See, e.g., *Platform*, *supra* note 5, at 12-13.

its readers when it denies that majoritarian coercion will be necessary to achieve many of its goals.³⁷ Whatever communitarians are, they are something new to the American political scene.³⁸

C. The Case for Domestic Disarmament

The Communitarian Network's papers on gun control call for severe firearms legislation, based upon the premise that the right of individuals to keep and bear arms (which really is not a right at all, it is argued) is outweighed by the right of the public to be safe. The position is summarized in *The Responsive Communitarian Platform: Rights and Responsibilities (Platform)*:³⁹

There is little sense in gun registration. What we need to significantly enhance public safety is *domestic disarmament* of the kind that exists in practically all democracies. The National Rifle Association's suggestion that criminals, not guns, kill people ignores the fact that thousands are killed each year, many of them children, from accidental discharge of guns, and that people—whether criminal, insane, or temporarily carried away by impulse—kill and are much more likely to do so when armed than when disarmed. The Second Amendment, behind which the NRA hides, is subject to a variety of interpretations, but the Supreme Court has repeatedly ruled, for over a hundred years, that it does not prevent laws that bar guns. *We join with those who read the Second Amendment the way it was written, as a communitarian clause, calling for community militias, not individual gun slingers.*⁴⁰

37. Libertarian political philosopher Tibor R. Machan, for example, calls communitarianism an attempt to present a "palatable collectivism" to the American people. Tibor R. Machan, *Individualism Versus Classical Liberal Political Economy* (unpublished lecture), at 1 (on file with author). Nadine Strossen, president of the American Civil Liberties Union (ACLU), faults communitarians for employing "rhetoric [that] is very slippery" in an attempt to introduce a number of liberty-threatening measures into the body politic. Peter Steinfels, *A Political Movement Blends Its Ideas from Left and Right*, N.Y. TIMES, May 24, 1992, § 4, at 1, available in LEXIS, News Library, NYT File. Conservative Burton Yale Pines of the National Center for Public Policy Research characterizes communitarianism as "just the latest incarnation to get the government meddling in people's affairs." James A. Barnes, *The New Guru of Communitarianism*, NAT'L J., Nov. 30, 1991, at 2931, 2931.

38. As Seymour Martin Lipset notes: "The recent efforts, led by Amitai Etzioni, to create a 'communitarian' movement are an attempt to transport Toryism to America. British and German Tories have recognized the link and have shown considerable interest in Etzioni's ideas." SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 37 (1996).

39. *Platform*, *supra* note 5.

40. *Id.* at 20-21. The actual number of accidental firearms deaths for the entire American population in 1993 was 1600. See NATIONAL SAFETY COUNCIL, *ACCIDENT FACTS 5* (1994). The number of accidental firearms deaths of children aged 0 to 14 was 220. See *id.* In a

This position is developed in the Communitarian Network position paper dedicated solely to the issue of gun ownership, *Domestic Disarmament*. The paper's argument is summarized in five propositions:

1. Legal analysis shows there is no individual right to keep and bear arms guaranteed in the Second Amendment to the United States Constitution;⁴¹

2. Permitting individual gun ownership in this country causes thousands of injuries and deaths every year and, therefore, poses an inordinate threat to public safety;⁴²

3. Polls indicate that the vast majority of Americans want some forms of additional gun control legislation;⁴³

4. The gun control proposals currently advocated (waiting periods, registration, and the like) will not adequately mitigate the damage gun ownership causes to the American community;⁴⁴

5. Therefore, because there is no constitutional right of individuals to keep and bear arms, America must adopt laws even stricter than those in Europe, Canada, and Japan.⁴⁵

As a first step, *Domestic Disarmament* calls for a ban on the sale and possession of handguns and so-called "semiautomatic assault weapons," as well as a prohibition of all ammunition that can be used in

different context, Etzioni writes: "As Sigmund Freud would say, there are no accidents." THE SPIRIT OF COMMUNITY, *supra* note 33, at 226. Indeed, that is one reason why firearms prohibition is unlikely to have much of an effect on the accidental death rate. Many firearms accidents are the result of recklessness. The perpetrators are "disproportionately involved in other accidents, violent crime, and heavy drinking." Philip J. Cook, *The Role of Firearms in Violent Crime: An Interpretative Review of the Literature*, in CRIMINAL VIOLENCE 236, 269 (Marvin E. Wolfgang & Neil Alan Weiner eds., 1982) (citing G.D. NEWTON, JR. & F.E. ZIMRING, FIREARMS & VIOLENCE IN AMERICAN LIFE 19 (1969)); see also GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 282-83 (1991) ("[Data suggest] that there are some common predisposing factors shared by participants in accidents and participants in acts of intentional violence."); Roger Lane, *On the Social Meaning of Homicide Trends in America*, in I VIOLENCE IN AMERICA 55, 59 (Ted Robert Gurr ed., 1989) ("[T]he psychological profile of the accident-prone suggests the same kind of aggressiveness shown by most murderers . . ."). Thus, without guns, many gun accident victims might find some other way to kill themselves "accidentally," such as by reckless driving. Indeed, they tend to have a record of reckless driving and automobile accidents. See KLECK, *supra*, at 294 (citing Julian A. Waller & Elbert B. Whorton, *Unintentional Shootings, Highway Crashes and Acts of Violence*, in 5 ACCIDENT ANALYSIS & PREVENTION 351 (1973)). Banning just one type of dangerous object can accomplish little for this group.

41. DOMESTIC DISARMAMENT, *supra* note 1, at 29-38.

42. *Id.* at 5-6, 23-28.

43. *Id.* at 19-21.

44. *Id.* at 7-9.

45. *Id.* at 9, 22.

these firearms.⁴⁶ (This latter requirement would outlaw virtually all ammunition, because handguns and assault weapons come in a nearly limitless variety of calibers.)

Etzioni is willing to offer a few concessions to gun owners:

Gun collectors may be accommodated by provisions allowing them to keep their collections, but rendering them inoperative (cement in the barrel is my favorite technique). Hunters might be allowed (if one feels this "sport" must be tolerated) to use long guns that cannot be concealed, without sights or powerful bullets, making the event much more "sporting." Finally, super-patriots, who still believe they need their right to bear arms to protect us from the Commies, might be deputized and invited to participate in the National Guard, as long as the weapons with which they are trained are kept in state-controlled armories. All this is acceptable, as long as all other guns and bullets are removed from private hands.⁴⁷

Making some breathtaking assumptions about the ease with which the government will collect more than 200 million guns and many billion rounds of ammunition from at least 50 million gun owners,⁴⁸ Etzioni proposes the following experiment designed to set the policy in motion:

Perhaps the best way to proceed, if nationwide domestic disarmament cannot be achieved immediately, is to introduce it in some major part of the country, say, the Northeast. That will allow everyone to see the falsity of the NRA's beloved statement that criminals kill people, not guns. . . . The rapid fall in violent crime sure to follow will make ever more states demand that domestic disarmament be extended to their region.⁴⁹

Thus, to Etzioni, the answer to gun crime is simple: implement a national policy that entails the virtual prohibition of most firearms and ammunition, beginning with a ban on assault weapons and handguns, and eventually encompassing all firearms and ammunition in private hands.

There are some indications that the Clinton Administration, following the communitarian lead, is thinking along similar lines. Although President Clinton has stated his opposition to a ban on hunting weapons, he has at least indicated support for most of the rest

46. *Id.* at 8-10.

47. *Id.* at 9-10.

48. See *infra* notes 89-90 and accompanying text.

49. DOMESTIC DISARMAMENT, *supra* note 1, at 11.

of the Communitarian Network's agenda on guns. In particular, he put an immense amount of political capital into passing the 1994 federal ban on assault weapons.⁵⁰ After that year's elections, he opined that the assault weapons ban had cost the Democrats twenty seats in the House of Representatives, thereby giving control of Congress to the Republicans.⁵¹ Nevertheless, said President Clinton, he would sacrifice his own reelection to maintain the federal ban.⁵²

In addition, President Clinton ordered Attorney General Janet Reno to draft a comprehensive proposal for strict national handgun licensing.⁵³ A White House working group outlined a proposal for highly restrictive licensing of all handguns and all semiautomatic long guns that have not already been banned, and much more stringent controls on all other firearms.⁵⁴ In a 1993 interview, President Clin-

50. See David B. Kopel, *Assault Weapons*, in GUNS: WHO SHOULD HAVE THEM? 159, 160-61 (David B. Kopel ed., 1995). The federal ban on assault weapons was codified at 18 U.S.C. § 922(u), (w) (as amended 1994).

51. See Evelyn Theiss, *Clinton Blames Losses on NRA*, PLAIN DEALER (Cleveland), Jan. 14, 1995, at A1 (quoting the President as saying, "the fight for the assault-weapons ban cost 20 members their seats in Congress"); see also Brad O'Leary, *Fire Power*, CAMPAIGNS & ELECTIONS, Dec./Jan. 1995, at 32, available in LEXIS, News Library, Mags File (arguing that the NRA backed Republicans in the 1994 election, thereby contributing to Democratic defeats). Of the 55 House races and 10 Senate races identified, 38 House races and 7 Senate races resulted in a progun Republican taking the seat away from Democratic control (by defeating an incumbent or, more typically, by winning an open seat from which a Democrat was retiring). See Theiss, *supra*. Ten Senate races also involved a progun candidate winning by less than the number of self-identified NRA members in the state. See *id.*

52. "Jim Florio gave up his governorship for it. If I have to give up the White House for it, I'll do it." Theiss, *supra* note 51 (quoting President Clinton).

53. See Joe Battenfeld, *Clinton Vows Full-Scale War on Crime Next Year*, BOST. HERALD, Dec. 10, 1993, at 1, available in 1993 WL 6293677; Pierre Thomas, *Clinton Mulls Registration of Handguns*, WASH. POST, Dec. 9, 1993, at A1, available in 1993 WL 2084315.

54. A White House Interdepartmental Working Group on Violence recommended stringent new restrictions on gun rights. See INTERDEPARTMENTAL WORKING GROUP ON VIOLENCE, REPORT TO THE PRESIDENT AND THE DOMESTIC POLICY COUNCIL 21-25 (1994) [hereinafter REPORT TO THE PRESIDENT]. Although the report was intended to be kept secret, it was uncovered and discussed in, among other places, *National Review* magazine. See Don B. Kates, Jr., *Shot Down*, NAT'L REV., Mar. 6, 1995.

The Clinton proposal would regulate all secondary firearms transfers (transfers between private individuals). See REPORT TO THE PRESIDENT, *supra*, at 22. Every firearms transaction would be required to be routed through a licensed gun dealer and recorded by the federal government. See *id.* Failure to register an already-owned "restricted" handgun with the government would also be a federal crime. See *id.* Firearms purchases would be limited to one per month. See *id.* at 23. A license would also be required to purchase ammunition. See *id.* at 22. New "performance standards" would ban guns that hold too much ammunition or fire too rapidly. See *id.* at 24. These new performance bans would be in addition to the current assault weapon law that bans over 200 guns because they are said to fire too fast. See 18 U.S.C. § 922(v), (w) (1994). The White House memorandum predicts that such regulation would make illegal "[m]any handguns now manufactured in the United States for civilian use." REPORT TO THE PRESIDENT, *supra*, at 24. Even stricter laws

ton stated that he favored a ban on all handguns, but that he recognized such a ban was not currently politically feasible.⁵⁵ The Federal Bureau of Investigation (FBI) and President Clinton have begun pushing for broad new restrictions on ammunition.⁵⁶ Finally, Henry Cisneros, the Secretary of the Department of Housing and Urban Development (HUD) during President Clinton's first term, was a signer of the *Platform* manifesto before accepting his post in the Clinton Administration.⁵⁷ Were his views sharply out of step with those of the President (for example, had he signed a document calling for a complete ban on abortion), it is doubtful that he would have remained in the Cabinet.

would apply for the group of handguns and semiautomatic long guns that remained legal. *See id.* at 22. All handguns and all semiautomatic long guns—even a Marlin Camp Carbine—would become “restricted weapons.” *Id.* Owners of restricted weapons could only possess them at home, at work, or at a target range or in transport there. *See id.* Thus, it would be a federal crime to go bird hunting with a Remington 1100 shotgun. It would be a federal crime to carry a handgun in public for protection—even if the carrier had a state license authorizing handgun carrying. *See id.* at 23-24. (Thirty-one states currently make handgun carry permits readily available to ordinary citizens who pass a background check, and sometimes a safety class.) *See* John R. Lott & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 4 (1997). In addition, the White House memorandum recommends consideration of a federal law to outlaw “the carrying of firearms in . . . work sites.” REPORT TO THE PRESIDENT, *supra*, at 23.

55. *See* Jann S. Wenner & William Greider, *The Rolling Stone Interview: President Clinton*, ROLLING STONE, Dec. 9, 1993, at 45. President Clinton is not pushing for a handgun ban now, but only because he does not “think the American people are there right now.” *Id.*

56. A Federal Bureau of Investigation (FBI) paper recommended expanding the federal ban to “armor piercing ammunition.” Memorandum from Agent John E. Collingwood to the Director, FBI, *Proposed FBI Policy on Gun Control*, May 12, 1993, at 4, 6, 7 (on file with author). The definition of such ammunition, according to the FBI recommendation, should be “based upon performance standards, not upon composition.” *Id.* at 7. In other words, if ammunition can perform in such a way as to pierce body armor, it should be banned. By this definition, virtually all hunting ammunition is armor piercing because any round from a high-powered rifle can penetrate body armor. The proposal harmonizes well with the communitarian desire to ban everything. If the .30 '06 and other hunting rounds are prohibited, there is obviously little use for the rifles that fire them.

At the signing of a directive on handgun safety locks, President Clinton remarked: “If a bullet can tear through a bulletproof vest like a hot knife through butter, it should be against the law and that is the bottom line.” Remarks on Signing the Memorandum on Child Safety Lock Devices for Handguns and an Exchange with Reporters, 33 WKLY. COMP. PRES. DOC. 10 (Mar. 10, 1997); *see also* H.R. 2386, 104th Cong. (1995) (granting the Secretary of State authority to promulgate rules defining armor piercing ammunition under 18 U.S.C. § 921(a)(17)(B)).

57. DOMESTIC DISARMAMENT, *supra* note 1, at 2. The *Platform* contained a paragraph overview of the communitarian call for domestic disarmament. *See Platform*, *supra* note 5, at 1; *see supra* notes 39-40 and accompanying text.

II. THE FEASIBILITY AND COMMUNITARIAN IMPLICATIONS OF DOMESTIC DISARMAMENT

Communitarians, including President Clinton, argue that the presence of so many guns in America makes it the most dangerous country in which to live.⁵⁸ Rhetorical flourish is employed to drive the point home: “[T]he danger that our cities be turned into Beirut or Dubrovniks must be averted.”⁵⁹ The gun control proposals that have been enacted into law and those that are currently the subject of political discussion are but “vanilla-pale measures,” according to Etzioni; to him, the only truly effective measure to end gun violence is domestic disarmament.⁶⁰

Many criminologists agree that the enactment of laws that Etzioni calls vanilla-pale measures will do little to stem the tide of gun-related violence in this country. The leading criminological studies, those done by James Wright, Kathleen Daly, Peter Rossi, and Gary Kleck, conclude that the measures currently proposed will, at best, only slightly mitigate the level of criminal misuse of firearms.⁶¹ One of the Wright-Rossi studies, a National Institute of Justice survey of felons in state prisons, concluded that criminals will always get guns and use them, no matter what gun control laws are passed.⁶² Indirectly supporting the viewpoint of *Domestic Disarmament*, Kleck observes that, in a country awash in guns, such as ours, no gun control policy—short of universal confiscation—“is likely to have a dramatic impact on violence in America. Because gun availability, even among high-risk individuals, seems to have at best a modest impact on violence rates, gun controls only nibble at the edges of the problem rather than striking

58. The President complained that “no other nation” tolerates the level of gun violence seen in America. Ronald A. Taylor, *Clinton Blasts NRA for Opposing Gun Control*, WASH. TIMES, Mar. 2, 1993, at A6, available in 1993 WL 5826697.

59. DOMESTIC DISARMAMENT, *supra* note 1, at 5.

60. *Id.* at 8-11.

61. See KLECK, *supra* note 40, at 32-33 (indicating that of 121 possible effects of gun restrictions, “only ten are solidly or partially consistent with a hypothesis of gun control effectiveness”); JAMES D. WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA 317 (1983) (stating that some studies on connections between gun control legislation and gun homicides and gun assaults purport to show relatively few incidents in states with restrictive laws, but other studies purport to show no such trend); JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 227-28 (1986) (observing that despite all of the gun control laws of the twentieth century, “the number of armed criminals and the amount of armed crime has tended to increase, not abate”). Prior to researching the firearms issue, Wright, Rossi, and Kleck were proponents of gun control legislation. They have generally reversed their positions as a result of investigating the issue. See WRIGHT ET AL., *supra*, at 310-24.

62. See WRIGHT & ROSSI, *supra* note 61, at 18.

at its core."⁶³ Thus, Etzioni's repudiation of vanilla-pale gun control measures is well supported by scholarly research on the gun issue.

Most European nations (Switzerland and a few others excepted) impose stricter firearms controls than does the United States.⁶⁴ The typical model is a strict licensing system for handguns and a somewhat milder licensing system for most long guns.⁶⁵ There is a great deal of variation in this model, from countries with the most rigorous laws and the most aggressive enforcement against ordinary gun owners (such as Spain, Germany, and Great Britain)⁶⁶ to countries with more relaxed attitudes (such as Norway, France, Italy, Belgium, Latvia, and the Czech Republic).⁶⁷ Actual bans on handguns (Ireland)⁶⁸ are rare, and bans on all guns (Romania under Facism Communism)⁶⁹ are rarer still. Thus, *Domestic Disarmament* goes far beyond where most European nations have trod, at least during their periods of democratic rule. Nevertheless, *Domestic Disarmament* springs in part from what might be termed a European sensibility toward an armed populace.⁷⁰ In a 1976 *Public Interest* essay, *The Great American Gun War*,⁷¹ historian B. Bruce-Briggs described the combatants of what he called a "low-grade war"⁷² fought over gun ownership by social factions representing "two alternative views of what America is and ought to be."⁷³ Advocates of strict gun control are usually

those who take bourgeois Europe as a model of a civilized society: a society just, equitable, and democratic; but well ordered, with the lines of responsibility and authority clearly drawn, and with decisions made rationally and correctly by

63. KLECK, *supra* note 40, at 445. Kleck does believe that some gun control proposals, such as regulating the private transfer of firearms, could have a modest effect on gun crime. See *id.* at 336.

64. See KOPEL, *supra* note 13, at 15.

65. See *id.* at 59.

66. See *id.*

67. See *id.*

68. See Jim Cusack, *Handguns Banned in Ireland Since Early 70s*, IRISH TIMES, Oct. 17, 1996, at 10, available in 1996 WL 12405749. England recently banned most handguns, but still allows single-shot .22 calibre handguns. See *Guns and Freedom*, DAILY TELEGRAPH (London), May 12, 1997, at 21, available in LEXIS, News Library, TXTNWS File.

69. See LIBRARY OF CONGRESS, LAW LIBRARY, GUN CONTROL LAWS IN FOREIGN COUNTRIES 163-66 (revised 1976) (discussing a 1941 decree, abrogated in 1971, which stipulated that "whoever possesses firearms, ammunition and explosives of any kind and under any form, even if such holders have a license for possession and use, shall . . . surrender them" (quoting Decree No. 142, M.O., No. 20 *bis*, Jan. 24, 1941)).

70. For the communitarians' attempt to create a European-style Tory political ideology in the United States, see *supra* note 38 and accompanying text.

71. B. Bruce-Briggs, *The Great American Gun War*, PUB. INTEREST, Fall 1976, at 37.

72. *Id.* at 37.

73. *Id.* at 61.

intelligent men for the entire nation. To such people, hunting is atavistic, personal violence is shameful, and uncontrolled gun ownership is a blot upon civilization.⁷⁴

In most of Europe, gun ownership is not a right but a state-granted privilege.⁷⁵ Likewise, the Communitarian Network views gun ownership in America as a privilege rather than a right, a privilege that should now, due to the level of gun violence, be denied.⁷⁶

Ironically, despite the Communitarian Network's emphasis on the importance of individuals yielding to the will of the majority of the community, the Communitarian Network's gun prohibition policy actually deviates greatly from what a large majority of Americans favor. Polls indicate that most Americans believe the Second Amendment does protect an individual right to arms,⁷⁷ although many Americans do support what they see as moderate gun control measures.⁷⁸ Most Americans do not favor firearms prohibition; rather, they view self-defense⁷⁹ and the recreational use of firearms as obvious benefits to be retained.⁸⁰ A ban on handguns is favored by only twenty-seven percent.⁸¹ A ban on long guns garners only eleven percent support.⁸²

Because, in all likelihood, Americans will not support a policy of gun prohibition, why even take this particular proposal of the Communitarian Network seriously? Although the case for domestic disarmament is at the moment a pipe dream, there are important reasons why the Communitarian Network's argument deserves serious attention.

74. *Id.*

75. *See, e.g.,* KOPEL, *supra* note 13, at 82-87 (discussing British system).

76. DOMESTIC DISARMAMENT, *supra* note 1, at 9-11.

77. *See* KLECK, *supra* note 40, at 359-77 (comparing various polls and studies which show that most Americans believe that individuals have rights to own guns); Gordon Witkin, *Should You Own a Gun?*, U.S. NEWS & WORLD REP., Aug. 15, 1994, at 24 (reporting that 86% of men and 67% of women support the right to individual gun ownership; 80% of whites and 65% of blacks support gun rights).

78. *See* Witkin, *supra* note 77, at 28 (reporting that 49% of all Americans believe gun owners should receive government licenses and complete, mandatory training).

79. *See id.* at 24 (reporting that 45% of American gun owners cite self-protection as a primary reason for gun ownership).

80. *See* KLECK, *supra* note 40, at 374-75 (arguing that gun ownership allows for the benefits of hunting).

81. *See* LUNTZ WEBER RESEARCH & STRATEGIC SERVICES, A NATIONAL SURVEY ON CRIME, VIOLENCE AND GUNS 9-10 (1993).

82. *See* *Nearly 2 in 5 Americans Have Heard a Gunshot in Their Neighborhood and 3 in 4 Support Gun Ownership for Average Citizens, According to New U.S. News Poll*, U.S. NEWS & WORLD REP. (news release), Aug. 8, 1994, at 1, 4-5 (reproducing the results of a telephone survey conducted by the Tarrance Group and Mellman-Lazarus-Lake from May 16, 1994 to May 18, 1994). Ten percent of those polled favored a "[t]otal ban" on guns, while one percent "lean[ed] toward a total ban." *See id.*

First, the gun rights lobby has long argued that the eventual goal of gun control legislation is gun prohibition.⁸³ Procontrol voices have pointed to this allegation as evidence of the lobby's "paranoia."⁸⁴ We now witness an important think tank, one that strongly influences the present Administration and many members of Congress, openly calling for gun confiscation. Second, while the communitarians serving in the Clinton Administration do not believe that total disarmament is possible, they clearly hope to achieve a high degree of disarmament.⁸⁵

Serious reflection on the argument for domestic disarmament raises the question of how wise such a policy would be, particularly from the standpoint of communitarianism. Might the attempt to seize as many firearms as possible create more communal problems than it would solve? This question is faced squarely by Washington, D.C., attorney and former Justice Department official Ronald Goldfarb, who follows Etzioni in calling for domestic disarmament "beginning with a model program."⁸⁶ Disarmament should be implemented in three phases, avers Goldfarb: (1) increasing regulation of firearms sales, (2) registering firearms once the sales of such have been efficiently regulated, and finally (3) confiscating as many weapons and as much ammunition as possible.⁸⁷ Goldfarb seems troubled, however, over problems arising from such a controversial and herculean endeavor:

Is there an individual right to self-defense that cannot be abrogated? How do we balance the necessary policing with the public's right of privacy and its constitutional protections against illegal searches and seizures?

. . . How would disarmament be accomplished? What would be done with the existing 200 million firearms . . . ? What about hunters and other sportsmen?

83. See KLECK, *supra* note 40, at 9 (asserting that gun control opponents argue "that today's controls, no matter how limited and sensible, will just make it that much easier to take the next, more drastic step tomorrow, and then the next step, and the next, until finally total prohibition of private possession of firearms is achieved").

84. See *id.* at 11 ("The fact that such escalation [of gun controls] *could* happen says nothing about whether it *will* happen.").

85. See *supra* notes 53-57 and accompanying text.

86. Ronald Goldfarb, *Domestic Disarmament: It's Time to Take a Second Look at the Second Amendment*, WASH. POST, Nov. 21, 1993, at C3, available in 1993 WL 2087239.

87. See *id.* Goldfarb's three-step strategy is similar to the one proffered by the late Nelson T. "Pete" Shields, the Founding Chair of Handgun Control, Inc.:

The first problem is to slow down the number of handguns being produced and sold in this country. The second problem is to get handguns registered. The final problem is to make possession of all handguns and all handgun ammunition—except for the military, police, licensed security guards, licensed sporting clubs, and licensed gun collectors—totally illegal.

Richard Harris, *A Reporter at Large: Handguns*, NEW YORKER, July 26, 1976, at 53, 58.

. . . What is the danger of creating a disarmed public? How do we adopt such a profound proposal . . . ? Would virtual disarmament make the law enforcement establishment too powerful? Would a real ban on guns fail as dismally as the attempt to ban alcohol?⁸⁸

A. *Guns and Other Dangerous Items*

No approach to gun control can claim to be rational without first putting gun violence in perspective. There are at least 50 million gun-owning families in America.⁸⁹ Of the roughly 200 million guns they own, about a third are handguns.⁹⁰ There are at least one million so-called assault weapons.⁹¹

There are approximately 30-35,000 gun-related deaths in America every year.⁹² Viewed in light of how many guns and gun owners there are in America, the numbers reflect that only a very small fraction of gun owners misuse their guns. This fact has led sociologist James D. Wright to note that, in sum, "gun ownership is apparently a topic more appropriate to the sociology of leisure than to the criminology or epidemiology of violence."⁹³

It is undisputed that firearms are used for defensive purposes at least several tens of thousands of times per year.⁹⁴ Yet the Communitarian Network does not propose banning a product that is involved in more deaths every year than guns, a product that does not prevent any crimes. That product is alcohol, which is in some ways a close analogue to guns.

88. Goldfarb, *supra* note 86.

89. See James D. Wright, *Ten Essential Observations on Guns in America*, SOCIETY, Mar. 1, 1995, at 63, available in 1995 WL 12535299.

90. See *id.*

91. See Jim Stewart & Andrew Alexander, *Assault Guns Muscling in on Front Lines of Crime*, ATLANTA J. & CONST., May 21, 1989, reprinted in 135 CONG. REC. S7006-01 (daily ed. June 20, 1989) (reporting that assault guns are 1 million of the 200 million privately owned firearms in the United States); cf. Michael G. Lenett, *Taking a Bite out of Violent Crime*, 20 U. DAYTON L. REV. 573, 573 (1995) ("There are over one million semiautomatic assault weapons . . . on the streets of America today.").

92. See Wright, *supra* note 89, at 63.

93. *Id.*

94. See Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 153 (1995) (reporting that the *National Crime Victimization Survey* of the Department of Justice, see *infra* note 97, suggests that Americans use guns for self-defense reasons approximately 80,000 times per year in assaults, robberies, and household burglaries, while other studies find self-defense use of guns occurring more frequently). Even the gun control groups accept the figure of tens of thousands of defensive uses as valid. See *id.* (reporting that antigun writers concede the findings in the *National Crime Victimization Survey*).

Though a legal drug rather than a manufactured tool, alcohol, like guns, is used recreationally by millions of Americans.⁹⁵ Although the manner in which harm is wrought by drinking (alcohol-related diseases, accidents caused by drunks, and criminal violence perpetrated by the disinhibited) is not exactly the same as with guns (suicide, firearms accidents, and crimes perpetrated with guns), alcohol, like guns, is a material cause of harm to many Americans.⁹⁶ Further, because alcohol disinhibits potential criminals and lowers the defensive awareness of potential victims, it contributes to a much larger fraction of violent crime than do firearms.⁹⁷ The use of alcohol is a material cause of approximately 100,000 deaths every year in America, nearly three times as many deaths as caused by firearms.⁹⁸ The parallel between alcohol and firearms is also reflected by the fact that the same agency supervises the two items: the Bureau of Alcohol, Tobacco and Firearms (BATF), which might aptly be called the "Bureau of Semi-Licit but Morally Suspect Consumer Products."

In contrast to the expansive gun control arguments of *Domestic Disarmament*, the Communitarian Network limits its attention to the societal costs of alcohol to vanilla-pale measures such as drunk driving roadblocks.⁹⁹ Where is the Communitarian Network's argument for additional "alcohol control" laws analogous to those they advocate for guns? Why not impose a ban on distilled liquor on the basis that "no one needs" that much alcoholic firepower to have a good time? (This is the usual line of argument for laws banning assault weapons.)¹⁰⁰ More important, where are the Communitarian Network's position papers on the reinstatement of domestic prohibition? Why are we to

95. Cf. J. Michael McGinnis & William H. Foege, *Actual Causes of Death in the United States*, 270 JAMA 2207, 2208 (1993) (reporting that approximately 18 million Americans suffer from alcohol abuse while another 76 million are affected by alcohol abuse at some time).

96. See *id.* at 2208-10.

97. Firearms are involved in less than 12% of violent crimes. See BUREAU OF JUSTICE STATISTICS, HIGHLIGHTS FROM 20 YEARS OF SURVEYING CRIME VICTIMS: THE NATIONAL CRIME VICTIMIZATION SURVEY, 1973-92, at 29 (1993) (reporting that 32% of all violent crime includes the use of weapons; of the weapons used, handguns are used 29% of the time, and other guns are used 8% of the time).

98. See McGinnis & Foege, *supra* note 95, at 2208-09.

99. See *supra* note 27 and accompanying text.

100. See Testimony of Richard M. Aborn Before the Committee on Codes of the Assembly of the State of New York (Jan. 3, 1991). Aborn, then an attorney for Handgun Control, Inc., later President of the group, testified:

These [semi-automatic pistols] gave appeal because of the ease of firing and the large clips that they can hold. There is no reason why a legitimate gun owner needs to have a clip capable of holding more than six rounds, and thus I would suggest the banning of clips that hold more than six rounds.

accept the toll exacted on society by the easy availability of alcohol, but not that of the less-easy availability of guns, especially when the former kills nearly three times more than the latter?

Communitarian advocates of prohibitive gun control laws—most of whom, it is safe to assume, imbibe on occasion—apparently accept the cost to society of the ease with which alcohol is procured and consumed, most likely because drinking is pleasurable and the large majority of drinkers are responsible. Thus the Communitarian Network does not apply the same logic to gun ownership as to alcohol, even though the vast majority of gun owners take pleasure in owning firearms and exercise that right responsibly. Guns are singled out for prohibitionist legislation, while a relatively blind eye is turned toward the much heavier toll exacted by the sale and consumption of alcohol.

This analogy between guns and alcohol is not intended to minimize either the annual tragedy of 35,000 firearms-related deaths or of 100,000 alcohol-related deaths. It is only intended to put matters in perspective and to highlight that, as a matter of course, Americans accept the social costs of potentially dangerous substances such as alcohol, or potentially dangerous objects such as automobiles and guns, because of the benefits those things afford. One may certainly argue that alcohol actually provides little benefit to society, but the experiment with alcohol prohibition during the 1920s demonstrated that millions of Americans found the recreational benefits of alcohol consumption to be sufficient justification for resistance to that policy. It was this stubborn refusal of Americans to give up their freedom, combined with the observation of how alcohol prohibition lined the pockets of gangsters,¹⁰¹ that led to the repeal of Prohibition.¹⁰² Few today, communitarians included, would argue for the resurrection of the failed Prohibition experiment, even though alcohol actually inflicts greater harm on society than do firearms.¹⁰³

1. Noncompliance of Law Enforcement Personnel.—Proponents of gun prohibition sometimes forget that America's law enforcement community, which would obviously be needed in the effort to confiscate all firearms, includes many "gun culture" types. This is all the more true in the nation's vast rural areas, where a disproportionate

101. Cf. SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 899-902 (1965) (explaining that organized crime, which benefitted from bootlegging, allied itself with local governments such as the City of Chicago).

102. See U.S. CONST. amend. XXI (repealing U.S. CONST. amend. XVIII).

103. Alcohol prohibition retains a core support of approximately 17%, which is at least as large as the percentage favoring complete gun confiscation. See ABC News/Wash. Post Survey (telephone poll conducted May 8, 1985-May 13, 1985).

fraction of the nation's guns are possessed.¹⁰⁴ Surveys have indicated that the rank-and-file of the law enforcement community possess a deep-seated belief that law-abiding citizens have a constitutional right to own firearms.¹⁰⁵ It is therefore likely, as firearms instructor and former police officer Massad Ayoob suggests, that many members of the law enforcement community would either openly refuse to carry out a gun confiscation law or would at least contribute to its subversion in some way.¹⁰⁶

One such law enforcer is Richard Mack, former Sheriff of Graham County, Arizona. Sheriff Mack has gained national attention because of his successful federal lawsuit that blocked implementation of the Brady Act¹⁰⁷ in his state.¹⁰⁸ Mack believes that law enforcement

104. See Witkin, *supra* note 77, at 31 (indicating that 78% of all rural residents own firearms, while only 44% of city residents and 43% of suburban dwellers do).

105. A 1993 poll conducted by the Southern States Police Benevolent Association, for example, reveals that 90% of southern police feel that the Constitution protects the right of individuals to keep and bear arms. See *Police Views on Gun Control*, AUSTIN AMERICAN-STATESMAN, Oct. 4, 1993, at A8, available in 1993 WL 6804712; see also *Funny You Should Ask*, POLICE, Apr. 1993, at 56 (describing a poll of police attitudes that indicated 85% believed gun ownership by civilians increased public safety); *The Law Enforcement Technology Gun Control Survey*, LAW ENFORCEMENT TECH., July/Aug. 1991, at 14-15 (reporting survey that indicated 77.4% of respondents thought gun control infringed on the constitutional right to bear arms; 84.6% thought gun control did not lessen crime; and police chiefs, sheriffs, and top managers were more likely to support gun control than middle managers, while street officers were the least likely to support such control); cf. Scott Marshall, *Poll: South's Police Leery of Stricter Gun Control*, ATLANTA CONST., July 13, 1993, at 3A ("Nearly two-thirds of rank-and-file Southern police officers believe that stricter control laws are not the answer to curbing violent crime.").

106. See *Will the Police Confiscate Your Guns?—No*, AM. HANDGUNNER, Sept./Oct. 1994, at 116, 116-19.

107. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 921-930 (1994)).

108. See *Mack v. United States*, 856 F. Supp. 1372, 1381 (D. Ariz. 1994) (holding that certain provisions of the Brady Act violate the Tenth Amendment), *rev'd*, 66 F.3d 1025, 1032 (9th Cir. 1995), *cert. granted sub nom.* *Printz v. United States*, 116 S. Ct. 2521 (1996). By the time the Ninth Circuit reversed the lower court's decision, the Arizona legislature had enacted an "instant check" law that excepted Sheriff Mack (and all other Arizonans) from the Brady Act. See ARIZ. REV. STAT. ANN. § 13-3114 (West 1989 & Supp. 1996).

There are several other cases in which sheriffs have sued to overturn the Brady Act. See, e.g., *Romero v. United States*, 883 F. Supp. 1076, 1088 (W.D. La. 1994) (holding certain provisions of the Brady Act to violate the Tenth Amendment); *McGee v. United States*, 863 F. Supp. 321, 327-28 (S.D. Miss. 1994) (finding portions of the Brady Act to contravene the Tenth Amendment and to exceed congressional authority as bestowed by Article I, § 8 of the Constitution), *aff'd sub nom.* *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996); *Frank v. United States*, 860 F. Supp. 1030, 1044 (D. Vt. 1994) (holding certain provisions of the Brady Act to be violative of the Tenth Amendment), *rev'd*, 78 F.3d 815 (2d Cir. 1996); *Koog v. United States*, 852 F. Supp. 1376, 1389 (W.D. Tex. 1994) (finding the Brady Act to be consistent with the dictates of the Tenth Amendment), *rev'd*, 79 F.3d 452 (5th Cir. 1996).

officials and military personnel are bound by their oath of office to refuse to enforce any unconstitutional gun law:

No police officer, soldier, or any other government official, should in any manner comply with an order that is unlawful or attempt to enforce a mandate that is unconstitutional. . . . May each of us in this most noble profession, as we pursue the guilty among us, never be guilty ourselves of the greater crime: violating our oath in God's name to defend the constitutional rights of the people we work for.¹⁰⁹

2. *Resistance*.—As Ronald Goldfarb and other gun prohibitionists realize, a successful policy of domestic disarmament must be preceded by a federal attempt to register all firearms currently owned.¹¹⁰ In fact, the German Nazi regime used registration records as a precursor to, or as a means of, confiscating guns within its own borders and within its territorial acquisitions, and many gun owners are aware of this historical precedent.¹¹¹ Fear of confiscation is one reason for such little compliance with current registration laws where they have been enacted in America. New York's "Sullivan Law,"¹¹² the first major licensing and registration scheme imposed in twentieth-century America, is ignored by millions of New Yorkers.¹¹³ In Illinois it is estimated that about 75% of handgun owners are in noncompliance with the state's registration law.¹¹⁴

There has also been substantial resistance to laws that require registration of so-called assault weapons. California was the first state to pass a ban on military-style semiautomatics.¹¹⁵ The California law re-

109. RICHARD I. MACK & TIMOTHY ROBERT WALTERS, FROM MY COLD DEAD FINGERS: WHY AMERICA NEEDS GUNS! 211, 213 (1994).

110. See *supra* notes 86-87 and accompanying text.

111. See Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 623-30 (1995).

112. N.Y. PENAL LAW §§ 265, 400 (McKinney 1989 & Supp. 1997) (originally enacted as N.Y. PENAL LAW 1909 §§ 1896, 1903).

113. Cf. KOPEL, *supra* note 13, at 393 ("[I]f 1 percent of illegal handgun owners in New York City were caught, tried, and sent to prison for a year, the state prison system would collapse." (citing DONALD B. KATES, JR., GUNS, MURDERS, AND THE CONSTITUTION: A REALISTIC ASSESSMENT OF GUN CONTROL 59 (1990))).

114. See Don B. Kates, Jr., *Handgun Control: Prohibition Revisited*, INQUIRY, Dec. 5, 1977, at 20, 20 n.1.

115. See CAL. PENAL CODE §§ 12275-12290 (West 1992). The California law, entitled the Roberti-Roos Assault Weapons Control Act of 1989, bans rifles, handguns, and shotguns that (1) are designated as assault weapons by the statute, (2) are simply variations of those designated, or (3) possess characteristics sufficient to warrant inclusion on a list of assault weapons promulgated by the Attorney General. See *id.* § 12276.

quires mandatory registration of all such weapons owned prior to the enactment of the ban.¹¹⁶ A group called Gun Owners React openly called for those who owned such arms to disobey the registration requirement.¹¹⁷ Nearly 90% of the approximately 300,000 assault weapon owners in California refused to register their weapons.¹¹⁸ A few months later, Denver passed a similar ordinance.¹¹⁹ Only 1% of the estimated 10,000 assault weapons in that jurisdiction were ever registered.¹²⁰ Other municipalities that have passed similar ordinances have seen about the same percentage of guns registered.¹²¹ New Jersey was the next state to enact an assault weapon ban.¹²² Out of the 100,000 to 300,000 assault weapons in that state, 947 were registered, an additional 888 were rendered inoperable, and 4 were turned over to the authorities.¹²³

If the Morton Grove, Illinois, handgun ban is any indication, gun owners appear to be even more disobedient to decrees requiring them to turn their firearms over to authorities.¹²⁴ The Morton Grove police wisely adopted an "honor system," whereby guns would be confiscated through the owners' voluntary compliance with the ban, rather than by searching the residences of known handgun owners.¹²⁵ Only a handful of handguns were turned in.¹²⁶ Noncompliance with such laws in more libertarian areas of the nation, such as the West and

116. See *id.* § 12285(a).

117. See Seth Mydans, *Californians Defy Assault Weapons Law*, CHI. TRIB., Dec. 28, 1990, at 24, available in 1990 WL 2902280 (characterizing the civil disobedience of Gun Owners React as being in the tradition of Gandhi and Reverend Martin Luther King, Jr.).

118. Cf. KOPEL, *supra* note 13, at 231 n.210 (reporting that "approximately 10 percent have registered themselves as required by law").

119. See *id.*

120. See *id.*

121. See *id.* ("The rate of compliance with semi-automatic bans in Boston, Cleveland, and other American cities has been about one percent.").

122. See *id.*

123. See Wayne King, *New Jersey Law to Limit Guns Is Being Ignored*, N.Y. TIMES, Oct. 26, 1991, § 1, at 22, available in LEXIS, News Library, NYT File; Howard Rabb, *New Jersey Politicians' Nightmare Comes True: Gun-Owners Stage Successful Mass Rebellion*, GSSA SENTINEL, Fall 1991, at 4.

124. See *Ban Gives No Ammunition to Either Side of Gun Debate: Not Much Has Changed in the Illinois Village That Enacted the Toughest Handgun Law in the Nation 10 Years Ago*, ORLANDO SENTINEL, June 14, 1992, at A14, available in 1992 WL 10608228.

125. Cf. *id.* ("Of the 54 handguns taken in by Morton Grove police since 1982, 31 were surrendered voluntarily. Most of the rest were confiscated—usually during arrests for other matters.").

126. See KLECK, *supra* note 40, at 409-10. This phenomenon is consistent with a poll revealing that 73% of Illinois residents would not obey a law requiring them to turn over their firearms to the federal government. See *id.* at 330 (citing DAVID J. BORDUA ET AL., ILLINOIS LAW ENFORCEMENT COMMISSION, PATTERNS OF FIREARMS OWNERSHIP, REGULATION, AND USE IN ILLINOIS (1979)).

South, may be higher. Indeed, noncompliance is legitimized by vocal progun police such as the implacable Sheriff Richard Mack and his journalist cohort, Timothy Robert Walters:

Only a nation of armed citizens—the ones who protect themselves from criminal attack every 48 seconds—is equipped of mind, spirit and arsenal sufficient to protect the intent of the Founding Fathers and the tenets of the U.S. Constitution and Bill of Rights. As a united people, we must not allow the enemy to take away our last argument for freedom.¹²⁷

3. *Overwhelming and Ruining the Criminal Justice System.*—Criminologist Don Kates observes that even if only half of all handgun owners defied a confiscation law, the criminal justice system would simply not be able to cope:

Terrorizing [tens of millions of handgun owners] into compliance would require catching, trying and jailing large numbers of them. But to jail just one percent of probable violators would fill all the cells in our present federal, state and local jail system. We would have to either free all the murderers, robbers, and rapists now serving time or build a brand new prison system doubling our combined national capacity—just to hold one percent of all probable gun law violators. Comparable expansion would be required for our courts, prosecutors and police. Effective enforcement of national gun legislation would require an expenditure equal to the cost of catching, trying and punishing every other kind of federal, state, and local criminal combined. I cannot do better than to quote the question with which [a University of] Wisconsin study ends: “Are we willing to make sociological and economic investments of such a tremendous nature in a social experiment for which there is no empirical support?”¹²⁸

Add to a handgun ban the attempt to enforce a law banning all firearms, or virtually all firearms, and enforceability problems become immense.

Just as alcohol prohibition in the 1920s and drug prohibition in modern times have spawned vast increases in federal power, as well as

127. MACK & WALTERS, *supra* note 109, at 143.

128. Don B. Kates, Jr., *Some Remarks on the Prohibition of Handguns*, 23 ST. LOUIS U. L.J. 11, 29 (1979). The University of Wisconsin study concluded that it “is inevitabl[e] that gun control laws have no individual or collective effect in reducing the rates of violent crime.” *Id.* at 26.

vast infringements on the Bill of Rights, another national war against the millions of Americans who are determined to possess a product that is very important to them is almost certain to cause tremendous additional erosion of constitutional freedom and traditional liberty. Legal and customary protections against unreasonable searches and seizures, invasion of privacy, selective enforcement of laws, and harsh and punitive statutes would all suffer.¹²⁹ Attempting to disarm Americans would likely result in widespread police corruption, increased wiretaps, and other evils associated with enforcement of laws against consensual possessory offenses,¹³⁰ thus encouraging public contempt for the law.

Of course, the problem of citizen noncompliance could be partially avoided by simply banning the production of new firearms or by adopting a Morton Grove-type "honor system"¹³¹ to enforcement of a law against gun possession. These vanilla-pale approaches, however, would leave most of America's 200 million guns in private hands, hardly domestic disarmament.

4. "Nasty Things May Happen": *Armed Resistance*.—More alarming than simple noncompliance with gun prohibition is the apparent willingness of many gun owners to fight, if necessary, for their right to bear arms.¹³² The rhetoric of resistance is not confined to gun magazines, but also appears in scholarly journals.¹³³

129. See David B. Kopel, *Peril or Protection? The Risks and Benefits of Handgun Prohibition*, 12 ST. LOUIS U. PUB. L. REV. 285, 319-23 (1993) (offering a detailed analysis of the civil rights implications of gun-prohibition laws).

130. See Don B. Kates, Jr., *Why a Civil Libertarian Opposes Gun Control*, 3 CIV. LIBERTIES REV. June/July 1976, at 24, 24 ("[E]nforcement of even a partial prohibition on handguns would take an immense toll in human liberty and bring about a sharp increase in repugnant police practices as well as hundreds of thousands of jail sentences."); see also David T. Hardy & Kenneth L. Chotiner, *The Potentiality for Civil Liberties Violations in the Enforcement of Handgun Prohibition*, in *RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT* (Don B. Kates, Jr. ed., 1979) (discussing the potential for police abuse and popular resistance to handgun prohibition).

131. See *supra* notes 124-126 and accompanying text.

132. See, e.g., Stephen Weaver, *Freedom's Last Stand: Are You Willing to Fight for Your Guns?*, GUNS & AMMO, Sept. 1994, at 28, 29, 127 ("We cannot hope to prevail against a tyrannical government armed with fully automatic weapons when we are reduced to bolt actions or worse. . . . Do I know what I'm suggesting here? Yes I do. I am speaking of the specter of civil war while adamantly hoping it can be avoided.").

133. See, e.g., Jeffrey R. Snyder, *A Nation of Cowards*, PUB. INTEREST, Fall 1993, at 40. Snyder stated:

The repeal of the Second Amendment would no more render the outlawing of firearms legitimate than the repeal of the due process clause of the Fifth Amendment would authorize the government to imprison and kill people at will. A government that abrogates any of the Bill of Rights, with or without

How seriously should the possibility of a civil war over gun prohibition be taken? The emotions over gun control today run extremely high. The "militia movement" that is much in the news these days is a reaction, in part, to gun control legislation.¹³⁴

The number of those currently involved with citizen militias is at least in the tens of thousands nationwide, and possibly higher.¹³⁵ Most mainstream gun owners, including most of the "hard core," do not currently belong to these militias. This is largely because many of the militias are motivated as much by other political concerns (some of them truly bizarre, such as United Nations invasion conspiracies) as they are by gun control legislation, and these concerns are not generally shared by mainstream gun owners.¹³⁶ Some analysts believe, however, that the militias are even now drawing an increasing number of mainstream gun owners to their ranks.¹³⁷ If the federal government actually attempted to disarm Americans, not only would many Ameri-

majoritarian approval, forever acts illegitimately, becomes tyrannical, and loses the moral right to govern.

This is the uncompromising understanding reflected in the warning that America's gun owners will not go gently into that good, utopian night: "You can have my gun when you pry it from my cold, dead hands." While liberals take this statement as evidence of the retrograde, violent nature of gun owners, we gun owners hope that liberals hold equally strong sentiments about their printing presses, word processors, and television cameras. The republic depends upon fervent devotion to all our fundamental rights.

Id. at 47-48, 55.

134. See Steve Lipsher, *The Radical Right*, DENV. POST, Jan. 22, 1995 (first of two-part series), at 1A, available in LEXIS, News Library, DPost File ("Frustrated by taxes, gun laws and intrusive regulations, a growing number of ultra-conservative 'patriots' has coalesced in Colorado to battle Big Brother—the government."); cf. Stacey Baca, *Secrecy: The Key to Militias*, DENV. POST, Jan. 23, 1995 (second of two-part series), at 1A, available in LEXIS, News Library, DPost File (quoting the head of the Colorado Free Militia: "We are an organization founded to support, protect and defend the Constitution of the United States and Colorado. It may come to the point where we literally have to defend ourselves against the tyrannical government A gun is a very good tool to do that.").

135. Cf. Baca, *supra* note 134 (reporting that "[a]n FBI report obtained by The Post" reveals that 3000 citizens have joined militias in Colorado); Lipsher, *supra* note 134 (reporting that "FBI documents" reveal that up to 3000 citizens have joined militias in Colorado alone).

136. Cf. Stacey Baca, *FBI Finds Militias Encompass a Cross-Section of Citizens*, DENV. POST, Jan. 23, 1995, at 4A, available in 1995 WL 6564048 ("Militia members come from all walks of life, and that worries cops and watchdog organizations. The concern is noted in an FBI investigative document, which sizes up militia members as a cross-section of citizens.").

137. An informative article on the militia movement (though typical of attempts to paint the movement with a broad brush) appears in Daniel Junas, *Angry White Guys with Guns: The Rise of the Militias*, *Covert Action Q.*, Spring 1995, at 20. The author hints, correctly, that there are important distinctions between the small group of white supremacists, the larger group of conspiracy theorists, and the much larger group of disaffected "mainstream gun owners" who are being attracted to the movement as a result of the gun control measures adopted by the Bush and Clinton Administrations, not because these gun owners

cans likely fight back, but the number of those who would do so could conceivably be in the millions.¹³⁸

hold racist views. *See id.* at 20-25. For a less frantic view of militias, see Mack Tanner, *Extreme Prejudice: How the Media Misrepresent the Militia Movement*, REASON, July 1995, at 42.

While it is true that the "patriot" movement is composed of a significant number of conspiracy theorists and a much smaller number of supremacists, a tiny fraction of whom can rightly be described as potential terrorists, it is clear that the movement is actually more racially and ideologically diverse than commonly reported. For example, an author of a report by the Anti-Defamation League of B'nai B'rith has admitted: "[T]he movement overall is [not necessarily] fundamentally racist and anti-Semitic It is a factor but not the predominant factor by any means." Baca, *supra* note 136. Baca notes that James Johnson, a spokesman for the Ohio Unorganized Militia, is an African American. *See id.* Economist and nationally syndicated columnist Walter Williams is also an African American. Although Williams has not proclaimed himself a militia member, he recently called for private citizens to organize militias and evict federal agencies from their states should those agencies fail to heed Tenth Amendment resolutions passed by those states. *See* Walter Williams, *Too Many Laws, and Fewer and Fewer Worth Obeying*, NAT'L EDUCATOR, quoted in WAKE-UP CALL AMERICA, Aug. 1994, at 7.

Much is said and written about "right-wing" patriot groups, but little is mentioned about the libertarian contingent. Libertarians, who are adamantly progun and who believe in the right to resistance, nevertheless reject conspiracy theories and most of the other beliefs of the far right. These contrasting views unfortunately do not stop the media from linking libertarians with ultra conservatives. Commenting on one journalist's apparent inability to understand (or unwillingness to report) the distinction between libertarianism and the far right, Libertarian Party of Denver Chairman David Segal complained:

Lumping Libertarians, John Birchers, religious zealots, hatemongers, tax protesters, gun proponents and constitutionalists together in the same Patriot Movement is like lumping the Nazi SS, Soviet NKVD, British Commandos, United States Marines and the Mafia together in the same "professional killer movement."

I can only assume it was our support for constitutional government and the right to keep and bear arms—rather than our advocacy of equal rights for gays and lesbians, abortion choice, ending drug prohibition and, yes, your right to publish sensationalistic drivel—that earned us a place among the hatemongers and religious zealots in Lipsher's version of the "patriot movement."

David Segal, in *Letters to the Post*, DENV. POST, Jan. 29, 1995, at D2, available in 1995 WL 6565815 (responding to Lipsher, *supra* note 134).

138. Using a conservative percentage, assume that only 2% of the roughly 50 million American gun owners, see *supra* note 89 and accompanying text, would resort to force of arms in the face of prohibitive gun legislation. This would be about 1 million people.

Various polls suggest the potential for explosive growth of the militia movement. A *Time/CNN* poll indicates that 27% of Americans feel that armed resistance to the government is a right. *See 1 in 4 Says Armed Opposition Is OK*, ROCKY MTN. NEWS (Reuters), Apr. 29, 1995, at 44A. According to the same poll, 52% of Americans feel that the government "has become so large and powerful it poses a threat to the rights and freedoms of ordinary citizens." *See id.* An ABC News/*Washington Post* poll shows that 36% of Americans agree that the federal government threatens personal rights and freedoms, but only 9% agree that violence against the government is sometimes justified. *See Nightline* (ABC television broadcast, May 17, 1995), available in LEXIS, News Library, Script File. According to the poll, 13% of Americans support private militias. *See id.* As ABC's Chris Bury points out, 9% and 13% of the population translates into 17 million and 25 million adults, respectively. *See id.*

As the specter of myriad American civilians fighting their own government to retain their gun rights were not troubling enough, there is evidence that at least some members of the armed forces would join the resistance. Many members of the armed services are gun culture types: they own firearms themselves, are convinced that Americans have the inalienable right to keep and bear arms, and they take an oath to defend the Constitution from every enemy, "foreign or domestic."¹³⁹ It is therefore likely that at least some in the military would not simply look the other way as the government attempted to enforce a policy of domestic disarmament.¹⁴⁰ A master's thesis studying the attitudes of American soldiers found that the large majority would *not* obey orders to fire on citizens who resisted gun confiscation.¹⁴¹

Contrasting these hard-core members of the gun culture with the advocates of prohibitionist gun legislation "who take bourgeois Europe as a model of a civilized society," Bruce-Briggs describes the former as

a group of people who do not tend to be especially articulate or literate, and whose world view is rarely expressed in print. Their model is that of the independent frontiersman who takes care of himself and his family with no interference from the state. They are "conservative" in the sense that they cling to America's unique pre-modern tradition—a non-feudal society with a sort of medieval liberty writ large for everyman. To these people, "sociological" is an epithet. Life is tough and competitive. Manhood means responsibility and caring for your own.

This hard-core group is probably very small, not more than a few million people, but it is a dangerous group to cross. From the point of view of a right-wing threat to internal security, these are perhaps the people who should be dis-

139. 5 U.S.C. § 3331 (1994).

140. See *60 Minutes: The Resister* (CBS television broadcast, Apr. 30, 1995). According to one member of the Special Forces writing in a recent issue of *The Resister*, published by an underground group of members of the Special Forces,

My friends and I are all in agreement; our government is getting out of control and the first time we are given a mission to disarm the citizens of this country we are going to desert and join whatever guerrilla movement demonstrates it is fighting to restore the principles this country was founded on, republicanism and individual rights.

"John," *SWCS Instructors Participating in Drug Raids*, 1 *RESISTER*, Summer 1994, at 1, 4.

141. See ERNEST GUY CUNNINGHAM, *PEACEKEEPING AND U.N. OPERATIONAL CONTROL: A STUDY OF THEIR EFFECT ON UNIT COHESION* (U.S. Navy, Naval Postgraduate School, Monterey, Cal., Mar. 1995) (indicating 61.66% of the 300 Marines surveyed stated they would not obey such orders, while 12% had no opinion).

armed first, but in practice they will be the last. As they say, to a man, "I'll bury my guns in the wall first." They ask, because they do not understand the other side, "Why do these people want to disarm us?" They consider themselves no threat to anyone; they are not criminals, not revolutionaries. But slowly, as they become politicized, they find an analysis that fits the phenomenon they experience: Someone fears their having guns, someone is afraid of their defending their families, property, and liberty. Nasty things may happen if these people begin to feel that they are cornered.¹⁴²

"Nasty things" would likely ensue if the government attempted to enact and enforce gun prohibition. It was, after all, government attempts to confiscate "weapons of war" at Lexington and Concord that sparked the American Revolution¹⁴³ and the Texan rebellion against Mexico.¹⁴⁴ If it is true, as Bruce-Briggs implies, that millions rather than mere thousands of gun owners would be involved in fighting for their gun rights, then those who foresee a speedy quashing of this rebellion are probably deluding themselves.

Many people will be incredulous, even scandalized, over the proposition that many gun owners would resist attempted disarmament. Nevertheless, a number of notable constitutional scholars have shown that this type of disobedience is not only characteristically American, but that the Second Amendment's very reason for being is to enable American citizens to resist even their own government when their civil liberties are thus assailed.¹⁴⁵ It was the Framers of the Constitution and the revolutionary generation, and not the 1990s "Militia of Montana," who first insisted that the only reason a government would seek to disarm its population would be to enslave it.¹⁴⁶

142. Bruce-Briggs, *supra* note 71, at 61-62.

143. See Thomas M. Moncure, Jr., *Who Is the Militia: The Virginia Ratification Convention and the Right to Bear Arms*, 19 LINCOLN L. REV. 1, 6 (1990) ("General Gage . . . attempt[ed] to seize arms and munitions at Lexington, Massachusetts, resulting in the 'shot heard round the world.'"); cf. ESSEX GAZETTE, Apr. 25, 1775, at 3, col. 3 (giving a contemporary account of the happenings in Boston).

144. See Stephen P. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bills of Rights*, 41 BAYLOR L. REV. 629, 636 (1989) ("The 'Lexington' of the Texas Revolution was sparked at Gonzales, where the Mexicans tried to seize a small cannon the settlers used to scare away Indians." (citing N. SMITHWICK, *THE EVOLUTION OF A STATE, OR RECOLLECTIONS OF OLD TEXAS DAYS* 71 (2d ed. 1984))).

145. For a discussion of the origin of the Second Amendment, as well as commentary by constitutional scholars, see *infra* notes 401-451 and accompanying text.

146. For example, at the Virginia Convention to ratify the Constitution, George Mason pointed out that the British government had decided "to disarm the people . . . was the best and most effectual way to enslave them." 3 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 380 (Jonathan Elliot ed., 1859).

Virtually all legal scholarship on the Second Amendment from the last two decades acknowledges as much. Sanford Levinson so concluded in his famous *Yale Law Journal* article, *The Embarrassing Second Amendment*.¹⁴⁷ Levinson is not alone. Constitutional scholarship on the Second Amendment shows that one of the major reasons the Amendment was included in the Bill of Rights was to ensure the perpetuation of a force of armed citizens that could resist domestic tyranny when—but only when—it was absolutely necessary.¹⁴⁸

147. Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 657 (1989) ("If one does accept the plausibility of any of the arguments on behalf of a strong reading of the Second Amendment, but, nevertheless, rejects them in the name of social prudence and the present-day consequences produced by finicky adherence to earlier understandings, why do we not apply such consequentialist criteria to each and every part of the Bill of Rights?").

148. The *American Political Dictionary* states that the "right to bear arms is an implicit recognition of the right of revolution, stemming from the idea that a tyrant could not be overthrown if the people were denied the means." JACK C. PLANO & MILTON GREENBERG, *THE AMERICAN POLITICAL DICTIONARY* 76 (6th ed. 1982). One of the earliest law review pieces devoted to the issue of the right to keep and bear arms concluded that the right to arms is "for preserving to the people the right and power of organized military defense of themselves and the state and of organized military resistance to unlawful acts of the government itself, as in the case of the American Revolution." Lucilius A. Emery, Note, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 476 (1915). As to the question of when armed resistance is justified—when it becomes lawful resistance as opposed to insurrection—the Founders were clear that violence must always be the last resort. See *THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS* xlvii (David E. Young ed., 2d ed. 1995) [hereinafter *THE ORIGIN OF THE SECOND AMENDMENT*]. All peaceful means of redressing the situation must be pursued, they argued, before shots may be fired. See Glenn Harlan Reynolds, *Up in Arms About a Revolting Movement*, CHI. TRIB., Jan. 30, 1995, at 11, available in 1995 WL 6161015.

There has been an explosion of Second Amendment research in the last two decades, resulting in a number of people within the legal academy converting, sometimes reluctantly, to the "individual right" interpretation of the Second Amendment. One of these converts is Duke Law School constitutional law professor William Van Alstyne who, while not supporting every position taken by the NRA on gun control, nevertheless states that the individual right stance "advanced by the NRA with respect to the Second Amendment is extremely strong Indeed, it is largely by the 'unreasonable' persistence of just such organizations in this country that the Bill of Rights has endured." William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1255 (1994).

These scholars point out that the current militia phenomenon is not unprecedented. American history has witnessed a number of instances in which Americans have taken up arms in response to perceived acts of despotism on the part of government. The current situation, in fact, bears some similarity to the state of affairs that shortly preceded the Revolutionary War. In response to what the colonials perceived as a systematic British assault upon their rights, independent local militias were formed all over the colonies, often in opposition to the will of the royal governors. These militia "associations" were usually created through declarations or resolutions by county entities, much in the same way that certain county commissions have recently created their own militias. See *infra* note 283. For example, George Mason and George Washington formed the Fairfax County Militia Association by resolution. See STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 60 (2d ed. 1994). In this resolution, George Ma-

Although most gun owners have not, of course, kept up with the *Yale Law Journal*, the ideology of forceful resistance to a gun-banning central government has been transmitted—from American gun owners in 1776 to American gun owners in 1997—quite effectively. Many gun owners believe that it would be perfectly legitimate—even morally required—to oppose gun prohibition by force of arms.¹⁴⁹ When we celebrate the Fourth of July, we remember that America was, after all, born through what the British perceived as “insurrection”; our Founders enjoined us never to lose that “spirit of resistance.”¹⁵⁰ Millions of American gun owners, rightly or wrongly, still heed that message.

Predictably, proponents of gun control have responded bitterly that the conclusion of Levinson and other legal scholars represents nothing less than an “insurrectionist” interpretation of the Second Amendment.¹⁵¹ Such a criticism ignores the important distinction be-

son declared: “Threat’ned with the Destruction of our Civil-rights, & Liberty, . . . we will, each of us, constantly keep by us” arms and ammunition. *Id.* (quoting George Mason). In other places, the refusal of local government entities to create militias did not prevent the formation of autonomous militias. As a writer from Georgia warned: “[T]he English troops in our front, and our governors forbid giving assent to militia laws, make it high time that we enter into *associations* for learning the use of arms, and to choose officers” *Id.* (quoting the WILLIAMSBURG VIRGINIA GAZETTE, Oct. 27, 1774). Similar associations had been formed all over the colonies by the time the Revolution came to an end. *See id.* at 60-65 (discussing various colonial military associations).

Autonomous militias were also formed by African Americans during the 1960s to protect the black community and the civil rights movement from racist groups, such as the Ku Klux Klan, which often engaged in terrorism with approval from law enforcement authorities. *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 356-58 (1991).

149. *See supra* notes 132-134 and accompanying text.

150. Thomas Jefferson is perhaps the best known of the leading Founders for insurrectionist utterances. With reference to Shays’ Rebellion, Jefferson reminded James Madison that “a little rebellion now and then is a good thing It is a medicine [sic] necessary for the sound health of government.” Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), in *THE PORTABLE THOMAS JEFFERSON* 415, 417 (Merrill D. Peterson ed., 1975). Jefferson also asked: “[W]hat country can preserve it’s [sic] liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants.” Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787), in *THE ORIGIN OF THE SECOND AMENDMENT*, *supra* note 148, at 102.

151. *See, e.g.*, Dennis Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991). Henigan, who serves as Director of the Legal Action Project at the Center to Prevent Handgun Violence in Washington, D.C., argues that Levinson’s insurrectionist interpretation of the Second Amendment spells an end to the rule of law in America. *See id.* at 123. It is not surprising, therefore, that Henigan’s response to the Santa Rosa County Commission’s militia resolution is that it creates only a “bogus local militia.” *See* Larry Rohter, *County Creates Militia to Defend Gun Rights*, N.Y. TIMES, May 29, 1994, at L14, available in LEXIS, News Library, NYT File. If Santa Rosa County’s militia is “bogus,” then so were those militias formed by American counties to fight the British during the Revolutionary War. Having insisted that a militia is something created only by the government, an-

tween *unjustifiable* resistance—insurrection—and *justifiable* resistance to government tyranny—a right that Americans exercised in the Revolution and one that the Founders declared to be an inalienable right.¹⁵² To criticize the notion of rebellion and resistance per se is to criticize the theory of government embodied in the Declaration of Independence.¹⁵³

“It would be useful,” Bruce-Briggs concludes, “if some of the mindless passion, on both sides, could be drained out of the gun control issue.”¹⁵⁴ On the communitarian side, Etzioni and others must ask themselves the following question: If the passage of the Brady Act¹⁵⁵ and the assault weapon ban¹⁵⁶ have caused such alarm and have triggered plans of resistance in the minds of many otherwise law-abiding gun owners, what is bound to happen if such an extreme proposal as domestic disarmament is made the law of the land? The worst case scenario would be a civil war, while the best case scenario would be a massive conflict and breakdown of law and order, reminiscent of the era of alcohol prohibition. In neither case would a more harmonious,

tigun groups now face the uncomfortable problem of having to explain away militias that are created by governments.

152. The distinction between justifiable resistance to tyranny and insurrection is clearer in theory than in practice. The current militia movement—many of whose members adhere to conspiracy theories—advocates “working within the system,” because the federal government and the United Nations have not made a violent effort to impose full-scale tyranny. See Tanner, *supra* note 137, at 45, 47. Likewise, the revolutionaries of the 1770s also worked within the system (through petitions to Royal Governors and the like), until they became convinced that the various problems with the British were more than just a large collection of problems—that the individual abuses were elements of a monarchical plot to reduce the Americans to slavery. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). For more on the colonists as conspiracy buffs, see LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY 42-51 (1978). It was essential to 1770s Patriots that they demonstrate—to themselves and to the world—the justice of their rebellion by showing that there was a master plot. For this reason, the Declaration of Independence, before detailing King George’s “long train of abuses and usurpations,” put those abuses and usurpations in context: Americans have suffered “a long train of abuses and usurpations, pursuing invariably the same Object [that] evinces a *design* to reduce [the Americans] under absolute Despotism.” THE DECLARATION OF INDEPENDENCE, *supra*, at para. 2 (emphasis added).

In fact, Jefferson and the rest of the 1770s “Patriot movement” were wrong. Although King George III pursued a terrible, destructive policy toward the American colonies, there was no “design” to reduce the Americans under “absolute Despotism.” The King was heavy-handed, but he had no master plan; his policies were reactionary.

153. See THE DECLARATION OF INDEPENDENCE, *supra* note 152, at para. 1 (declaring that humans have a right and a duty to overthrow tyrannical government); Luther Martin, *Genuine Information X*, MD. GAZETTE, Feb. 1, 1788, reprinted in THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 148, at 246.

154. Bruce-Briggs, *supra* note 71, at 62.

155. 18 U.S.C. § 922(s), (t) (1994).

156. *Id.* § 922(u), (w).

unified, communitarian society result. Moreover, it is not only law-abiding citizens who would not give up their guns, criminals would not either.

B. Country, Court, and the Crisis of Legitimacy

Prohibitionist solutions, whether they involve the banning of alcohol, firearms, gold, or other goods, serve in the long run to diminish "legitimacy"—the popular sense that the government exists to serve rational, pragmatic ends and, therefore, ought to be obeyed. Historian William Marina, who has written extensively on the American Revolution, has argued that successful firearms prohibition will never become a reality in the United States and is doomed to fail internationally as well.¹⁵⁷

With the benefit of historical perspective, Marina made two points, both stemming from his study of resistance and revolution in the modern world. The first was an empirical observation about repressive regimes: Oppressive states are inherently unstable, and most of them eventually give way to populist forces of reform or revolution.¹⁵⁸ This is especially true in the modern era, which may aptly be dubbed the "era of revolution." (Marina made these predictions in the wake of Watergate and Vietnam, long before the collapse of the Soviet Empire.)¹⁵⁹ When states become tyrannical they lose legitimacy, and hence their legitimate authority to govern. Marina focused on the American Revolution as one of the clearest examples of what happens when there is a "crisis of legitimacy" that pits the people against their government.¹⁶⁰

The American Revolution was the product of what Marina called the "Country" ideology, which stresses popular sovereignty and republicanism, as opposed to the "Court," or centralized, statist ideology.¹⁶¹ "Here," noted Marina, "the authority emanated from the people upward, versus the standing army, where authority rested with the state.

157. See William Marina, *Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective*, in *FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY* 417, 446 (Don B. Kates, Jr. ed., 1984).

158. See *id.* at 443.

159. See *id.* at 418.

160. See *id.* at 432-35.

161. See *id.* at 432. The story is told in much greater detail in Joyce Lee Malcolm's excellent history of the conflict over the right to keep and bear arms in seventeenth-century England, the prototype court versus country conflict. See JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994).

Participation in the people's militia was thus an integral aspect of citizenship in what was perceived as a republican culture."¹⁶²

America, partly by design, has avoided the most intense country versus court conflicts. The national capital was deliberately chosen to be far removed from the finance and trade centers (New York and Philadelphia at the time).¹⁶³ Yet it is still true that Washington, D.C., is in many ways quite different from the rest of the United States. A demographic survey of various American cities focused on what their inhabitants liked to do for fun: was a good time to them a night at the ballet, cooking a gourmet meal, a morning of Bible reading, or a weekend of hunting?¹⁶⁴ The survey results revealed that the most aberrational city was Washington, D.C.; its inhabitants had less in common with the "average American" than those of any other American city.¹⁶⁵ (Among other things, the percentage of hunters was very low.)¹⁶⁶ Thus, it should not be particularly surprising that a think tank located in the court city, a think tank that has the Executive's ear, should simply fail to understand how intense the resistance to its proposals would be out in the "country," nor would it be surprising for the court to fail to foresee that an attempt to disarm the populace, and further centralize armed force under court control, could literally start a civil war. That was how the English Civil War was started.¹⁶⁷

Just as it is predictable for the court to underestimate the intensity of the country's likely resistance to court's demands for disarmament, it is also predictable that the court will overestimate its ability to control the country.¹⁶⁸ (This miscalculation also contributed to the English Civil War.) This realization leads to Marina's second historical point: Powerful states have rarely been able to control revolutions in arms technology,¹⁶⁹ nor have they been able, historically, to prevent the people from obtaining that technology, especially when it comes to small arms.¹⁷⁰ Even modern superpowers have been largely incapa-

162. Marina, *supra* note 157, at 421.

163. See Whit Cobb, *Democracy in Search of Utopia: The History, Law, and Politics of Relocating the National Capital*, 99 DICK. L. REV. 527, 529-38 (1995).

164. See Paul Farhi, *D.C. Rated As Nation's Yuppie Capital*, WASH. POST, May 25, 1990, at F1, available in 1990 WL 2129720.

165. See *id.*; see also Paul Farhi, *Not Your Ordinary Metropolis*, WASH. POST, Aug. 6, 1989, at A1, available in 1989 WL 2040394 (citing results of consumer research studies).

166. See Farhi, *supra* note 164.

167. See MALCOLM, *supra* note 161, at 19.

168. See Marina, *supra* note 157, at 445.

169. See *id.* at 422-28 (discussing the technological weapons advance and shortfalls of the ancient Chinese, Greeks, and Romans).

170. See *id.* at 445 ("With the present system of international arms trade, governments cannot control the flow of arms downward.").

ble of disarming or vanquishing targeted armed populations.¹⁷¹ Support for Marina's thesis can be seen in the inability of powerful modern states to defeat the North Vietnamese and Viet Cong, the Irish Republican Army, the Afghan *mujahedin*, and the Somali militias.

Marina analyzed the impotence of powerful states not only in terms of the inherent lack of military flexibility created by reliance on superweapons, but also in terms of the eventual societal decline that "imperial" nations have historically suffered (among which he numbers America).¹⁷² The Founders were also aware that, historically, nations that became empires became both morally and politically corrupt, and, therefore, impotent. Thus, the Founders consciously sought to establish a general government of specified, limited powers that would not excessively involve itself in foreign entanglements, and whose authority emanated upward from the states.¹⁷³ Nevertheless, this vision did not prevent America from passing into its own imperial phase, just as the Roman Republic had done. This drift toward empire on the part of America has only led, once again, to a global crisis of legitimacy.¹⁷⁴ Witness, for example, the impotence of the United Nations in the former Yugoslavia and elsewhere throughout the world where various states have reconfigured themselves or asserted their former sovereignty.¹⁷⁵

Stagnation created by the drift toward empire has resulted in what Marina has called "the emergence of a new paradigm. In many ways this paradigm is an updating of the 'Country' ideology, yet bridges a spectrum from left to right and includes many who would view themselves as nonpolitical"¹⁷⁶ This new paradigm, with its attendant ideas of people participation, decentralization, smallness of scale, and obtaining appropriate intermediate technology such as small arms, may lead adherents to bypass or ignore the government, "despite the efforts of imperial centralizers to stop the process."¹⁷⁷

171. Marina concludes: "As the international arms trade increases . . . more people will obtain access to guns as governments lose control over the great number of arms being traded." *Id.* at 441-42. Firearms prohibition is thus "a dubious if not impossible proposition in any given country, and certainly in one with the personal freedoms long enjoyed by Americans." *Id.* at 444.

172. *See id.* at 443-44.

173. *See* MORISON, *supra* note 101, at 305-12.

174. *See* Marina, *supra* note 157, at 445.

175. *See* Helene Fontanaud, *Chirac Takes Center Stage: Britain, U.S. Admonished to 'Pull Themselves Together'*, S.F. CHRON., July 15, 1995, at A8, available in 1995 WL 5290810; Stephen J. Hedges et al., *Will Justice Be Done? Bosnia's War Has Ended, but Its Worst Criminals Are Still at Large*, U.S. NEWS & WORLD REP., Dec. 25, 1995, at 44, available in 1995 WL 13413526.

176. Marina, *supra* note 157, at 445.

177. *Id.*

Thus, "the larger philosophical outlook underlying the Country interpretation of the Second Amendment takes on a new meaning and relevance. In today's international context, any such effort at arms prohibition by the state against the individual, in violation of the Second Amendment, is bound to fail."¹⁷⁸

Failure to heed the argument that gun prohibition is futile "is apt to have far more serious repercussions on the legitimacy of those seeking prohibition than upon the actions or existence of those whose lives they seek to regulate."¹⁷⁹ Moreover, a return to "decentralization" and "smallness of scale" in America and elsewhere may be inevitable.¹⁸⁰ Such a return to a "republican culture," as shall be argued below, is the most plausible cure for gun-related violence in America.

Solutions to America's plague of violence are most likely to be found if all Americans, whatever their feelings about guns, heed the words of Isaiah: "Let us reason together."¹⁸¹ Etzioni and the communitarians do attempt to reason with the public concerning the types of rights beloved in the "court" at Washington. Although the communitarian agenda for selective censorship,¹⁸² drug testing,¹⁸³ and the like¹⁸⁴ may not comport with strict construction of the Constitution, there is a recognition that freedom of speech and privacy are tremendously important, and that First and Fourth Amendment rights should be infringed only when there is a compelling reason to do so. Etzioni formulates a four-part test for when rights may be infringed: (1) clear and present danger, (2) no alternative way to proceed, (3) "adjustments" should be as limited as possible, and (4) infringing policies should minimize harmful side effects.¹⁸⁵ His respectful hesitancy toward infringing rights of journalists vanishes, however, when the object of regulation becomes the one-half of American households that own guns. Consider the Communitarian Network's "accommodation" of gun owners: rendering collectors' guns "inoperative" and limiting hunters to long guns "without sights or powerful bullets, making the event much more sporting."¹⁸⁶

178. *Id.* at 446.

179. *Id.*

180. *Id.* at 445-46.

181. *Isaiah* 1:18.

182. *See Platform, supra* note 5, at 19 (arguing that curbs on "verbal expressions of racism, sexism, and other slurs" are not necessarily violative of the First Amendment and should be employed).

183. *See id.* at 20.

184. For other items on the Communitarian Agenda, see *supra* notes 14-29 and accompanying text.

185. *See THE SPIRIT OF COMMUNITY, supra* note 33, at 177-90.

186. *See supra* note 47 and accompanying text.

There is an important ethical case to be made against hunting, but that case is properly made within the context of animal rights (a cause for which Etzioni's book displays absolutely no sympathy),¹⁸⁷ and vegetarianism. While dismissing the idea that hunting could be a true "sport," Etzioni displays a truly cosmopolitan ignorance about hunting, and about the interests of animals. The statement about denying hunters "powerful bullets" obviously comes from someone who has never thought about hunting in a serious manner. If hunting is to be tolerated, it is desirable that the hunted be killed as painlessly and rapidly as possible. Accordingly, hunters today are trained only to take a shot that they are confident will bring the animal down almost instantly (typically, a shot to the heart or the lungs). No ethical hunter would fire at the general mass of a deer, hoping to hit a leg or some nonvital organ. To the extent that hunters are deprived of "powerful bullets" (that is, bullets that have been found suitable for bringing the animal down) or deprived of scopes (which make the shot more precise), hunters would use inferior, less capable bullets, and would shoot them less accurately. As a result, many animals would be wounded rather than killed. Fleeing, some would escape, only to die a lingering, painful death after days or weeks, as a result of infection or other complication from the bullet wound. Persons who have strong ethical objections to hunting per se, but who also believe that hunting, to the extent allowed, should be done as humanely as possible, should prefer that animals be hunted with powerful and accurate rifles, rather than with other weapons, such as bows or inferior firearms, which risk causing an especially slow and agonizing death.

Etzioni's snide accommodation of gun collectors—by allowing them to keep their guns if they employ his "favorite" technique of pouring "cement in the barrel"¹⁸⁸—is likewise explainable only as a product of condescending ignorance. Most automobile collectors would find little value in a car that was rendered inoperable, as by pouring cement in the piston cylinders. Even if a collected car spends all its time in a garage, or a collected gun resides in a wall-mounted display case, it is still important to the collector to know that his object *could* serve its purpose. Rendering the object inoperable—especially through internal destruction such as cementing vital parts—also destroys most of the economic value of the collected object. Many law-

187. Etzioni is opposed to "minting" any new rights for humans, which makes it unlikely that new rights for animals would be recognized. His other reference to "animal rights" is a passage referring to terrorism. See *THE SPIRIT OF COMMUNITY*, *supra* note 33, at 42, 199 (mentioning how some Americans go to extremes fighting for animal rights).

188. See *supra* note 47 and accompanying text.

abiding gun collectors would lose tens of thousands of dollars, in collections built up over decades, if Etzioni's scheme were enacted. One wonders if Etzioni has ever viewed a friend's gun collection, or has ever thought seriously about the real impact his gun confiscation proposal would have on the millions of good citizens who are gun collectors. Perhaps an argument could be made that gun collecting presents such a risk of harm to society that even licensed collectors with registered collections should be forced to destroy (by disabling) their collections. Etzioni has not made such an argument. He has simply sneered at the cretins whom he imagines compose the ranks of the nation's gun collectors and hunters.¹⁸⁹

If Etzioni were H.L. Mencken, sneering at the booboisie beyond the Beltway or the Bos-Wash corridor would be understandable,¹⁹⁰ but Etzioni proclaims himself a communitarian, a man who wants to (in Richard Nixon's words) "bring us together."¹⁹¹ The Americans who live more than half an hour from a Metroliner stop are hardly going to be persuaded to put down their guns by a man and movement that hold them in contempt and view them as cretins to be subjugated, rather than as fellow citizens with whom to begin a dialogue.¹⁹²

C. Summary

If domestic disarmament became policy in this country, tens of millions of Americans would simply hide their guns from the authorities. The majority of these guns are now, and would remain, unregistered. Thus, the majority of firearms would remain in the hands of

189. For more on the culture of gun collectors, see Barbara Stenross, *The Meanings of Guns: Hunters, Shooters, and Gun Collectors*, in *THE GUN CULTURE AND ITS ENEMIES* 53-55 (William R. Tonso ed., 1990). There are many more gun collectors than there are gun criminals; there are hardly any articles on the former, and innumerable articles on the latter. By treating nonviolent, lawful uses of firearms as barely worth study, the mainstream of modern sociology produces a distorted picture of firearms in America.

190. See Richard H. Gilluly, Editorial, *A Second Look at Mencken*, *BALT. SUN*, June 21, 1995, at 15A, available in 1995 WL 2448743 (explaining that Mencken created the pejorative term—"the booboisie"—to show his disdain for ordinary people).

191. THEODORE H. WHITE, *AMERICA IN SEARCH OF ITSELF* 431 (1982) (quoting Richard M. Nixon).

192. "[T]rue communal values cannot be imposed by an outside group or an internal elite or minority but must be generated by the members of community in a dialogue which is open to all and fully responsive to the membership." Amitai Etzioni, *Old Chestnuts and New Spurs*, in *NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES* 17 (Amitai Etzioni ed., 1995) [hereinafter *Old Chestnuts*]. Communitarians should seek "political modes of . . . compromise that seek creative syntheses from different interests and divergent moral concerns." Thomas A. Spragens, Jr., *Communitarian Liberalism*, in *NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES* 50 (Amitai Etzioni ed., 1995).

their owners, or on the black market. Just as organized crime is able to smuggle tons of drugs into the country every year, it would be able to do the same with illicit firearms. Even if illegal imports could be entirely eliminated, guns are not particularly difficult to manufacture in a basement workshop with tools that can be obtained at a hardware store.¹⁹³

The vigorous attempt to enforce domestic disarmament would entail systematic violations of fundamental rights enjoyed by American citizens. Even if it proved possible to catch and prosecute only a small fraction of the projected number of those who would refuse to comply with registration or relinquishment requirements, both the courts and the nation's jails would almost certainly be overloaded.¹⁹⁴ Attempted enforcement of domestic disarmament would also likely result in law enforcement oppression, corruption, resistance, or rebellion (depending upon the officer).¹⁹⁵ This, in turn, could very well lead to a breakdown in respect for the law and the institutions that make it.¹⁹⁶

There is an alarming potential for violence that would result from a serious attempt to disarm Americans. Many Americans are already preparing to meet force with force should gun prohibition laws be passed. The size of the militia movement is sure to increase should it become clear that the federal government intended to embark upon the wholesale disarmament of its citizens.

Domestic disarmament could be a cure worse than the disease. It would therefore be preferable, as Bruce-Briggs suggests, to drain the "mindless passion" out of the gun control debate¹⁹⁷ and begin to discuss rationally what might realistically lead to a diminution of gun violence among a people that has historically been armed and will almost certainly remain so.

193. See RONALD B. BROWN, *HOMEMADE GUNS AND HOMEMADE AMMO* (1986); BILL HOLMES, *HOME WORKSHOP GUNS FOR DEFENSE AND RESISTANCE: THE HANDGUN* (1979).

194. See *supra* notes 115-123 and accompanying text (discussing the disobedience of assault weapons owners in California, Denver, and New Jersey after these jurisdictions passed stringent gun control measures).

195. See *supra* notes 104-109 and accompanying text (discussing the resistance of American law enforcement personnel to disarmament).

196. It is precisely stubborn realities such as these that led former ACLU Executive Director Aryeh Neier to conclude that because "reprehensible police practices are probably needed to make anti-gun laws effective, my proposal to ban all guns should probably be marked a failure before it is even tried." Hardy & Chotiner, *supra* note 130, at 194.

197. See *supra* note 154 and accompanying text.

III. VIRTUE AND COMMUNITY MILITIAS

The Communitarian Network's platform argues that the Second Amendment does not protect an individual right to keep and bear arms, but rather only the existence of "community militias," which the Network equates with the National Guard.¹⁹⁸ For this assertion, Etzioni relies largely upon an essay by historian Lawrence Delbert Cress.¹⁹⁹ This reliance is appropriate, as Cress's article is one of the few historical pieces in the last twenty years written by an academic and published in a scholarly journal that concludes the Second Amendment is not an individual right.²⁰⁰ Cress reasons that because the discussion surrounding the ratification of the Second Amendment focused mainly on the necessity of protecting the institution of the militia, a community rather than an individual right is guaranteed in the Second Amendment.²⁰¹

This community-only view has serious problems. Because this view is exclusively propounded by gun control advocates who wish to remove the Second Amendment as an obstacle to gun control proposals, no community-rights theorist has explained what the Second Amendment *does* mean if it does not mean that people have a right to keep and bear arms. Glenn Reynolds and Don Kates actually do investigate what the Second Amendment means if it is not a guarantee of individual right.²⁰² They demonstrate that the nonindividual view of the Second Amendment is intellectually incoherent,²⁰³ inconsistent with Article I of the Constitution,²⁰⁴ and actually allows states (to the extent that they desire) to repeal all federal gun controls within their borders.²⁰⁵

The Communitarian Network claims to favor "community militias" rather than individual "gun slingers."²⁰⁶ A problem arises when the Communitarian Network then advocates disarming private citizens and "much of the police force."²⁰⁷ Whatever the community militia might be, it can hardly be a militia at all if its members are totally

198. DOMESTIC DISARMAMENT, *supra* note 1, at 1.

199. *Id.* at 10; see Lawrence Delbert Cress, *An Armed Community: The Origin and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984).

200. See Cress, *supra* note 199, at 23.

201. See *id.* at 29-42.

202. See Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995).

203. See *id.* at 1741-43.

204. See *id.* at 1743-49.

205. See *id.* at 1752-53.

206. *Platform*, *supra* note 5, at 21.

207. DOMESTIC DISARMAMENT, *supra* note 1, at 9.

disarmed. The Communitarian Network contends that the community militia is the National Guard. So because the Second Amendment guarantees *some* "right," do all Americans have a *right* to serve in the National Guard? If the community militia is not the National Guard, who will supply it with "arms," without which it could hardly be the "militia" referred to in the Second Amendment? If we are to be faithful to the Constitution, there must be some kind of militia; what should this militia look like?

To begin to answer these questions, which the Communitarian Network has failed to do, we turn to David C. Williams, who has devoted great attention to the militia's relevance in contemporary America.²⁰⁸

A. *The Militia and Republicanism*

Republicanism has gained many academic adherents in recent years, first among historians, and more recently in the law schools. The modern communitarian movement may even be viewed, at least in part, as an expression of the republican philosophy.²⁰⁹

In his *Yale Law Journal* article, entitled *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*,²¹⁰ Williams takes a "modern, republican" look at the Second Amendment.²¹¹ He agrees with the communitarians that America has become a fragmented society and that a sense of the importance of civic duty, such as that manifested during the early days of the republic, needs to be restored among the American people.²¹² "Republicanism appeals to many because it emphasizes community over separation and public dialogue over strict autonomy."²¹³ Thus, a "neorepublican" America would be one in which communitarian values would take hold among the American populace, leading away from the atomized society that the Communitarian Network and other advocates of the common good decry.

Williams acknowledges that true republics have citizen militias. Under republican theory, the militia

208. See Williams, *supra* note 6.

209. See Spragens, *supra* note 192, at 37-38. Spragens refers to the movement as a "twentieth century legatee of the civic Republican tradition." *Id.* at 37; see also ROBERT BOOTH FOWLER, *THE DANCE WITH COMMUNITY: THE CONTEMPORARY DEBATE IN AMERICAN POLITICAL THOUGHT* 63-79 (1991) (determining that the ideal republican community is encapsulated in "civil virtue").

210. Williams, *supra* note 6.

211. *Id.* at 552.

212. *Id.* at 570.

213. *Id.* at 562.

constituted a forum in which state and society met and melded, and this combination offered some advantages for curbing corruption. If the evil of partiality touched a segment of the population, then the militia—constituted as an instrument of the state—could restrain any movement toward demagogic rebellion. But if the state became corrupt, then the militia—now constituted as “the people”—could resist despotism. Indeed, the line between state and people ideally disappeared in the militia, in that the militia members were both the rulers and the ruled.²¹⁴

Furthermore, the militia “offered training in virtue, making citizens independent and self-sacrificing.”²¹⁵ It also “allowed citizens to participate directly in their own self-government, not just through the process of representation, and it consigned to them ultimate control of the means of force.”²¹⁶

Thus, Williams understands that the right to arms as guaranteed by the Second Amendment is a reference to the right of the people themselves to act as a popular militia, not just to “have” a professional, select militia such as the National Guard. Nevertheless, he is not ready to say that community militias such as those that existed in the eighteenth century should be restored: “In republican theory, only a virtuous citizen militia can be entrusted with the means of force to resist state authority, but citizens will not be virtuous until they are already participating in policy making under a republican form of government.”²¹⁷ This state of affairs, Williams argues, no longer exists in America.²¹⁸ American citizens are generally too preoccupied with self-interest and too far removed in their political thinking from the republicanism that reigned in eighteenth-century America.²¹⁹ They can no longer be trusted to be virtuous.²²⁰ Furthermore, today’s so-

214. *Id.* at 554. Even the promilitia *Resister* is concerned about the composition of the civilian militia and the potential for “demagogic rebellion” when it devolves into rag-tag bands of armed people:

The unorganized militia is the armed citizenry at large. This arrangement is not only rational, it is essential, for without legitimate authority any demagogue could form a “militia,” which in practice would be little more than a local armed gang.

Therein lies the inherent danger of the militia movement and the reason the Special Forces Underground will not commit its assets indiscriminately.

J.F.A. Davidson, *On Militia*, *RESISTER*, Spring 1995, at 1, 19.

215. Williams, *supra* note 6, at 602.

216. *Id.*

217. *Id.* at 605.

218. *Id.* at 607-08. “Conditions have so changed, however, that the new militia could not generate all of the benefits of the old—although it might produce some.” *Id.*

219. *Id.* at 602-05.

220. *Id.*

called "militia" is not universal (though Williams admits that militia participation never was). Guns are owned by only a "slice" of the American populace,²²¹ and that segment of society cannot seriously be considered America's militia for a number of reasons, the chief of which is that "a modern militia would be a reflection of modern America—divided and driven by self-interest."²²² Because America has drifted from its republican moorings, the Second Amendment today is not only "embarrassing," it is "terrifying."²²³ Thus, Williams concludes, because the militia does not exist, the Second Amendment poses no obstacle to current gun control laws.²²⁴

As a practical matter, gun ownership is not confined to a mere "slice" of the American population; guns are possessed in roughly half of all households.²²⁵ As a matter of current constitutional policy, Williams's argument runs into one insurmountable obstacle: the language of the Second Amendment itself.²²⁶ The Second Amendment does not say that "the militia" has a "right to keep and bear arms"; rather, "the people" have the right. The introductory, subordinate phrase of the Second Amendment ("A well regulated Militia, being necessary to the security of a free State") does not, grammatically, limit the scope of the right in the main clause ("the right of the people to keep and bear Arms, shall not be infringed"). Parsing the Second Amendment carefully can lead to no other result.²²⁷

221. *Id.* at 554.

222. *Id.* at 608. Williams's article was published before, and therefore makes no reference to, the rise of the civilian militias described above. See *supra* notes 134-138 and accompanying text. Williams would doubtless point to these militias as proof that there really is no true militia in America today and that Americans are "divided and driven by self-interest"—the divisions being those of the left, the right, and everything in between, and the self-interest consisting of the interest on the part of the gun culture to remain armed on one hand and, on the other, the desire of those who eschew the idea of gun ownership to be "safe" from guns. See *infra* note 237.

If Americans are divided and driven by self-interest on the gun issue, it is partly because the government has departed so far from the republicanism of the Founders and have opted, instead, for the idea of the state as the chief guarantor of "security." The right-wing militias, as wild-eyed and wrong-headed as they often are, at least stand closer to the communal republican tradition Williams wants to see revived than do those who would cede the means of force to those government forces they believe will remain beneficent.

223. Williams, *supra* note 6, at 553.

224. *Id.* at 615.

225. See KLECK, *supra* note 40, at 51-52 Tbl. 2.2.

226. See *supra* note 8.

227. In a passage cited by the Supreme Court as one of the many "important opinions and comments" on the militia, nineteenth-century commentator Thomas Cooley wrote: "The alternative to a standing army is 'a well-regulated militia'; but this cannot exist unless the people are trained to bearing arms." THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 729 (Walter Carrington ed., 8th ed. 1927), cited in *United States v. Miller*, 307 U.S. 174, 182 n.3 (1939). Cooley also wrote:

Moreover, the Second Amendment *right* cannot be dependent on government action for its continued existence, any more than the First Amendment right to freedom of speech can be contingent on

The Right is General—It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent [I]f the right were limited to those enrolled [by law in the militia], the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.

THOMAS COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 282 (2d ed. 1891):

Stephen Halbrook observes that the Second Amendment may be stated in the form of a hypothetical syllogism: "If a well-regulated militia is necessary to the security of a free state . . . then the right to the people to keep and bear arms shall not be infringed." HALBROOK, *supra* note 148, at 85. If, for argument's sake, a civilian "well-regulated militia" is no longer "necessary to the preservation of a free State," it does not logically follow that "the right of the people to keep and bear arms" may be now infringed. To so conclude would be to commit the fallacy of denying the antecedent. In illustrating the fallacious logic entailed in denying the antecedent, an analogous but simpler syllogism may be used: "If it is raining, there are clouds. It is not raining. Therefore, there are no clouds." The conclusion is obviously fallacious, for there may in fact be clouds even though it is not raining.

The Cato Institute's Sheldon Richman parses as follows:

Approaching the sentence as grammarians, we immediately note two things: the simple subject is "right" and the full predicate is "shall not be infringed." This, in other words, is a sentence about a right that is already assumed to exist. It does not say, "The people shall have a right to keep and bear arms"

That has important implications for the opening militia phrase Gun opponents often argue that if the opening phrase does not apply—if, say, the standing army takes the place of the militia—then the right to keep and bear arms is nullified. That view would require a willingness by the framers of the Constitution to agree to this statement: If a well-regulated militia is not necessary to the security of a free state, the right of the people to keep and bear arms shall (or may) be infringed. But it is absurd to think that the Framers would embrace that statement. Their political philosophy would not permit them to speak of a permissible infringement of rights The term infringement implies a lack of consent

If [the Framers'] concern had been to keep the national government from limiting the states' power to form militias, they might have written: "A well-regulated militia being necessary to the security of a free state, the power of the States to form and control militias shall not be limited."

Sheldon Richman, *What the Second Amendment Means*, FREEDOM DAILY, OCL 1995, at 28, 29-31. Richman also explains that nullifying the opening clause does not nullify the entire sentence: "Imagine a long-lost Constitution that stated: 'The earth being flat, the right of the people to abstain from ocean travel shall not be infringed.' Would anyone seriously argue that discovery of the earth's spherical shape would justify compelling people to sail?" *Id.* at 30.

Neil Schulman, an award-winning science fiction writer from southern California, and also a writer on gun control issues, asked professional grammarians what the Second Amendment meant and obtained the same result. See J. NEIL SCHULMAN, *STOPPING POWER: WHY 70 MILLION AMERICANS OWN GUNS* 151-59 (1994).

the government's teaching people to read virtuous books. Fundamentally, the Founders saw rights, including the right to arms, as being *recognized* by the government rather than *granted* by the government.²²⁸ The (justifiable) fear that the federal government would neglect militia training, and thereby increase the relative power of the federal standing army, was an important objection of the Anti-Federalists.²²⁹ That Anti-Federalist predictions have come true today to a great degree is hardly an argument for eviscerating the Second Amendment (or any of the other checks on the federal government that the Anti-Federalists successfully demanded be added to the Constitution).

The grammatical result is also consistent with original intent. The natural right to arms had the purpose of facilitating resistance to both criminal governments and individual criminals. Against a lone criminal, an individual gun owner might use her firearm by herself, rather than as part of a militia. The subordinate clause of the Second Amendment was certainly never intended to abrogate the common law and natural right to self-defense against criminal attack.²³⁰

228. See generally Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992) (discussing the natural law philosophers who influenced the Founders in the belief that it is man's right and duty to engage in self-defense).

For example, in *United States v. Cruikshank*, 92 U.S. 542 (1875), the United States Supreme Court noted that the right to peaceably assemble derives "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists." *Id.* at 551-53 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)). For a more detailed discussion of *Cruikshank*, see *infra* notes 476-489 and accompanying text.

229. This objection was articulated by George Mason, who, at the Virginia Convention to ratify the Constitution, stated:

The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia. . . .

But we need not give them power to abolish our militia. If they neglect to arm them, and prescribe proper discipline, they will be of no use.

George Mason, Speech in Virginia Convention (June 14, 1788), in Martin, *supra* note 153, at 401-02.

Patrick Henry echoed this sentiment: "If Congress neglect[s] or refuse[s] to discipline or arm our militia, they will be useless . . ." Patrick Henry, Speech in Virginia Convention (June 5, 1788), in *id.* at 374.

230. See Kates, *supra* note 228, at 87. Kates supplies quotations from or references to William Blackstone, the Baron de Montesquieu, John Locke, Algernon Sidney, John Trenchard and Walter Moyle (authors of *Cato's Letters*), Thomas Paine, Timothy Dwight, John Barlow, Thomas Jefferson, and James Madison, among others. See *id.* at 89-101. As Kates demonstrates, the right to defense against a criminal government was simply seen as an instance of the natural right to resistance against individual criminals. See *id.* at 89-90.

Moreover, Williams's proposals for current substitutes for the militia, designed to restore healthy republicanism, are problematic. Williams favors the creation of "militia surrogates"—universal national service, for example.²³¹ Yet, as Professor Akhil Amar points out, mandatory service in a federal standing army (or other enforced federal labor) is antithetical to the very notion of a local, state-based militia as a check on federal power.²³² In republican theory, one of the key "virtues" of the militiaman was his independence; he had his own means of support and was not dependent on or submissive to the government. He was wholly opposite to the federal conscript, who, under republican theory, by virtue of his submission to and dependence on the central government, was morally degraded.²³³

Williams does not dismiss the idea of a civilian militia as an ideal to someday be reinstated. He specifically notes the role the militia historically played in the inculcation of public virtue and political participation, as well as in the preservation of liberty.²³⁴ "Eventually," Williams concludes, "the people should reacquire direct control of the means of force, but only when the right structures offer them an opportunity for virtue."²³⁵ In short, Williams takes the Constitution seriously. Unlike virtually every other person who reads the Second Amendment as not guaranteeing an individual right, he gives the Second Amendment a content that makes it meaningful.

Williams's article is not, however, without its weaknesses. First, it is not intuitively obvious that Americans in the 1990s are, in contrast to their 1790s forebears, unfit to possess arms. Americans of the 1990s are considerably less racist and sexist than their predecessors.²³⁶ They have not only abolished slavery (present in twelve of the thirteen

231. Williams, *supra* note 6, at 610-12. Williams describes this concept as service rendered by youths from different backgrounds brought together for a common, not necessarily military, experience. *Id.* at 610. He notes the most significant problem as totalitarianism if service is mandatory. *Id.* at 611.

232. See Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 *YALE L.J.* 1131, 1165 (1991).

233. See *id.* at 1169-70.

234. Williams, *supra* note 6, at 602.

235. *Id.* at 615.

236. Slavery impaired civic virtue not just because it excluded slaves from the polity, but because of the degrading effect that slavery had on whites. As Thomas Jefferson wrote:

There must doubtless be an unhappy influence on the manners of our people produced by the existence of slavery among us. The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other. Our children see this, and learn to imitate it; for man is an imitative animal. This quality is the germ of all education in him. From his cradle to his grave he is learning to do what he sees others do.

states when the Constitution was ratified), but they have also extended full civil equality to persons of all races and both sexes. Such a broadly inclusive view of the community was unimaginable in the 1790s, and modern Americans deserve some credit for having had the virtue to achieve it.

The suggestion that changed circumstances allow one to ignore, rather than amend, a provision of the Constitution ought, at the very least, to be accompanied by compelling proof of dramatic changes in circumstances. Given that human nature remains relatively constant, it is far from proven that modern Americans are far less virtuous than Americans of two hundred or one hundred years ago.²³⁷

THOMAS JEFFERSON, *Manners, in NOTES ON THE STATE OF VIRGINIA* 162 (William Peden ed., University of North Carolina Press 1982) (1782).

237. In *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879 (1996), David C. Williams elaborates his thesis that "the People" on which the Second Amendment is contingent have ceased to exist. "The People" were, in Williams's idealized republican conception, ethnically homogeneous, unified, and civically virtuous, able to act decisively to overthrow a tyrant. *Id.* at 904-09. In contrast, modern, pluralistic, diverse Americans are a mere collection of individuals. Ironically, the political divisiveness that is allegedly fomented by the "individual rights" analysis of the Second Amendment is itself a barrier to the unified polity on which the Second Amendment must be predicated. *Id.* at 951-52.

Williams deserves credit for engaging the individual rights/insurrectionary (that is, the historical) basis of the Second Amendment in a serious manner, a dialogic responsibility none of the other critics of the Second Amendment even attempts to fulfill. Nevertheless, Williams's *Cornell Law Review* piece, like his *Yale Law Journal* piece, see *supra* note 6, still falls short of successfully explaining the Second Amendment into nothing.

The most important reason is that his description of the idealized, united "the People" on which the Second Amendment is said to depend is ahistorical. "The People"—in the sense of militia-eligible people—may have all been free white males, but this hardly means that they were homogenous, or that they felt they had much in common with each other. In contrast, modern Americans share a national media, a national economy, and easy interstate travel. As John Adams wrote:

The Colonies had grown up under constitutions of government so different, there was so great a variety of religions, they were composed of so many different nations, their customs, manners, and habits had so little resemblance, and their intercourse had been so rare, and their knowledge of each other so imperfect, that to unite them in the same principles in theory and the same system of action, was certainly a very difficult enterprise.

X THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR 283 (Charles Francis Adams ed., 1850-56), *quoted in* Anne Husted Burleigh, John Adams 54-55 (1969).

The American Revolution was not the work of a united polity that rose as one against a tyrant. John Adams estimated that only a third of the population supported the Revolution, with another third opposed, and one-third neutral. See HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 76 (1980).

Williams insists that a revolution conducted pursuant to the precepts of the Second Amendment must be "made by an orderly and unified people according to commonly shared norms and understandings." Williams, *supra*, at 951. The American Revolution was no such revolution, so why should a Second Amendment revolution have to be? What

Ratification of the right to arms was not a single act from two hundred years ago. From Kentucky to Alaska, almost every state that has entered the Union has included a right to bear arms provision in its state constitution.²³⁸ During the 1980s four states without that type of provision added one by popular vote,²³⁹ one added the provision by

brought together one-third of the American population from 1776 to 1781 was not a common religion or common ethnic heritage or a similar worldview. What the revolutionary minority of the population had in common was a belief that King George was taking away their ancient rights—what they called “the rights of Englishmen.” If there is ever a Second Amendment revolution in this country, it will be because a very large fraction of the American population becomes so convinced that the federal government is taking away the traditional rights of Americans—as expressed in the Constitution—and because tens of millions of Americans are willing to take up arms, and like the revolutionary minority of 1776, submit themselves to the immense perils of rebellion against the most powerful military in the history of the world. It is doubtful that America will ever come to such an unhappy state, but if the federal government one day became so oppressive that a third of the population would risk their lives and fortunes to fight against it, the rebellion would be precisely the act for which the Second Amendment was written.

Williams admits, briefly, that what he defines as “the People” may never have existed in 1776, let alone in the early republic. Williams, *supra*, at 922, 949. Williams accuses the Framers of making the same error as modern individual rights theorists: “conjuring with the People.” *Id.* at 949. Williams then suggests that modern Americans should not be permitted to interpret the Second Amendment in precisely the same (allegedly mistaken) way that their Framers did. *Id.* Why assume that the Framers were mistaken? Perhaps, much better than late twentieth-century law professors, the Framers understood the profound disunity of America in the late eighteenth century. (Domestic discord and bitter rivalries between various states were one reason, after all, that the Framers felt a need to replace the Articles of Confederation with the Constitution, and a stronger central government.) Why presume that the Framers thought that a homogenized, unified people were the condition precedent of the Second Amendment, when the Framers’ historical experience showed that such unity did not exist, and had never existed?

Even if one accepts Williams’s argument that “the People” imagined by the authors of the Second Amendment are wholly different from the people of the United States today, he has not made his case. The Constitution also refers to “the House of Representatives,” and that collective body today is radically different from the House of Representatives that the Framers envisioned. Like the American people, from which the House is drawn, the modern House is far more diverse racially, ethnically, and religiously than its 1792 ancestor. The civic virtue that the Framers intended to be represented in the House has been replaced by party factions and by career office holders, both of which were anathema to the Framers.

What if one could prove beyond any doubt that today’s House resembles in name only the House of virtue that the Framers envisioned as the foundation of Article I? Would such proof be the slightest reason for a court or a scholar to assert that the modern House no longer has constitutional authority to exercise the powers granted it by the Constitution? Under a written Constitution, “the People,” like “the House of Representatives,” cannot be divested of their constitutional rights by pointing out how they have changed, arguably for the worse, over the last two centuries.

238. See *infra* note 390 (setting forth a sampling of the constitutional provisions of those states guaranteeing the right to bear arms).

239. See NEB. CONST. art. I, § 1 (affirming the right to bear arms for defense of self and family, for the common defense, and for hunting and recreation; adopted Nov. 8, 1988 by general election); NEV. CONST. art. 1, § 11 (affirming the right to keep and bear arms for

legislative action,²⁴⁰ while Utah strengthened the language of an existing provision.²⁴¹ At the federal level, the Freedmen's Bureau Bill, the Civil Rights Acts passed by the Reconstruction Congress, and the Fourteenth Amendment (which, of course, was ratified by most states) were all intended, in part, to protect the individual right to arms from state infringement.²⁴² The Property Requisition Act of 1941 and the Firearm Owners' Protection Act of 1986 were enacted by Congress to protect the gun ownership rights of American citizens.²⁴³ A "changed circumstances" argument negating the right to arms becomes particularly implausible when Congress, the states, and the American people have repeatedly affirmed and added additional protections to that right up through the present era.

Criticism that would cite the current militia movement as proof that modern Americans are, compared to their ancestors, too rebellious to be trusted with Second Amendment rights lacks historical support. The Second Amendment was proposed only three years after three counties in western Massachusetts had erupted against oppressive state taxes and heavy-handed sheriffs in "Shays' Rebellion."²⁴⁴

security, defense, lawful hunting, and recreation; adopted Nov. 2, 1982 by general election); N.H. CONST. pt. 1, art. 2-a ("All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state."); W. VA. CONST. art. III, § 22 (affirming the right of citizens to bear arms for defense of family, self, and state and for recreation, and hunting; ratified Nov. 4, 1986).

240. See DEL. CONST. art. I, § 20 (affirming the right to keep and bear arms for "defense of self, family, home and state, and for hunting and recreational use"; adopted Apr. 16, 1987).

241. Compare UTAH CONST. art. I, § 6 ("The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed . . ."), with UTAH CONST. art. I, § 6 (amended 1984), quoted in Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, app. at 240 (1982) ("The people have the right to bear arms for their security and defense . . ."). See generally M. Truman Hunt, Comment, *The Individual Right to Bear Arms: An Illusory Public Pacifier?*, 1986 UTAH L. REV. 751 (discussing the 1984 amendment to Article I, Section 6 of the Utah Constitution and concluding that the state retains broad discretion to regulate arms).

242. See *infra* notes 466-475 and accompanying text.

243. See Stephen Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 599 (1995).

244. See MORISON, *supra* note 101, at 301-04; Alden T. Vaughan, *The "Horrid and Unnatural Rebellion" of Daniel Shays*, AM. HERITAGE, June 1966, at 50, 50-53, 77-81. Shays's list of grievances for which the people, "now at arms," demanded reforms dealt mostly with taxes and other financial issues. See Letter from Thomas Grover to the "Printer of the Hampshire Herald" (Dec. 7, 1786), reprinted in *THE TREE OF LIBERTY: A DOCUMENTARY HISTORY OF REBELLION AND POLITICAL CRIME IN AMERICA* 71-72 (Nichols N. Kittrie & Eldon D. Wedlock, Jr. eds., 1986). There were also complaints about the suspension of habeas corpus and the "unlimited power" granted to law enforcement officers by the Riot Act. See *id.* The last of eight reforms demanded by the Shaysites was that "Deputy Sheriffs [be] totally set aside, as a useless set of officers in the community." *Id.* at 72.

Three years after the Second Amendment was ratified, parts of Virginia (today, West Virginia) and western Pennsylvania revolted against high federal taxes on whiskey.²⁴⁵ President Washington exercised his power to call forth the militia to suppress the Whiskey Rebellion, the local militia responded, and the insurrection was crushed.²⁴⁶

Despite some limitations, Williams does get to the heart of the primary question that the Second Amendment poses: what can be done to promote *responsible* gun ownership. As he recognizes, the militia, in its republican conception, was similar to the jury.²⁴⁷ While the jury right was (and is) exercised by individuals (individual defendants claiming a right to a jury trial, or individual Americans claiming a right not to be excluded from a jury pool), the jury comes together as a collective body. This collective body is at once an instrument of state power (the criminal justice system) and at the same time a check on state power. Thus, for the same reasons that the Communitarian Network exalts service in the jury, the Communitarian Network ought to be looking for ways to encourage service in *well-regulated* militias. Domestic disarmament will obviously not build "a well-regulated militia" any more than getting rid of trial by jury would encourage responsible jury service.

If, on the other hand, Williams is correct that Americans have so little virtue that they cannot participate in communal institutions such as the militia,²⁴⁸ then the argument can be made that modern Americans likewise lack the virtue to serve on juries, making decisions that involve life and death, millions of dollars, or decades of imprisonment. Yet who among even the most severe critics of the contemporary jury system would suggest that the constitutional right to a jury trial can simply be ignored due to changed circumstances?

The communitarians are correct that responsibilities should accompany rights, or as Williams frames the issue, the early republicans were correct in believing that public virtue is necessary if the republic is to survive with its liberties intact.²⁴⁹ If, as the Founders intended,

245. See MORISON, *supra* note 101, at 340-41.

246. See *id.* at 341. Western farmers needed to distill their corn into whiskey in order to shrink it for transportation for sale. See Gerald Carson, *Watermelon Armies and Whiskey Boys, in RIOT, ROUT, AND TUMULT: READINGS IN AMERICAN SOCIAL AND POLITICAL VIOLENCE* 70, 72 (Roger Lane & John J. Turner, Jr. eds., 1978) [hereinafter *RIOT, ROUT, AND TUMULT*]. Virginians and Pennsylvanians were angry that the whiskey tax bore so one-sidedly on them, and that it was enforced so rigorously by the federal government. See *id.* at 71. One year after the insurrection, George Washington pardoned two captured rebel leaders. See MORISON, *supra* note 101, at 341.

247. Williams, *supra* note 6, at 579 n.161 (citing Amar, *supra* note 232, at 1191-95).

248. *Id.* at 554.

249. *Id.* at 553.

the people were to remain armed, then it would also be necessary to instill in them the highest degree of virtue in order to minimize firearms misuse. How might public policy contribute to the rebirth of the kind of virtue and familiarity with firearms that the Founders believed necessary to an enduring republic? Is it possible to take the first steps toward the revitalization of the citizen militia?

B. *Toward Well-Regulated Militias*

Williams appears to be of two minds. On the one hand, he wants the American people to prove themselves largely virtuous before they should be trusted with arms. On the other hand, he acknowledges the truth of the Founders' belief that the historical militia "offered training in virtue, *making* citizens independent and self-sacrificing."²⁵⁰ A good militia is not just an effect of public virtue, but a builder of virtue as well. Thus, it is appropriate to begin by considering policies that will eventually help citizens to be more virtuous and responsible with firearms.

1. *What "A Well-Regulated Militia" Is Not.*—Before we suggest how to progress toward a well-regulated militia, we should explain what a militia is *not*. Though the word "militia" likely evokes images of armed, camouflaged right-wingers who train in anticipation of fighting the troops of the "New World Order," this is not what is meant here. What is meant is a true citizen militia, as was common in the eighteenth and nineteenth centuries. The Supreme Court has stated that the militia is composed of "civilians primarily"²⁵¹ and that "all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States."²⁵²

As uniformed, armed bodies of government employees, sometimes subject to federal command, the modern National Guard and the modern police would both have been seen by the Founders as close cousins to the dreaded "standing army." To the Founders, "select militias" (comprising only a small fraction of "the people") and standing armies were thought to constitute the threat to liberty *par excellence*.²⁵³ The same Congress that passed the Bill of Rights, includ-

250. *Id.* at 602 (emphasis added).

251. *United States v. Miller*, 307 U.S. 174, 179 (1939).

252. *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (holding that the Military Code of Illinois, fairly construed, does not conflict with the laws of Congress regarding militias).

253. Richard Henry Lee, writing under the pseudonym "The Federal Farmer," articulated this fear of select militias and standing armies:

First, the constitution ought to secure a genuine and guard against a select militia, by providing that the militia shall always be kept well organized, armed, and

ing the Second Amendment and its militia language, also passed the Uniform Militia Act of 1792.²⁵⁴ That Act enrolled all able-bodied, white males between the ages of eighteen and forty-five in the militia and required them to furnish their own firearms, ammunition, and gunpowder.²⁵⁵ The modern federal National Guard was specifically raised under Congress's power to "raise and support Armies,"²⁵⁶ not under its power to "[p]rovide for organizing, arming, and disciplining, the Militia."²⁵⁷ The National Guard's weapons plainly cannot be the arms protected by the Second Amendment, because Guard weapons are owned by the federal government.²⁵⁸ To call the National Guard the militia of the Second Amendment is an Orwellian inversion of meaning.

We should also explain what "well-regulated" is not. The Second Amendment's phrase "a well-regulated militia" is sometimes said to mean something akin to "a militia subject to large amounts of bureaucratic regulation."²⁵⁹ Hence, gun controls not amounting to prohibition would be permissible restrictions on the well-regulated militia.

The colonial political usage of the phrase "well-regulated militia" also suggests that the word "regulated" was not an invitation to bureaucracy. Before independence was even declared, Josiah Quincy, Jr., had argued for the necessity of "a well regulated militia composed

disciplined, and include, according to the past and general usage [sic] of the states, all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing select corps of militia, or distinct bodies of military men, not having permanent interests and attachments in the community to be avoided. . . . [T]o preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them The mind that aims at a select militia, must be influenced by a truly anti-republican principle; and when we see many men disposed to practice upon it, whenever they can prevail, no wonder true republicans are for carefully guarding against it.

Richard Henry Lee, An Additional Number of Letters from the Federal Farmer to the Republican, Letter No. 18 (1788), in *THE ORIGIN OF THE SECOND AMENDMENT*, *supra* note 148, at 354-55 (footnote omitted). The first sentence in the above quotation, slightly shortened, was included in a proposed Declaration of Rights at the New York Convention in July 1788. See *THE ORIGIN OF THE SECOND AMENDMENT*, *supra* note 148, at 474.

254. Act of May 8, 1792, ch. 33, 1 Stat. 271 (repealed Jan. 21, 1903).

255. See *id.*

256. U.S. CONST. art. I, § 8, cl. 12.

257. U.S. CONST. art. I, § 8, cl. 16; see Jeffrey A. Jacobs, Note, *Reform of the National Guard: A Proposal to Strengthen the National Defense*, 78 GEO. L.J. 625, 626-32 (1990) (tracing the historical, constitutional, and statutory evolution of the National Guard).

258. See 32 U.S.C. §§ 105(a)(4), 106 (1959 & Supp. 1997).

259. See Greg Cantrell, "Well-Regulated" Key Term in Second Amendment, *AUSTIN AM.-STATESMAN*, May 1, 1995, at A11, available in 1995 WL 6091052.

of the freeholders, citizen and husbandman, who take up arms to preserve their property as individuals, and their rights as freemen."²⁶⁰

We should also note the particular meaning that the word "regulated" has in relation to firearms. In firearms parlance, "regulating" a gun has the same meaning today that it did centuries ago: adjusting the weapon so that successive shots hit as close as possible together. If the objective is achieved, the gun is "well-regulated." For example, an article that appeared in *Gun Digest* concerning double-barreled rifles notes: "The well-regulated double [rifle] shoots closely enough with both barrels to hit an animal at normal ranges."²⁶¹

260. CLINTON ROSSITER, *THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION* 127 (1963) (quoting Josiah Quincy, Jr., at the time of the Coercive Acts).

261. Howard E. French, *Double Rifles Had Glamour*, in *GUN DIGEST* 70, 73 (Ken Warner ed., 43d ed. 1989). The article continues:

[T]hese 8-bore bullets regulated perfectly

. . . .

When people speak of how double rifles group they always mention "regulating." The barrels of double rifles are not parallel, the bores are angled from rear to front. If the barrels were aligned side-by-side, the right barrel would shoot to the right and the left barrel to the left. To align the barrels of a double rifle they are fastened at the breech while the muzzles are held in a device that allows the barrels to be moved by wedges or by re-soldering until the bullets from both barrels shoot properly. Only then are the muzzles permanently affixed. The regulating of a double is simple in theory but difficult in practice. Probably most double rifles were regulated to shoot in the tropics, using Cordite, where temperatures could run as high as 120 degrees.

Id.

The *Rifle Guide* notes: "All of these [older, larger, black-powder, British] double rifles are regulated for a given bullet weight and a specific powder charge. Regulating, in this instance, means that both barrels will shoot very close together." R.A. STEINDLER, *RIFLE GUIDE* 96 (1978).

The following illustrate some additional uses of the term "regulated": "Guns like the now obsolete Paradox, 'Jungle Gun,' 'Explora,' 'Fauneta' and other similar 'ball and shot guns' were regulated for heavy bullets." Jack Lott, *Double Gun Actions*, in *BASIC GUN REPAIR* 56, 57 (Hans Tanner ed., 1973).

Luckily, "most old pairs of barrels will have been regulated during manufacture so no additional adjustments will be necessary." WILLIAM R. BROCKWAY, *RECREATING THE DOUBLE BARREL MUZZLE-LOADING SHOTGUN* 180 (1985).

The *Firearms Dictionary* does not define the term "regulated," but does define "regulating barrels" as "a tedious job needed to make both barrels of a side-by-side or O/U [over and under] gun shoot to the same point." R.A. STEINDLER, *THE FIREARMS DICTIONARY* 193 (1970).

The definition of "regulate" as "[a]lter or control with reference to some standard or purpose; adjust (a clock or other machine) so that the working may be accurate" dates back to the middle of the seventeenth century. II *THE NEW SHORTER OXFORD ENGLISH DICTIONARY* 2530 (3d ed. 1993) [hereinafter *NEW SHORTER OXFORD ENGLISH DICTIONARY*].

Thus, a well-regulated militia would be an effective citizen militia whose members hit their targets.²⁶² Government efforts to make the militia well-regulated would seem permissible, whereas regulations that did not promote militia quality would be suspect. Let us now examine some particular programs that could promote a well-regulated militia.

2. *The Civilian Marksmanship Program.*—One easy starting point for the promotion of a well-regulated militia—because it exists already—is the Civilian Marksmanship program. The Director of Civilian Marksmanship program (DCM), created through the efforts of Theodore Roosevelt, is the federal government's attempt to educate the public about gun safety and marksmanship.²⁶³

DCM training takes place according to congressional directive and receives federal financial and resource support.²⁶⁴ Most training is conducted at gun clubs that have been certified as DCM participants.²⁶⁵ The DCM training program involves rifles only.²⁶⁶

One purpose of the program is to provide the armed forces with recruits that have firearms training upon enlistment.²⁶⁷ Nevertheless, the fraction of the civilian population (including the DCM population) that joins the military is small enough that the DCM may not be cost-effective from a purely military perspective. Enhancing the standing army, however, is not the only purpose of the DCM.

The DCM serves another purpose. Because the American people constitute, as the Supreme Court states, "the reserved military force or reserve militia of the United States,"²⁶⁸ the DCM is one of the key ways

262. "Regulated" can be used in a similar manner regarding the "accurizing" of other items. For example, one could speak of "regulating" a grandfather clock so that it keeps proper time. See NEW SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 261, at 2530.

263. See Civilian Marksmanship: Promotion of Practice with Rifled Arms, Army Reg. 920-20 (Mar. 19, 1990) [hereinafter Civilian Marksmanship].

264. Cf. Vaughn R. Croft, Editorial, *Marksmanship Program Was and Is Needed, Helpful*, PANTAGRAPH (Bloomington, Ill.), May 14, 1995, at A13, available in 1995 WL 5242973 ("The Civilian Marksmanship Program trains youth in body, soul and mind in the ideals of responsible citizenship. Teddy Roosevelt wanted youth to learn the ideals of telling the truth and shooting straight.")

265. See Civilian Marksmanship, *supra* note 263, at 7.

266. See *id.* at 3.

267. See *id.* "The purpose of the [DCM] is to promote practice in the use of rifled arms by citizens . . . subject to induction into the U.S. Armed Forces." *Id.* A federal study found that, to the extent DCM participants do enlist in the armed forces, they were much better marksmen. See ARTHUR D. LITTLE, INC., A STUDY OF THE ACTIVITIES AND MISSIONS OF THE NBPRP [NATIONAL BOARD FOR THE PROMOTION OF RIFLE PRACTICE], REPORT TO THE DEPARTMENT OF THE ARMY, No. C-67431 (Jan. 1966).

268. *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

in which the federal government carries out Article I, Section 8, Clause 16 of the Constitution, which authorizes Congress “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.”²⁶⁹ Of course, other benefits are reaped from the program as well: Americans learn how to handle firearms safely and competently, and the program is an implicit affirmation of every American’s responsibility to further the common good.

The real opposition to the DCM comes not from deficit hawks, but from the most determined congressional allies of the antigun lobbies.²⁷⁰ From their viewpoint, the DCM does send the wrong message—civilians are not only entitled, but they are *encouraged* to become proficient users of rifles such as the M-1 Garand.²⁷¹ From the viewpoint of persons (including communitarians) that want a genuine well-regulated militia, however, the DCM sends the message that American gun owners should be educated in the safe and responsible use of firearms and in their duty to assist in the common defense.²⁷²

3. *Other Marksmanship and Safety Training Programs.*—There are many potential marksmanship programs that could be implemented to extend responsible marksmanship training far beyond the federal DCM program. With the exception of gun prohibitionists, most parties to the gun debate would agree that the better trained gun owners are, the better off society is. Individuals who practice shooting with their friends at target ranges are the most likely to be influenced by social models of responsible gun use. City dwellers, who may buy a gun for self-protection and never learn how to fire it safely, could particularly benefit from marksmanship and safety training programs.²⁷³

269. U.S. CONST. art. I, § 8, cl. 16.

270. See John Mintz, *M-1 Rifle Giveaway Rules Gun Control Proponents*, PLAIN DEALER (Cleveland), May 9, 1996, at 14A, available in 1996 WL 3550238.

271. See *id.*

272. As a result of recently enacted legislation, the DCM program will no longer require a federal subsidy. The program will be turned over to a private, nonprofit institution that will fund the DCM through donations, and from the sale of obsolete army rifles to participants. See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (codified as amended in scattered sections of 36 U.S.C. and 10 U.S.C.). If the rifles were not sold, the federal government would have to bear the expense of storing them or destroying them.

273. Roy Innis, National Chairman of the Congress on Racial Equality, noted: “Another irony of oppressive gun control laws is that as decent citizens are forced to arm themselves illegally, they are less likely to practice and gain proficiency with the weapon.” Roy Innis, “Bearing Arms for Self-Defense—A Human and Civil Right,” Speech (May 15, 1990) (transcript on file with author).

The simplest way to promote marksmanship programs is to remove illogical legal impediments to such programs. In New York State, for example, a father may not take his eleven-year-old son to a shooting range and allow the son to shoot a rifle, even under continuous parental supervision.²⁷⁴ Such laws should be repealed.

Target shooting can promote character development in a city or school. It emphasizes mental discipline, is nonsexist, and is a lifetime sport.²⁷⁵ Moreover, it is safe. Target shooting has a lower injury rate than almost any other sport; fights between competitors are nonexistent,²⁷⁶ and there is no known incident of one competitor harming another in a sanctioned match.²⁷⁷

Regulations that serve solely to harass adult target shooters have no place in a rational gun control policy. The less target shooting gun owners are allowed, the less trained and more dangerous they will be. Zoning regulations outlawing indoor target ranges within a particular distance of a school or a church are irrational; they simply make the statement that guns are bad and should not exist near good institutions.

Likewise, there is no social benefit from laws like that in New York City, where a licensed target shooter cannot bring a guest to a shooting range to fire even a single bullet from the licensed shooter's gun unless the prospective guest obtains her own expensive gun permit.²⁷⁸ Such a law is not a rational policy of gun control. It is bureaucratic gun prohibition, enacted simply to make a statement that the

274. See N.Y. PENAL LAW § 265.20(a)(7) (McKinney 1989 & Supp. 1997) (prohibiting children under age 12 from loading or firing a rifle or shotgun even under supervision).

275. Thomas Jefferson advised his nephew:

A strong body makes the mind strong. As to the species of exercises, I advise the gun. While this gives a moderate exercise to the Body, it gives boldness, enterprise and independence to the mind. Games played with the ball, and others of that nature, are too violent for the body and stamp no character on the mind.

Let your gun therefore be the constant companion of your walks.

Letter from Thomas Jefferson to Peter Carr, in *THE JEFFERSON CYCLOPEDIA* 318 (John P. Foley ed., 1967).

276. See Letter from M.S. Gilchrist, Director, NRA, to David B. Kopel, Research Director, Independence Institute, Golden, Colorado 1 (Apr. 17, 1997) (on file with author). Mr. Gilchrist states that NRA statistics "verify the contention that organized shooting is perhaps the safest sport available to the American population. Ten years of records show that there has not been a death or significant gun related injury having taken place during a sanctioned match." *Id.*

277. See *id.*

278. See NEW YORK, N.Y., CHARTER AND ADMINISTRATIVE CODE § 10-303 (1996) (making it illegal "to dispose of any rifle or shotgun to any person unless said person" holds a permit to possess rifles and shotguns).

government heartily disapproves of anyone other than itself having guns.

Another simple step to encourage responsible gun use is to better allocate funds the government already spends on civilian gun use. In 1937, Congress enacted the Federal Aid in Wildlife Restoration Act, more commonly known as the Pittman-Robertson Act.²⁷⁹ The Act, initiated by sportsmen, levies a federal excise tax on the manufacturers, producers, or importers of firearms, ammunition, and archery gear.²⁸⁰ States receive part of the revenue based upon the ratio their populations bear to the entire United States population.²⁸¹ Hunting and associated activities may receive the lion's share.²⁸² Putting more funds into public shooting ranges and less into hunting would make responsible gun training available and convenient for large numbers of urban gun owners.

Encouraging active sports (as opposed to mere spectating) in which participants are not encouraged to knock down or harm each other, and in which mental self-control is emphasized, would seem to be an ideal communitarian program.

Beyond merely allowing sports programs, counties and states can play a more affirmative role in promoting civic virtue relating to firearms. After all, because the militia is largely a local, rather than federal, force, counties and states bear a direct responsibility for militia oversight. Some county governments have declared by resolution the existence of civilian militias within their jurisdictions, albeit under the present unhappy conditions in which such resolutions are passed in response to federal gun control legislation.²⁸³ There is no reason, therefore, that these local governments, or other local governments,

279. 16 U.S.C. § 669 (1994).

280. *See id.* § 669b(a) (referencing §§ 4161(b) and 4181 of Title 26, which impose an 11% tax on producers, manufacturers, or importers of bows and arrows and an 11% tax on the producers, manufacturers, or importers of firearms (other than pistols and revolvers), shells, and cartridges, respectively).

281. *See id.* § 669c(b).

282. *See id.* § 669g(b) (allowing states to use the funds they receive pursuant to § 669c(b) to finance up to 75% of the costs of "hunter safety program[s] and the construction, operation, and maintenance of public target ranges, as a part of such program[s]" provided that the states fund the remaining 25% of a specified manner).

283. One of the first county commissions to pass a militia resolution was Santa Rosa County in Florida. *See* Santa Rosa County, Fla., Resolution No. 94-09 (Apr. 14, 1994). The resolution merely restates the definition of the militia contained in Florida state law (all able-bodied adult citizens), but invites citizens of Santa Rosa County to formally declare themselves members of the militia, pursuant to that statutory definition. *See id.* Federal gun control legislation prompted the resolution. State Commission Chairman H. Byrd Mapoles stated: "Most folks in this county are not willing to give up their guns." Rohter, *supra* note 151. The militia resolution is therefore "simply a way for us to say that Santa

could not create firearms training programs similar to that of the DCM. Local government oversight would also help to ensure that militias do not contain any unsavory elements.

Another way for both the state and the federal governments to further civilian participation in the reserve militia might be to give tax or tuition credits to those who take firearms training courses from an accredited gun club, and subsequently provide evidence that they have, at periodic intervals, qualified on the gun range, much as security guards and the police do. Perhaps state governments could also provide financial incentives to colleges and universities that offer gun training courses as physical education electives.

4. *Using the Militia to Restore Order.*—It is time for a serious debate on whether police forces should be supplemented (but not supplanted) by the civilian militia. The police should maintain their role as protectors of the public, but obviously they cannot be everywhere at once.

In addition to historical precedent, modern experience suggests that the militia can make an important contribution to public safety. In conditions of civil disaster or disorder, armed citizens have played an important role in protecting innocent lives and preserving property. Such was the case in the aftermath of disasters such as Hurricane Andrew²⁸⁴ and the Los Angeles riots,²⁸⁵ when the police or National Guard were either unavailable or could not respond effectively. A civilian militia trained in firearms and disaster-readiness skills could

Rosa County is united and stands its ground." *Id.* Santa Rosa County's resolution has been adopted by two neighboring counties. *See id.*

The Catron County Commission in New Mexico made explicit in its militia resolution what the Santa Rosa County Commission did not: both the New Mexico and United States Constitutions guarantee the right of New Mexico citizens to keep and bear arms, and "there are forces in our country that are striving to take away our right to bear arms . . . , therefore . . . every head of household residing in Catron County is required to maintain a firearm of their choice, together with ammunition." Catron County, N.M., Resolution No. 007-95 (Aug. 2, 1994).

284. *See Agencies Unprepared to Cope with Andrew, Storm Panel Finds*, HOUSTON CHRON., Apr. 15, 1993, at 22, available in 1993 WL 9547534; Michael Fleeman, *Volunteers Aid Victims of Andrew*, SAN DIEGO UNION-TRIB., Sept. 6, 1992, at A11, available in 1992 WL 4749291; *From Hurricane's Fury Comes Heartbreak, Help: Volunteers Working Hard at Good Works*, HOUSTON CHRON., Aug. 30, 1992, at 1, available in 1992 WL 11443165.

285. *See Lynda Gorov & Tom Mashberg, Volunteers, Donations Help Residents of Riot Area*, SAN FRAN. CHRON., May 9, 1992, at A8, available in 1992 WL 6260008; Penelope McMillian, *After the Riots: The Search for Answers*, L.A. TIMES, May 9, 1992, at 1, available in 1992 WL 2916608; *Volunteers Aid L.A. Cleanup*, CALGARY HERALD, May 10, 1992, at A12, available in 1992 WL 6392206.

serve even better.²⁸⁶ Indeed, riot suppression was frequently performed by the militia in the eighteenth and nineteenth centuries,²⁸⁷ and is one of the constitutional purposes for which the federal government is authorized to use the militia.²⁸⁸

Although Etzioni would be horrified, Glenn Harlan Reynolds uses communitarian (albeit not Communitarian Network) reasoning to suggest that the crime-reductive effect of using the militia could be dramatic:

In the days prior to the invention of professional police forces in the early part of the nineteenth century, responding to crime was not seen as vigilantism, but as a civic duty—one backed by sanctions. The cry of “Stop Thief!” was not simply a cartoon cliché, but had the legal consequence of compelling all within its hearing to aid in arresting a thief. Individuals took turns on the “watch and ward,” patrolling cities and towns at night. Everyone was seen as having a real stake in the maintenance of public order.

Today, with the increasing professionalization of law enforcement, the stock phrase is not “Stop Thief!” but “Don’t get involved.” People, often encouraged by law enforcement professionals possessing a natural desire to protect their professional turf, have followed that advice with a vengeance. . . . Reversing this trend would probably do more to address our crime problem than either compulsory handgun licensing, or anti-assault weapon legislation.

Of course, unlike those legislative options it would require work from citizens, and from politicians, and that may be my suggestion’s biggest flaw. I have no doubt that if all able-bodied citizens were required to put in a few days per year walking the streets of their neighborhoods, crime would drop substantially. Citizens could be called together for training and equipment inspection (“mustered”) and could be required to provide themselves with the necessary equip-

286. See David D. Haddock & Daniel D. Polsby, *Understanding Riots*, 14 CATO J. 147, 156-57 (1994).

287. See, e.g., Pauline Majer, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, reprinted in RIOT, ROUT, AND TUMULT, *supra* note 246, at 38-43.

288. The Constitution empowers Congress “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” U.S. CONST. art. I, § 8, cl. 15. At the Virginia Convention, James Madison cited “a riot” as one of the situations in which the militia could be called forth. James Madison, Speech in Virginia Convention (June 14, 1788), reprinted in THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 148, at 416. Two days later, Madison reiterated: “If riots should happen, the militia are proper to quell it, to prevent a resort to another mode [the standing army].” James Madison, Speech in Virginia Convention (June 16, 1788), reprinted in *id.* at 420.

ment, whether that included firearms or not. This would produce direct results—in terms of law enforcement on the streets—light-years beyond current proposals to add additional professional police, and at far lower cost. However, I wonder whether politicians will be willing to endorse such a requirement, in a society that struggles to get people to show up for jury duty.

This difficulty in securing public service is one reason why the militia system initially declined. Everyone wants to be a free rider, and I have no illusions about the enthusiasm of the average citizen for tramping about the streets in mid-winter in search of crime. But the burden is not that great, and the statutory authority for imposing it is already on the books, both at the state and federal levels

. . . .

We have spent the last hundred years or so expecting steadily less from citizens in terms of public involvement and citizen responsibilities. Not surprisingly, most citizens have managed to live down to these expectations. Instead of trying to find new ways to protect people, and society, from irresponsibility through regulation, perhaps it is time to start expecting more from people: more involvement, more responsibility, more simple goodness. We might find that people will live up to these expectations, as they have lived down to the current ones. The framers of our constitutions, at both the state and federal levels, certainly thought so, and the state of our society today suggests that they may have known something that we have forgotten.²⁸⁹

Were it not for Etzioni and the Communitarian Network's antipathy toward firearms, Reynolds's militia proposal might be considered mainstream communitarianism. For example, in a book of communitarian essays edited by Etzioni, each of the first three essays provides (unintended) support for Reynolds's idea.²⁹⁰ Discussing jury service, Etzioni warns that citizens cannot expect the right to a jury trial if they are not themselves willing to undertake the responsibility of service on a jury.²⁹¹ It is impracticable, and morally indefensible, Etzioni argues, for persons to claim benefits from communal services but not to con-

289. Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647, 670-73 (1994).

290. See *Old Chestnuts*, *supra* note 192, at 16-34; Spragens, *supra* note 192, at 37-51; Michael Walzer, *The Communitarian Critique of Liberalism*, in *NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES* 52-70 (Amitai Etzioni ed., 1995).

291. See *Old Chestnuts*, *supra* note 192, at 20-21.

tribute to them.²⁹² This point is certainly correct, and it applies just as much to public safety as to civil dispute resolution. As communitarian author Thomas Spragens put it: “[D]emocratic citizens should not perceive themselves or behave as mere passive recipients of government protection”²⁹³ The more that public safety is seen as a free good, provided exclusively by uniformed government employees, the less public safety will exist in the long run. In the same vein, Michael Walzer details how “liberalism is plagued by free-rider problems, by people who continue to enjoy the benefits of membership and identity while no longer participating in the activities that produce these benefits.”²⁹⁴ Communitarians are great fans of community policing,²⁹⁵ but simply redeploying professional safety officers misses the larger point of getting the general public involved in public safety in some more significant way than having a good relationship with “Officer Friendly.”

There has already been some movement in the direction suggested by Reynolds. “Sheriff Joe” Arpaio of Maricopa County, Arizona, for example, has supplemented his professional officers with deputized citizen patrols.²⁹⁶ The 2500 members of his posse have each received 130 hours of firearms training; about a third have bought their own guns.²⁹⁷ The posse members serve warrants, patrol malls and streets, and track down deadbeat parents.²⁹⁸ Former Sheriff Richard Mack of Graham County, Arizona, unsurprisingly, organized a local militia.²⁹⁹ In Lucas County (Toledo), Ohio (not usually considered a hotbed of Second Amendment ideology), several hundred unpaid citizens have been designated “special deputies.”³⁰⁰ These

292. *See id.*

293. Spragens, *supra* note 192, at 50.

294. Walzer, *supra* note 290, at 63. Walzer praises the Wagner Act as actively fostering unionism. *See id.* at 65. Thus, active government involvement in creating communal organizations—such as well-regulated militias—ought to be well within the communitarian paradigm.

295. *See, e.g.,* William M. Sullivan, *Institutions As the Infrastructure of Democracy*, in *NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES* 179 (Amitai Etzioni ed., 1995) (arguing that successful community policing leads to greater social cohesion and mutual accountability between police and the community’s citizens).

296. *See* Sandy Banisky, *Hard-Line Sheriff Seeks Ballot Lock*, *BALT. SUN*, Feb. 17, 1996, at 1A, available in *LEXIS*, News Library, *BALT. SUN* File.

297. *See id.*

298. *See id.*

299. *See* James Ridgeway, *Road to Ruin: The Buchanan Presidential Run Could Destroy Both Political Parties*, *VILLAGE VOICE*, Mar. 5, 1996, at 22, available in 1996 WL 12535299.

300. *See* *Lucas County Sheriff Kicks out Hundreds of Special Deputies*, *COLUMBUS DISPATCH*, Feb. 11, 1996, at 5C, available in 1996 WL 6187085.

special deputies carry guns and badges.³⁰¹ In Washington, D.C., Maurice Turner, while chief of the police department, enrolled volunteers in a training program identical to training for new police officers.³⁰² At the end of the training program, these unpaid volunteers would be issued badges and guns.³⁰³ On graduation day for the first set of volunteers, however, the program was terminated by the Washington, D.C., City Council.³⁰⁴

Communitarian scholar Rogers M. Smith, considering the possibilities for national service, notes the history of the militia in the eighteenth and nineteenth centuries as a forum for community service.³⁰⁵ He also notes that militia units of that period often fostered racial and sexual hierarchies, such as by excluding freed slaves from militia service.³⁰⁶ Certainly one cornerstone of twenty-first century state and local supervision of militias should be to ensure that they are nondiscriminatory.

This Article does not suggest details for how such a militia might be trained and what its precise duties would be. That task is better left to other scholars who have considered the topic. Robert Cottrol and Ray Diamond, for example, have presented a detailed proposal for reviving the militia in inner-city America—the area where crime is highest and where uniformed police forces have failed most dismally to provide adequate public safety.³⁰⁷

Similarly, this Article does not address the pragmatic objection of persons who object in principle to allowing citizens a role in law enforcement under the theory that any militia will be necessarily so inept, hot-tempered, or otherwise unfit that it will endanger, rather than enhance, public safety. The empirical issue will be answered in time, as individual jurisdictions implement variations of the policies of “Sheriff Joe” and former Chief Turner.

301. *See id.*

302. *See* Victoria Churchville, *D.C. to Add Police Reserves: Latest Tactic Calls for Training Volunteer Officers*, WASH. POST, Feb. 25, 1988, at D3, available in 1988 WL 2070387.

303. *See id.*

304. *See* Linda Wheeler, *Signing up for Active Duty in Drug War: More Professionals Joining D.C. Police Reserve Corps*, WASH. POST, Sept. 24, 1989, at D1, available in 1989 WL 2025056.

305. *See* Rogers M. Smith, *American Conceptions of Citizenship and National Service*, in *NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES* 233, 240-41 (Amitai Etzioni ed., 1995).

306. *See id.*

307. *See* Robert J. Cottrol & Raymond T. Diamond, *In the Civic Republic: Crime, the Inner City and the Democracy of Arms. Being a Disquisition on the Revival of the Militia at Large*, 1994 Annual James Thomas Lecture at Yale Law School (1994) (transcript on file with author).

For now, it is simply suggested that considering how to revive the militia is the most appropriate policy, both for those who consider themselves faithful adherents to the Constitution and for those who genuinely embrace communitarian values. Not only would a revived militia once again play a role in the defense of local and national communities, but its natural political dimension, as David C. Williams has noted, would engender in its members a sense of social and political responsibility.³⁰⁸ State and society could once again meld into a symbiotic, “neorepublican” political order that avoids the current polarization between the largely inaccessible “rulers” and the largely disaffected “ruled.”

5. *Safety Education in Schools.*—Assume, *arguendo*, that the above scenario is too far-fetched: that the United States will never again need the services of a civilian militia because there will never be any more riots, hurricanes, or other disasters on American soil; that professional forces are fully adequate for the security of the country against domestic crime and foreign invasion; that no government—even hundreds of years from now—could possibly tyrannize the citizenry; and that a return to the republicanism of the eighteenth century will never be realistic because twentieth- (or twenty-first-) century Americans are hopelessly morally inferior to their revolutionary ancestors. Even assuming this absurd scenario, training as many Americans as possible in the safe use of firearms is still in the interest of the American community.

The absence of a gun education policy in a country with over 200 million guns³⁰⁹ is foolish. Many minors now have and will continue to have easy access to both handguns and long guns. Neither new laws nor wishful thinking will change the situation.

The power to set curricula lies with local, largely autonomous, school boards. Unfortunately, school boards in the nation’s urban areas—where an unfortunate mix of gun crime and political correctness abounds—are the least likely to mandate gun education in the schools, while those in rural areas are the most likely to do so, and often do. Consistency demands that if it is wise to educate kids about the potential threat to life that unsafe sex poses, then we should, at the very least, work to maintain the decades-long trend of decline in the rate of gun accidents involving children.³¹⁰

308. See *supra* notes 210-224 and accompanying text.

309. See *supra* note 90 and accompanying text.

310. See David B. Kopel, *Children and Guns*, in GUNS: WHO SHOULD HAVE THEM? 309, 311 (David B. Kopel ed., 1995) (citing National Safety Council data showing fatal gun accidents

Gun education need not even involve the handling or firing of guns. The basic rules of gun safety can be communicated effectively by the written or spoken word. (This might be more advisable in some urban settings.) Because about eighty-four percent of accidental shootings involve the violation of basic safety rules, safety education addresses the vast majority of gun accidents.³¹¹ Owners of guns involved in accidental deaths of children are unlikely to have received safety training.³¹²

Groups such as the Boy Scouts of America, 4-H, the American Camping Association, and the NRA have long instructed children in the safe use of sporting arms. One successful effort to promote safety training for all children is the NRA's "Eddie Eagle" Elementary School Gun Safety Education Program.³¹³ The Eddie Eagle program offers curricula for children in grades K-1, 2-3, and 4-6, and uses teacher-tested materials, including an animated video, cartoon workbooks, and fun safety activities.³¹⁴ The hero, Eddie Eagle, teaches a simple safety lesson: "If you see a gun: Stop! Don't Touch. Leave the Area. Tell an Adult."³¹⁵

Eddie Eagle includes no political content, no statements about the Second Amendment, and nothing promoting the sporting use of guns.³¹⁶ The program and its creator, Marion Hammer, won the 1993 Outstanding Community Service Award from the National Safety Council.³¹⁷ As of January 1996, Eddie Eagle had reached more than 7 million children.³¹⁸ Unfortunately, however, some persons in positions of authority over school safety programs have refused to allow

involving children aged 0-14 declining from 530 in 1970 to 227 in 1991); Joe Waldron, "Child" Shooting Stats an Attempt to Mislead, SEATTLE POST-INTELLIGENCER, May 11, 1996, at A5, available in 1996 WL 6443419.

311. See United States General Accounting Office, *Accidental Shootings: Many Deaths and Injuries Caused by Firearms Could Be Prevented* (Mar. 1991).

312. See Marilyn Heins et al., *Gunshot Wounds in Children*, 64 AM. J. PUB. HEALTH 326, 327 (1974).

313. See NATIONAL RIFLE ASSOCIATION, "PROMOTE GUN SAFETY WITH ME": THE EDDIE EAGLE GUN SAFETY PROGRAM (1995) [hereinafter EDDIE EAGLE].

314. See *id.*

315. *Id.*

316. See *id.*

317. See Laurie Cassady, *Shorstein, NRA Aim to Save Kids*, FLA. TIMES-UNION, Nov. 2, 1994, at B2.

Eddie Eagle has been adopted in most Florida counties and has been endorsed by the Police Athletic League. See EDDIE EAGLE, *supra* note 313. Even the *Washington Post* calls *Eddie Eagle: My Gun Safety Book* a "must for any parent who keeps a gun in the home." William Barnhill, *Safe Aims*, WASH. POST, Jan. 7, 1992, at B5, available in 1992 WL 2968139.

318. See Pat Schneider, *NRA Material in Schools Here*, CAPITAL TIMES, Jan. 13, 1996, at 3A, available in 1996 WL 7068469.

Eddie Eagle to be used in their schools, because they disagree with the NRA's position on policy questions.³¹⁹

6. *Virtue Is Good*.—While we have listed various virtue-promoting programs that relate directly to community-minded, responsible firearms use, it should be acknowledged that responsible attitudes toward firearms depend ultimately upon a citizenry that is responsible about much more than firearms. This Article is not the place for a discussion of the many programs that have been suggested to promote family, community, and individual responsibility. It should be noted, however, that in addition to the other benefits flowing from these programs, a reduction in firearms injuries might be one important result.

It should also be kept in mind that disarming the populace could promote civic disorder. The revolutionary generation had read Sir Thomas More's *The Utopia*,³²⁰ which stated that when people relied on uniformed forces for their protection, rather than defending themselves and their nation, the people's character was corrupted.³²¹ Sir Thomas More thought that the introduction of a standing army had caused moral decline in France, Rome, Carthage, and Syria.³²² The Continental Congress compared Americans, "trained to arms from their infancy and animated by love of liberty," with the "debauched," dissipated, and disarmed British.³²³

In the cities with severe gun control—New York, Washington, Chicago, or London—citizens have retreated into a personal security shell; they rarely come to the aid of their fellow citizens who are being attacked by criminals.³²⁴ The predictions of More seem vindicated—

319. See Mark Spencer, *Board Selects New Gun Safety Videos*, HARTFORD COURANT, Oct. 16, 1996, at B6, available in 1996 WL 12661602.

320. SIR THOMAS MORE, *THE UTOPIA* (Jack Hexter ed., 1965).

321. See *id.* at 13, cited in "NO STANDING ARMIES!": THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND 16 (Lois G. Schwoerer ed., 1974).

322. See *id.*

323. See Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 237 n.144. (1983) (internal quotations omitted).

324. See, e.g., Editorial, *The Genovese Syndrome*, PHOENIX GAZETTE, May 27, 1995, at B10, available in 1995 WL 2797236 (discussing cases in which individuals observed crimes being committed without intervening, including the highly publicized case of Catherine "Kitty" Genovese who was murdered in front of her apartment building in front of at least 37 witnesses); Douglas Martin, *About New York; Kitty Genovese: Would New York Still Turn Away?*, N.Y. TIMES, Mar. 11, 1989, available in LEXIS, News Library, NYT File (discussing a similar incident in which a crowd watched a murderer stalk and attack a woman—on three separate occasions—until she was dead); Sam Roberts, *Routine Murders in a Hurried City Numb to Pain*, N.Y. TIMES, Feb. 11, 1991, at B1, available in LEXIS News Library, NYT File (discussing a similar incident in which witnesses to a murder failed to come forward or call the police); Myron Stokes, *The Shame of the City*, NEWSWEEK, Sept. 4, 1995, at 26, available in 1995 WL 14497306 (discussing another incident in which a woman was beaten on a bridge in De-

when a people cannot protect themselves, civic virtue declines. Psychologists have noted the phenomenon of "diffusion of responsibility"³²⁵—if several bystanders witness an emergency, they are less likely to respond than if only one person witnesses the accident.³²⁶ If the police are official monopolists of public safety and if citizens are told that they are too clumsy and unstable to be trusted with guns, then citizens will naturally develop a "don't get involved" attitude toward public safety.

The Communitarian Agenda rightly emphasizes the responsibility of people to take care of their communities, rather than relying on anonymous third parties to do so.³²⁷ Americans are already much more likely to join and to contribute unpaid labor to voluntary organizations than are the people of other democratic nations where the government is expected to provide most of the necessities of life.³²⁸ Community self-help is important not just because a given task can usually be accomplished more efficiently with local volunteers than with a federal program, but, more fundamentally, because exclusive reliance on external assistance weakens the cohesion and the virtue of the community.

IV. GUNS AND PUBLIC SAFETY

The presumption of *Domestic Disarmament* is that if there were fewer weapons there would be less violence.³²⁹ As opposed to some advocates of gun control, who merely want to disarm particularly dangerous types of persons, the Communitarian Network apparently believes that a reduction (or better yet, a complete elimination) in the number of firearms among the population as a whole would necessarily lead to a major reduction in violence.³³⁰ Less guns, less gun vio-

troit and jumped to her death while a crowd witnessed the entire scene). *But see* Phillip Burton, *What's a Cop's Off-Duty Duty? The Chilling Message of a Rockville Case: Don't Get Involved*, WASH. POST, Dec. 11, 1988, at C5, available in 1988 WL 2013058 (discussing a case in which a police officer is charged with assault for intervening, while off duty, in what he mistakenly, although reasonably, thought was a rape).

325. See Jack Wenik, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 YALE L.J. 1787, 1787 (1985).

326. See *id.*

327. See *Platform*, *supra* note 5, at 11.

328. See LIPSET, *supra* note 38, at 278-79 (comparing the United States with Canada, France, West Germany, Great Britain, Italy, and Japan).

329. DOMESTIC DISARMAMENT, *supra* note 1, at 5-6.

330. *Id.* at 9.

lence. This theory is known as the “weapons-violence hypothesis”—where there are more weapons, there will be more violence.³³¹

The problem with the weapons-violence hypothesis is that it is readily disproven. If the only or main variable were guns, then Switzerland should be one of the most violent nations on earth, because its militia system requires nearly every household to keep a fully automatic firearm and a store of ammunition.³³² Furthermore, Switzerland has, by European standards, very permissive handgun laws, laws that are less restrictive than those of many American states.³³³ Swiss citizens can buy anything from small handguns to antiaircraft rockets and antitank weapons with less trouble than a New Yorker can get a permit to install a new sink.³³⁴ Awash in guns, Switzerland is one of the least violent countries in the world, far less violent than the United Kingdom, Germany, or other European nations with severe gun controls or prohibitions.³³⁵

If the weapons-violence hypothesis were true, there would be a higher level of violence in America’s rural areas, where a disproportionate number of America’s guns are owned.³³⁶ In fact, the level of gun-related violence in those regions is considerably lower than in urban areas, where there are fewer guns and more gun control.³³⁷ The per capita rate of firearms deaths is far lower in rural areas, even though urban areas have the advantage of trauma centers within a few miles (at most) of the site of any firearms injury, a high density of hospitals and ambulances, as well as much higher police density to prevent shootings in the first place.³³⁸

The facts suggest that cultural or socioeconomic variables figure much more heavily into the violence phenomenon than does access to firearms. The relatively low incidence of violence that marks both

331. *Id.* (“[T]he unavailability of guns makes violent crime simply—yes it is simple—much less likely . . .”).

332. See KOPEL, *supra* note 13, at 278-94.

333. See *id.* at 283-84.

334. See *id.*

335. See *id.* at 286.

336. See Witkin, *supra* note 77, at 31. Persons residing in the Northeast are the “[l]east likely to own gun[s],” whereas Southerners are the “[m]ost willing to shoot to kill,” and Westerners are the “[m]ost sure guns deter crime.” *Id.*

337. See KLECK, *supra* note 40, at 430 (“Levels of general gun ownership appear to have no significant net effect on rates on homicide, rape, robbery, or aggravated assault, even though they do apparently affect the fraction of robberies and assaults committed with guns.”).

338. See Lois A. Fingerhut et al., *Firearm and Nonfirearm Homicide Among Persons 15 Through 19 Years of Age: Differences by Level of Urbanization, United States, 1979 Through 1989*, 267 JAMA 3048 (1992); cf. KLECK, *supra* note 40, at 23 (stating that gun ownership is higher and the violent crime rate is lower in rural areas).

armed Switzerland and the several largely disarmed nations touted by gun control advocates is due mainly to internal social controls that restrain citizens from committing violent acts against their neighbors.³³⁹ Japan, for example, has one of the most homogeneous and law-abiding populations in the world, unlike America.³⁴⁰ Also unlike America, Japan is one of the most anti-individualist nations on earth, a fact that results in a political system most Americans would consider oppressive.³⁴¹ The low level of violence in Japan is not primarily due to austere gun control laws, but to internalized moral restraints that have marked that society for centuries.³⁴² Indeed, in most of the countries touted by American gun prohibitionists as models, armed-violence rates were far lower at the turn of the century, when the countries had almost no gun laws, than at the end of this century, when increased gun controls have proven a poor substitute for self-control and social control.³⁴³

The Communitarian Network's hypothesis is that individuals (gun owners) must sacrifice their (supposed) rights for the greater good of public safety.³⁴⁴ A significant body of evidence suggests, however, that the Communitarian Network may have the facts backwards: gun ownership may make a positive impact on public safety and may benefit all persons, not just gun owners. In other words, one of the communitarian objectives—enhancement of public safety through responsible actions that benefit the entire community, not just an individual—is already in place through the mechanism of individual gun ownership.

There is copious evidence that a significant number of crimes are deterred every year by gun-wielding Americans. One of the first measurable pieces of evidence that criminals are deterred by the mere perception that potential victims may be armed dates back to the late 1960s, when the Orlando Police Department sponsored firearms safety training for women.³⁴⁵ The police instituted this program when it became evident that many women were arming themselves in response to a dramatic increase in sexual assaults in the Orlando area in

339. See KOPEL, *supra* note 13, at 290-92.

340. See *id.* at 22.

341. See *id.* at 23.

342. See *id.* at 27-39.

343. See *generally id.* (examining the history of Japan, Great Britain, Canada, Australia, New Zealand, Jamaica, Switzerland, and the United States with respect to crime and gun control laws).

344. DOMESTIC DISARMAMENT, *supra* note 1, at 6.

345. See Gary Kleck & David J. Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control*, 5 L. & POL'Y Q. 271, 284 (1983).

1966.³⁴⁶ The year following the well-publicized safety training program witnessed an 88% drop in the number of rapes in Orlando.³⁴⁷ As Gary Kleck and David Bordua note: "It cannot be claimed that this was merely part of a general downward trend in rape, since the national rate was increasing at the time. No other U.S. city with a population over 100,000 experienced so large a percentage decrease in the number of rapes from 1966 to 1967 . . ." ³⁴⁸ Furthermore, that same year, rape increased by 5% in Florida and by 7% on the national level.³⁴⁹

According to Kleck and Bordua, the gun training program "affected the behavior of potential rapists primarily because it served to inform or remind them of widespread gun ownership among women, and thereby increased the perceived riskiness of sexual assaults."³⁵⁰ The rape rate, after plummeting, did increase during the next five years, but this may be because the safety training courses no longer received the same degree of media attention as when first initiated.³⁵¹ Nonetheless, at the end of that five year period, the Orlando rape rate was still 13% below the 1966 level, when the classes were first publicized.³⁵² The rate of sexual assault increased 96.1% in Florida and 64% nationwide during that same five-year period.³⁵³ It is also interesting that rape in the area immediately surrounding Orlando increased by 308% during the same period.³⁵⁴

Having heard about the Orlando experience, Detroit Chief of Police Bill Stephens began a similar program in 1967, in the face of an epidemic of armed robberies.³⁵⁵ Within months of the Detroit program's initiation, which like the Orlando program was widely publicized, the rate of armed robberies had dropped by 90%.³⁵⁶

In 1982, the Atlanta exurb of Kennesaw passed an ordinance—in symbolic response to the handgun ban of Morton Grove, Illinois—requiring all residents (with certain exceptions, including conscien-

346. *See id.*

347. *See id.*

348. *Id.*

349. *See* Don B. Kates, Jr., *The Value of Civilian Handgun Possession As a Deterrent to Crime or Defense Against Crime*, 18 AM. J. CRIM. L. 113, 153 (1991).

350. Kleck & Bordua, *supra* note 345, at 287-88.

351. *See* Kates, *supra* note 349, at 153.

352. *See id.* at 153-54.

353. *See id.* at 154.

354. *See id.*

355. *See id.* (citing Neal Knox, *Should You Have a Home Defense Gun?*, in GUNS AND AMMO GUIDE TO GUNS FOR HOME DEFENSE 108 (G. James ed., 1975)).

356. *See id.*

tious objectors) to keep firearms in their homes.³⁵⁷ In the seven months following enactment of the ordinance there were only five burglaries, compared to forty-five in the same period the preceding year, constituting an 89% decrease in residential burglary.³⁵⁸ Kleck and Bordua maintain that "the publicized passage of the ordinance may have served to remind potential burglars in the area of the fact of widespread gun ownership, thereby heightening their perception of the risks of burglary."³⁵⁹

Studies of prison inmates confirm that criminals are deterred when they believe their potential victims are armed. Criminologists James Wright and Peter Rossi, who at one time had been proponents of severe gun control, concluded that an armed citizenry functions as an important deterrent to crime.³⁶⁰ Of the prison inmates interviewed, nearly 37% had encountered an armed victim during their criminal careers.³⁶¹ Approximately the same percentage (40%) reported that they had not committed a particular crime because they feared their potential victims were armed.³⁶²

One form of deterrence is termed "confrontation deterrence," whereby a criminal actually confronts a potential victim and is thwarted by that victim. Gary Kleck has conducted the most thorough criminological studies regarding confrontation deterrence. Dr. Kleck's initial research, based upon a 1981 Peter Hart survey conducted for a gun control group, suggested that there are roughly 645,000 instances of confrontation deterrence involving handgun-wielding citizens every year.³⁶³ That figure climbs to about 740,000 when all types of firearms are considered.³⁶⁴ The figures are broadly consistent with data from several other state and national surveys.³⁶⁵ As Kleck stated:

Much of the social order in America may depend on the fact that millions of people are armed and dangerous to each other. The availability of deadly weapons to the violence-prone may well contribute to violence by increasing the

357. See Kleck & Bordua, *supra* note 345, at 288.

358. See *id.*

359. *Id.*

360. See WRIGHT & ROSSI, *supra* note 61, at 237 ("More generally, the presence of firearms among a felon's associates and potential victims is probably a much greater threat to his well-being than the prospects of an extra 1 or 2 years in prison.")

361. See *id.* at 155.

362. See *id.*

363. See KLECK, *supra* note 40, at 106.

364. See *id.* at 107.

365. For more information on the surveys, see *id.* at 104-11 & tables 4.1, 4.2.

probability of a fatal outcome of combat. However, it may also be that this very fact raises the stakes in disputes to the point where only the most incensed or intoxicated disputants resort to physical conflict, with the risks of armed retaliation deterring attack and coercing minimal courtesy among otherwise hostile parties. Likewise, rates of commercial robbery, residential burglary injury, and rape might be still higher than their already high levels were it not for the dangerousness of the prospective victim population. Gun ownership among prospective victims may well have as large a crime-*inhibiting* effect as the crime-*generating* effects of gun possession among prospective criminals [T]he two effects may roughly cancel each other out.³⁶⁶

"The failure to fully acknowledge this reality," Kleck concluded, "can lead to grave errors in devising public policy to minimize violence through gun control."³⁶⁷ If Kleck is correct, and if attempts to implement drastic gun control policies, such as domestic disarmament, are ever successful, the result will likely only harm America's communities.

Although Kleck's research was consistent with nine other studies of the same topic,³⁶⁸ he was subjected to intense attack by gun control proponents.³⁶⁹ Kleck responded by conducting a much more thorough survey that took into account every criticism directed at his finding of 645,000 instances of confrontation deterrence involving armed citizens per year. For example, respondents who indicated that they had used a gun for self-defense were queried in detail about the actual use in order to sort out persons who might label as self-defense merely grabbing a gun when something went bump in the night, even if there were no confrontation with a criminal.

The new survey did show that Kleck had been wrong. The most thorough study of defensive gun use found that firearms are used for protection approximately 2.5 million times a year.³⁷⁰ Shots were usu-

366. *Id.* at 143 (citations omitted).

367. *Id.*

368. *See supra* note 365.

369. *Cf.* Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 543, 546, 548 (1995) (discussing how "health sages" refuse to cite or give credit to KLECK, *supra* note 40).

370. The revised figure comes from the National Self-Defense Survey, conducted in the spring of 1993 by Kleck and Dr. Marc Gertz. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995).

ally not fired; merely drawing the gun apparently drove off many would-be assailants.³⁷¹

Notably, Marvin E. Wolfgang, one of the most eminent criminologists of the twentieth century, and a strong supporter of gun control, reviewed Kleck's findings. Announcing that he found Kleck's implications disturbing, Wolfgang wrote that he could find no methodological flaw, nor any other reason to doubt the correctness of Kleck's figure.³⁷²

One public policy aimed at crime control that an increasing number of states are exploring and adopting is the liberalization of concealed carry laws.³⁷³ Data suggest that concealed carry laws *may* reduce homicide and aggravated assault rates.³⁷⁴ The data *are* clear that liberalized concealed carry does not lead to gunfights on the streets between licensees.³⁷⁵ This is because those who go through the rigorous background check usually required under the liberalized law are precisely those most apt to use guns responsibly in the first place. The predictions of those who oppose concealed carry have been proven false in every state where the law has been liberalized: concealed carry does not a John Rambo make.³⁷⁶

Because many criminals avoid victimizing people they think may be armed, what might happen to the violent crime rate if more people were armed and possibly carrying a firearm under their coat or in their purse as they walked down the street? Domestic violence would not likely be affected by concealed carry reform (except for stalking cases), but the incidence of "outdoor" crime would likely diminish. In

371. *See id.* at 175.

372. *See* Marvin E. Wolfgang, *A Tribute to a View I Have Opposed*, 86 J. CRIM. L. & CRIMINOLOGY 188 (1995).

I am as strong a gun-control advocate as can be found among the criminologists in this country I would eliminate all guns from the civilian population and maybe even from the police. I hate guns

Nonetheless, the methodological soundness of the current Kleck and Gertz study is clear. . . .

The Kleck and Gertz study impresses me for the caution the authors exercise and the elaborate nuances they examine methodologically. I do not like their conclusions that having a gun can be useful, but I cannot fault their methodology. They have tried earnestly to meet all objections in advance and have done exceedingly well.

Id. at 188, 191-92.

373. *See generally* Clayton E. Cramer & David B. Kopel, "Shall Issue": *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679 (1995) (discussing the history of concealed handgun permits and analyzing the effects of such laws in fourteen states).

374. *See id.* at 686; Lott & Mustard, *supra* note 54.

375. *See* Cramer & Kopel, *supra* note 373, at 736-37.

376. For a state-by-state comparison of results of concealed carry laws, see *id.* at 687-709.

situations in which a high fraction of the population is armed (in contrast to the one to four percent typical today in states that issue concealed handgun permits), predatory crime is virtually nonexistent.³⁷⁷

Gun ownership provides a crime-inhibiting force of some magnitude, although the exact size is subject to legitimate dispute. If domestic disarmament is adopted and is largely obeyed, it will destroy that socially beneficial force. Criminals will generally not disarm, and the perception will be created among them that there is less of a chance of encountering an armed victim. This will embolden many criminals to commit crimes they would have been deterred from committing when gun ownership was legal.

Accompanying the plainly false presumption of *Domestic Disarmament* that guns in the right hands make absolutely no positive contribution to public safety is the assumption that "all people"—not just people with felony records, or alcoholics, or other troubled individuals—"kill and are much more likely to do so when armed than when disarmed."³⁷⁸ There exists thorough criminological refutation of this assumption that the average citizen is a walking time-bomb, a potential murderer kept in check only by the absence of a firearm.³⁷⁹ In

377. See ROGER McGRATH, *GUNFIGHTERS, HIGHWAYMEN, & VIGILANTES: VIOLENCE ON THE FRONTIER* (1984) (investigating the crime rates of Sierra Nevada mining towns in late nineteenth century); see also Daniel D. Polsby, *The False Promise of Gun Control*, *ATLANTIC MONTHLY*, Mar. 1994, at 57, 57-70 (refuting the idea that more handguns means more violence).

378. *Platform*, *supra* note 5, at 71.

379. See Don B. Kates, Jr. et al., *Bad Medicine: Doctors and Guns, in GUNS: WHO SHOULD HAVE THEM?* (David B. Kopel ed., 1995).

The mythology of murderers as ordinary citizens contrasts starkly with the consistent findings of homicide studies dating back to the 1960s: that about seventy-five percent of murderers have adult criminal records; that when the murder occurred about 11 percent of murder arrestees were actually on pretrial release, i.e. they were awaiting trial for another offense; and that murderers average a prior adult criminal career of six or more years, including four major adult felony arrests.

We emphasize that these are adult records so that readers will not be misled into accepting the claim of Webster et al. (most murderers "would be considered law-abiding citizens prior to their pulling the trigger") as to the roughly twenty-five percent of murderers who lack adult records. The reason over half of those 25 percent do not have adult records is that they are juveniles. Juvenile criminal records might show these murderers to have extensive serious crime history. The research literature on characteristics of those who murder yields a profile of offenders that indicates that many have histories of committing personal violence in childhood against other children, siblings, and small animals. (Likewise, the juvenile crime records of the 87 percent of murderers who are adults might show crime careers averaging far more than six adult years with significantly more than just four major felony priors.)

truth, the vast majority of gun owners handle their firearms responsibly.³⁸⁰

If, on the other hand, Etzioni is right, and a huge fraction of the American population would commit murder at some point—given the combination of an upsetting event and a murder instrument—it is hard to imagine how such a population could be considered fit for self-government. The argument that Americans (or people in general) are too hot-tempered, clumsy, and potentially murderous to be trusted with dangerous objects such as firearms might be a good argument for an elitist (of the left-wing or right-wing variety) who believes that “the masses” need to be controlled by the firm hand of a powerful government of their betters. Whatever else might be said about that type of argument, it is thoroughly out-of-place coming from a communitarian, whose philosophy presumes that the American people are fully capable of virtue, responsibility, and self-government.

V. THE RIGHT GUARANTEED BY THE SECOND AMENDMENT: A CRITIQUE OF *DOMESTIC DISARMAMENT*'S LEGAL ANALYSIS

In support of the legality of confiscating all firearms, the Communitarian Network sets forth the “exclusively collective right” interpretation of the right to keep and bear arms.³⁸¹ Like “collective property” in a communist nation, the collective right to keep and bear arms supposedly belongs to the people as a whole, rather than to people as individuals, but in fact belongs exclusively to the government.³⁸² Yet, as antigun writer Ralph J. Rohner acknowledges, the argument that there is a community right to keep and bear arms, but not an individual one, raises the “metaphysical difficulty of how something can exist in the whole without existing in any of its parts.”³⁸³ If the right to keep and bear arms inheres in the universal (the people), then it must also inhere in the particulars (individual persons).

Although the collective right theory has no support from the United States Supreme Court,³⁸⁴ and precious little from legal scholarship, it does receive some support in dicta in lower federal court opinions (often cases in which gun criminals raise frivolous Second

380. See *supra* notes 89-93 and accompanying text.

381. *DOMESTIC DISARMAMENT*, *supra* note 1, at 6 (“[T]he notion . . . that there is a right to bear arms by private individuals is not to be found in the Constitution.”).

382. *Id.* at 29-35.

383. Ralph J. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 *CATH. U. L. REV.* 53, 55 n.10 (1966).

384. See *infra* notes 451-635 and accompanying text.

Amendment defenses).³⁸⁵ After his retirement from the bench, the late Chief Justice Warren Burger also endorsed the collective right theory.³⁸⁶ In addition, there is certainly no shortage of members of what Sanford Levinson calls the "elite bar,"³⁸⁷ who, having never read a law review article or legal case about the Second Amendment, confidently maintain to their less-educated fellow citizens that the Second Amendment does not protect an individual right to own guns. On this intellectual foundation, the Communitarian Network's supporters "join with those who read the Second Amendment" as a guarantee of an exclusively collective right, that is, "as a communitarian clause, calling for community militias, not individual gun slingers."³⁸⁸

This section analyzes in detail the Communitarian Network's case for the Second Amendment as an exclusively collective—nonexistent—right. *Domestic Disarmament* is one of the most recent presentations of the collective right thesis, and thus provides a useful vehicle for inquiry into the meaning of the Second Amendment. If, contrary to the thesis of *Domestic Disarmament*, the Second Amendment does guarantee an individual right, much of the remaining argument of that position paper is rendered irrelevant; the tradition of civil libertarianism in this country is one in which individual rights are protected even when they exact a toll on society or when the majority happens to be hostile to the exercise of those rights.³⁸⁹

On the other hand, if the Communitarian Network is right about the Second Amendment, there are several constitutional issues that could present obstacles to *Domestic Disarmament's* proposal for total gun confiscation. In particular, forty-three states have constitutional provisions protecting the right to keep and bear arms, which, although not a barrier to federal legislation, would prevent the regional implementation of gun confiscation proposed by *Domestic Dis-*

385. See *infra* notes 567-635 and accompanying text.

386. Warren E. Burger, *The Right to Bear Arms*, PARADE, Jan. 14, 1990, at 4.

387. Levinson, *supra* note 147, at 639 n.13. Levinson does not use this term in a pejorative sense, but merely as a description of the eminent jurists and legal scholars who mistakenly believe that the collective-right view is the established doctrine. See *id.*

388. *Platform*, *supra* note 5, at 21.

389. The very point of a written constitution is that it remains law until amended. With reference to the threat of what some have called the "tyranny of the majority," James Madison warned:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents

*armament.*³⁹⁰ Second, the Fifth Amendment to the United States

390. Alabama: "That every citizen has a right to bear arms in defense of himself and the state." ALA. CONST. art. I, § 26.

Alaska: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." ALASKA CONST. art. I, § 19.

Arizona: "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." ARIZ. CONST. art. 2, § 26.

Arkansas: "The citizens of this State shall have the right to keep and bear arms for their common defense." ARK. CONST. art. 2, § 5.

Colorado: "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons." COLO. CONST. art. 2, § 13.

Connecticut: "Every citizen has a right to bear arms in defense of himself and the state." CONN. CONST. art. I, § 15.

Delaware: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for hunting and recreational use." DEL. CONST. art. I, § 20.

Florida: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." FLA. CONST. art. I, § 8.

Georgia: "The right of the people to keep and bear arms, shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne." GA. CONST. art. I, § 1, para. V.

Hawaii: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." HAW. CONST. art. 1, § 15.

Idaho: "The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony." IDAHO CONST. art. I, § 11.

Illinois: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." ILL. CONST. art. 1, § 22.

Indiana: "The people shall have a right to bear arms, for the defense of themselves and the State." IND. CONST. art. 1, § 32.

Kansas: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." KAN. CONST. Bill of Rights, § 4.

Kentucky: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons." KY. CONST. § 1, para. 7.

Louisiana: "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." LA. CONST. art. I, § 11.

Maine: "Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned." ME. CONST. art. I, § 16.

Massachusetts: "The people have a right to keep and bear arms for the common defence. And as, in times of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it." MASS. CONST. Pt. I, art. XVII.

Michigan: "Every person has a right to keep and bear arms for the defense of himself and the state." MICH. CONST. art. I, § 6.

Mississippi: "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power where thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons." MISS. CONST. art. 3, § 12.

Missouri: "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed Weapons." MO. CONST. art. 1, § 23.

Montana: "The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons." MONT. CONST. art. II, § 12.

Nebraska: "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed." NEB. CONST. art. I, § 1.

Nevada: "Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes." NEV. CONST. art. 1, § 11, cl. 1.

New Hampshire: "All persons have the right to keep and bear arms in defense of themselves, their families, their property, and the State." N.H. CONST. pt. I, art. 2-a.

New Mexico: "No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms." N.M. CONST. art. II, § 6.

North Carolina: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice." N.C. CONST. art. I, § 30.

North Dakota: "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those enjoying and defending life and liberty; acquiring possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed." N.D. CONST. art. I, § 1.

Constitution³⁹¹ generally requires "just compensation" when the gov-

Ohio: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power." OHIO CONST. art. I, § 4.

Oklahoma: "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons." OKLA. CONST. art. II, § 26.

Oregon: "The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." OR. CONST. art. I, § 27.

Pennsylvania: "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." PA. CONST. art. I, § 21.

Rhode Island: "The right of the people to keep and bear arms shall not be infringed." R.I. CONST. art. I, § 22.

South Carolina: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law." S.C. CONST. art. I, § 20.

South Dakota: "The right of the citizens to bear arms in defense of themselves and the state shall not be denied." S.D. CONST. art. VI, § 24.

Tennessee: "That the citizens of this State have a right to keep and bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." TENN. CONST. art. I, § 26.

Texas: "Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." TEX. CONST. art. I, § 23.

Utah: "The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes, shall not be infringed; but nothing here shall prevent the legislature from defining the lawful use of arms." UTAH CONST. art. I, § 6.

Vermont: "That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power." VT. CONST. ch. I, art. 16.

Virginia: "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power." VA. CONST. art. I, § 13.

Washington: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of Men." WASH. CONST. art. I, § 24.

West Virginia: "A person has the right to keep and bear arms in defense of self, family, home and state, and for lawful hunting and recreational use." W.VA. CONST. art. III, § 22.

Wyoming: "The right of citizens to bear arms in defense of themselves and of the state shall not be denied." WYO. CONST. art. I, § 24.

391. U.S. CONST. amend. V. The Fifth Amendment provides, in pertinent part: "[P]rivate property [shall not] be taken for public use, without just compensation." *Id.*

ernment confiscates private property, although the destruction of contraband may in some cases fall outside the compensation requirement.³⁹² Finally, some courts, including the United States Supreme Court, have been unwilling to treat the congressional power to regulate "Commerce . . . among the several States"³⁹³ as a *carte blanche* to regulate or ban the mere intrastate possession of a firearm or other object.³⁹⁴

The Second Amendment issue is important not just because most policy advocates would not wish to propose a law that would be declared unconstitutional. No matter how persuasive a reader might find the Second Amendment exposition that follows, there is no guarantee that the federal courts would strike down a gun confiscation law. If gun confiscation actually garnered enough support to pass both houses of Congress and to be signed into law by the president, it is far from certain that the Supreme Court—no matter how clear the original intent of the Constitution's Framers and relevant precedent—would interpose itself. For example, the Equal Protection Clause of the Fourteenth Amendment³⁹⁵ was quite under-enforced by federal courts until the 1950s,³⁹⁶ the First Amendment³⁹⁷ was given little judicial protection until after World War I.³⁹⁸

Yet law is more than a prediction of what the courts may do. Nothing can change the history of the creation of the Second Amendment, and nothing can erase the Supreme Court decisions on the subject up to the present. America's gun owners, particularly those that are politically active, have not memorized every comma in Patrick

392. See *Bennis v. Michigan*, 116 S. Ct. 994, 996-1001 (1996).

393. The Commerce Clause provides that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8.

394. See *United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995) (holding that the Gun-Free School Zones Act exceeded congressional power under the Commerce Clause).

395. The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

396. See Julius L. Chambers, *Thurgood Marshall's Legacy*, 44 STAN. L. REV. 1249, 1252 (1992) (describing the NAACP's litigation strategy to use "the previously unenforced Reconstruction Amendments to the Constitution" to advance the rights of African Americans).

397. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

398. See *Dennis v. United States*, 341 U.S. 494, 503 (1951) (stating that the Court did little to protect free speech prior to *Schenck v. United States*, 249 U.S. 47 (1919)); see also David Kairys, *Freedom of Speech*, in *THE POLITICS OF LAW* 237 (David Kairys ed., 1990) ("[S]hortly [after World War I] speech was legally protected by the Supreme Court.").

Henry's speeches, nor can they give the page cites for *United States v. Miller*.³⁹⁹ Many gun owners, however, do know the general outlines of the legal history of the right to keep and bear arms in the United States. A harmonious communitarian society must be founded on popular acceptance of the legitimacy of the law. For the Supreme Court to uphold domestic disarmament would not, in the eyes of many millions of gun owners, delegitimize gun ownership; instead, such a decision would delegitimize the Supreme Court, the federal government, and the citizenry's obligation to obey the law.⁴⁰⁰ Should the Supreme Court ever rule that ordinary citizens have no legal protection from gun confiscation, the decision would, quite literally, be considered by many millions of armed citizens to be a repudiation of the Constitution and the social contract, and to be a declaration of war.

A. *The Origins of the Second Amendment*

The right to keep and bear arms in America is rooted in both English common law and the philosophy of natural law that the Framers viewed as superior to the common law. Historian Robert Shalhope observes that the Framers drew upon state constitutions setting forth rights rooted in nature as well as in the traditional rights of Englishmen as sources for the content of a national bill of rights.⁴⁰¹ Shalhope writes:

[T]hese sources continually reiterated four beliefs relative to the issues eventually incorporated into the Second Amendment: the right of the individual to possess arms [for self-defense], the fear of a professional army, the reliance on militias controlled by the individual states, and the subordination of the military to civilian control.⁴⁰²

399. 307 U.S. 174 (1939). For a discussion of *United States v. Miller*, see *infra* notes 507-540 and accompanying text.

400. In this connection, Randy Barnett warns:

When courts . . . distort the Constitution to rationalize the *ultra vires* actions of government, and when academics and political activists aid and abet them in this activity by devising ingenious rationalizations for ignoring the Constitution's words, they are playing a most dangerous game. For they are putting at risk the legitimacy of the lawmaking process and risking the permanent disaffection of significant segments of the people . . . [T]hen they must rely solely on intimidation and punishment to obtain compliance with the law.

Randy E. Barnett, *Foreword: Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443, 458 (1995).

401. See Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 608 (1982).

402. *Id.* Among these state right-to-arms provisions is that found in the Pennsylvania Declaration of Rights of the Constitution of 1776, which affirms:

The right to self-defense (and the corresponding right to arms) has long been considered a natural right in the political traditions of Western culture⁴⁰³ and was affirmed to be one of the rights of Englishmen under the 1689 British Constitution.⁴⁰⁴

Not only is there a long-standing right to self-defense at common law, but the widespread belief in the duty of an individual arms-bearer's participation in the common defense dates back beyond the Middle Ages.⁴⁰⁵ Prior to the Norman Conquest, citizens of England

That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

5 FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW HERETOFORE FORMING THE UNITED STATES OF AMERICA* 3083 (1909) (reprinting the Pennsylvania Constitution of 1776).

Language affirming the right of the people to keep and bear arms "in defense of themselves and the state," or similar language, is found in most state constitutions today. See *supra* note 390. Under American political theory, these constitutional provisions do not create the right to keep and bear arms; they only serve to guarantee them explicitly, as rights antecedent to the Constitution that are rooted in nature, common law, or both.

403. That one may defend oneself with deadly force seems to be taken for granted by ancient cultures. Cicero, one of the Roman orators held in high esteem by America's Founders, wrote:

And indeed, gentlemen, there exists a law, not written down anywhere but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; a law which has come to us not from theory but from practice, not by instruction but by natural intuition. I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will have to wait for justice too—and meanwhile they must suffer injustice first. Indeed, even the wisdom of the law itself, by a sort of tacit implication, permits self-defense, because it does not actually forbid men to kill; what it does, instead, is to forbid the bearing of a weapon with the intention to kill.

Cicero, *In Defense of Titus Annius Milo*, reprinted in *SELECTED POLITICAL SPEECHES* 222 (M. Grant trans., 1969), cited in Richard E. Gardiner, *To Preserve Liberty: A Look at the Right to Keep and Bear Arms*, 10 N. Ky. L. REV. 63, 66-67 (1982).

404. See HALBROOK, *supra* note 148, at 38.

405. In an effort to end the practice of relying on foreign mercenaries, the Byzantine Emperor Maurice handed down the following directive circa 579 A.D.: "We wish that every young Roman [subject of Byzantium] of free condition should learn the use of the bow, and be constantly provided with that weapon and with two javelins." *Strategikon*, reprinted in *I THE ART OF WAR IN THE MIDDLE AGES 178-79* (C. Oman trans., 1924), cited in DENO JOHN GEANAKOPOLOS, *BYZANTIUM: CHURCH, SOCIETY, AND CIVILIZATION SEEN THROUGH CONTEMPORARY EYES* 98 (1984).

In the ninth century, Emperor Leo VI urged, in essence, the creation of a popular militia skilled in guerrilla warfare:

We therefore wish that those who dwell in castle, countryside, or town, in short, every one of our subjects, should have a bow of his own. Or if this be impossible,

were legally obligated to keep and bear privately owned arms to ensure their preparation in the event that they were called upon to defend their country.⁴⁰⁶ Freeman in England served in the "fyrd," a people's militia whose duty it was to defend against invasion, to suppress insurrections, and to perform citizens' arrests.⁴⁰⁷ Later, "assizes of arms" were required by English kings.⁴⁰⁸ The Assize of Arms of Henry II,⁴⁰⁹ issued in 1181, required the whole body of freemen to possess arms.⁴¹⁰ Subsequent assizes expanded the responsibilities of the populace in keeping and bearing their arms for defense against criminals and invaders.⁴¹¹ This state of affairs rendered a standing army unnecessary for national defense.⁴¹²

The right of resistance also became a component of the right to keep and bear arms in England. In the thirteenth century, the tyranny of King John led to the revolt of his subjects, culminating in the obtusion of the Magna Carta upon him for his signature.⁴¹³ Although the Magna Carta was first won in the battle of Runnymede, it repeatedly had to be defended with force, as did lesser-known reforms, such as the Provisions of Oxford (1258), which were also reluctantly signed by a king who was confronted with armed force.⁴¹⁴ The first of these rebellions, rebellions that eventually included two full-scale civil wars, began only a few months after the Magna Carta was signed.⁴¹⁵ In 1264 Simon de Montfort led an uprising, known as the Baron's War, against John's son, King Henry III.⁴¹⁶ The uprising in-

let every household keep a bow and forty arrows, and let practice be made with them in shooting both in the open and in broken ground and in defiles and woods. For if there come a sudden incursion of enemies into the bowels of the land, men using archery from rocky ground or in defiles or in forest paths can do the invader much harm; for the enemy dislikes having to keep sending out detachments to drive them off, and will dread to scatter far abroad after plunder, so that much territory can thus be kept unharmed, since the enemy will not desire to be engaging in a perpetual archery skirmish.

Tactica, reprinted in I THE ART OF WAR IN THE MIDDLE AGES 179 (C. Oman trans., 1924), cited in DENO JOHN GEANAKOPOLOS, BYZANTIUM: CHURCH, SOCIETY, AND CIVILIZATION SEEN THROUGH CONTEMPORARY EYES 98-99 (1984).

406. See HALBROOK, *supra* note 148, at 37-54.

407. See *id.* at 38.

408. See *id.*

409. Assize of Arms, 27 Hen. 2, art. 3 (1181), reprinted in SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 85 (Carl Stephenson & Frederick George Marcham eds. & trans., 1937).

410. *Id.*

411. See Gardiner, *supra* note 403, at 66.

412. See *id.* at 67.

413. See THOMAS B. COSTAIN, THE CONQUERING FAMILY 253-61 (1962).

414. See THOMAS B. COSTAIN, THE MAGNIFICENT CENTURY 197-203 (1962).

415. See *id.* at 217-53.

416. See *id.*

volved not only knights in armor but also commoners bringing their own weapons to battle.⁴¹⁷ After initial victory, the uprising was eventually defeated.⁴¹⁸ The losers nevertheless carried on resistance from sanctuaries in forests, fens, and castles.⁴¹⁹ The Magna Carta and other reforms, such as the Provisions of Westminster, were finally accepted as binding upon a monarchy which acknowledged that the king himself was subject to the rule of law.⁴²⁰ Because the people of Wales and Scotland often engaged in armed resistance to the English military, they maintained substantially more autonomy than they would otherwise have enjoyed.⁴²¹

Thomas Jefferson's dictum—"the tree of liberty must be refreshed from time to time with the blood of patriots & tyrants"⁴²² could be a rough summary of the violent history of medieval England. As Stuart Hays observes: "Thus the right of lawful revolution was born into the constitutional law of England. This is of major import because without the right to revolt there is less reason to preserve the right to bear arms."⁴²³ Great Britain also saw numerous instances of guerrilla or revolutionary uprisings against invading foreign armies, including the guerrilla war of "Wiliken of the Weald" against French invaders in southern England,⁴²⁴ and the revolt led by William Wallace of Scotland, which, in the long run, secured independence for Scotland against the claims of English monarchs.⁴²⁵

Incipient theories of political resistance were advanced by medieval theologians such as Manegold of Lautenbach.⁴²⁶ The libertarianism of Manegold and others was further shaped during the Protestant

417. *See id.*

418. *See id.* at 271-72.

419. *See id.* at 217-53.

420. *See id.*

421. *See id.* at 53-58.

422. *See supra* note 150.

423. Stuart R. Hays, *The Right to Bear Arms: A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 385 (1960).

424. *See* THOMAS B. COSTAIN, *THE THREE EDWARDS* 61 (1962).

425. *See* COSTAIN, *supra* note 414, at 59-71, 78-84. The revolt of the Scottish hero, William Wallace, against King Edward I has recently been brought to American consciousness in the movie *Braveheart*. BRAVEHEART (Paramount 1995). For discussion of the life of William Wallace, *see* COSTAIN, *supra* note 414, at 59-71, 78-84.

426. Manegold is one of a number of medieval "libertarians" who wrote extensively on the right to resist a despotic ruler. In language that prefigures the Declaration of Independence, he argued that:

[I]f the king ceases to govern the kingdom, and begins to act as a tyrant, to destroy justice, to overthrow peace, and to break his faith, the man who has taken the oath is free from it, and the people are entitled to depose the king and to set up another, inasmuch as he has broken the principle upon which their mutual obligation depended.

Reformation by both Lutherans and Calvinists, but especially by the latter. This new "liberation theology" was to undergo a process of refinement during the following centuries, culminating in the English Civil War, the political philosophy of John Locke (on which the Declaration of Independence was later to be largely based), the Glorious Revolution of 1688, and, finally, the American Revolution.⁴²⁷ The provision regarding the right to keep and bear arms in the Declaration of Rights that issued from the Glorious Revolution is the immediate forbear of the Second Amendment to the United States Constitution.⁴²⁸ It was the British government's attempt to seize arms that sparked violent resistance and the beginning of the American Revolution, not only at Lexington and Concord,⁴²⁹ but also in Virginia.⁴³⁰

IV A.J. CARLYLE, *MEDIEVAL POLITICAL THEORY IN THE WEST* 164 (1950) (translating and paraphrasing Manegold's Latin text in AD GEBEHARDUM).

427. It has been noted by several church scholars that American resistance theory was directly influenced by Protestant resistance theories, and that the fiery Scottish reformer John Knox "was a key link in the development of the political ideology that culminated in the American Revolution." RICHARD GREAVES, *THEOLOGY AND REVOLUTION IN THE SCOTTISH REFORMATION: STUDIES IN THE THOUGHT OF JOHN KNOX* 126-56 (1980). The Protestant contribution to American political theory actually began with Martin Luther and John Calvin, and can be traced "from John Calvin to Phillipe de Duplessis-Mornay, from Phillipe de Duplessis-Mornay to John Knox, from John Knox to John Milton, from John Milton to John Locke, and from John Locke to Alexander Hamilton." R.H. MURRAY, *THE POLITICAL CONSEQUENCES OF THE REFORMATION* 105 (1960).

428. See Joyce Lee Malcolm, *The Right of People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 313-14 (1983).

429. See Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91, 112 n.107 (1989); ESSEX GAZETTE, *supra* note 143.

430. After the Americans routed the Redcoats at Concord, William Pitt urged the House of Lords to attempt reconciliation with the Americans, instead of attempting to subjugate them by force, and warned that the armed American people were a formidable opponent: "My Lords, there are three millions of whigs. Three millions of whigs, my Lords, with arms in their hands, are a very formitable body. 'twas the whigs my Lords, that set his Majesty's royal ancestors upon the throne of England." 1 WILLIAM GORDON, *THE HISTORY OF THE RISE, PROGRESS AND ESTABLISHMENT OF THE INDEPENDENCE OF THE UNITED STATES* 443 (1788, reprint 1964), *quoted in* DAVID T. HARDY, *ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT* 60 (1986). Later, during the war, Pitt told the House of Lords: "If I were an American, as I am an Englishman, while a foreign troop was landed in my country, I would never lay down my arms — never — never — NEVER! You cannot conquer America." William Pitt, Earl of Chatham, Speech in the House of Lords (Nov. 18, 1777), *quoted in* KOPEL, *supra* note 13, at 352 n.73.

Shortly before the outbreak of war, one of Britain's leading political philosophers blamed the royal governors' oppression of the American colonists upon the fact that the governors were emboldened by the presence of a standing army. See 2 JAMES BURGH, *POLITICAL DISQUISITIONS* 473, 476 (1775), *quoted in* HARDY, *supra*, at 49. Burgh's book was enormously influential in America. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 41 (1967).

Domestic Disarmament makes no mention of the numerous, extant political writings from eighteenth-century America that expound upon the right to keep and bear arms. These writings posit that bearing arms is an individual right based upon English common law and natural law, a right that is a logical corollary to the natural right of self-defense.⁴³¹ A necessary implication of the right of self-defense, in the view of the eighteenth-century American, was the right to resist tyranny with force of arms, a right also rooted in the common law of England.⁴³² The right to revolution lies at the heart of the Second Amendment's guarantee of the right to keep and bear arms.

This is clearly evident in the words of James Madison, the draftsman of the Second Amendment. In *Federalist No. 46*, Madison defines the militia as the totality of armed civilians.⁴³³ In response to the Anti-Federalists' fear that the proposed power of Congress to raise a standing army could lead to federal tyranny, Madison responded that any misuse of the army "would be opposed [by] a militia amounting to near half a million citizens with arms in their hands"⁴³⁴ (the total adult white male population at the time), and that such a democratic counterforce would be well able to meet the threat. In contrast to the Communitarian Network's wistful notions about adopting European gun control models for America, Madison wrote of "the advantage of being armed, which the Americans possess over the people of almost every other nation."⁴³⁵ If the Europeans enjoyed this right, he added, "the throne of every tyranny in Europe would be speedily overturned, in spite of the legions which surround it."⁴³⁶

Madison's personal notes, prepared for a speech he later delivered before Congress, describe the Bill of Rights, stating that "they relate first to private rights."⁴³⁷ Thus, the Second Amendment primarily protects a "private" right to arms, not a "public" or "collective" one. Madison's notes also contain a reference to the English Bill of Rights, which he had used in the process of drafting America's Bill of Rights.⁴³⁸ Madison listed certain objections to the English Bill of

431. See Kates, *supra* note 228, at 89-94.

432. See *id.* at 101-02 ("In America from the immediate pre-Revolutionary period through the debates over the Constitution, this equation of personal self-protection with resistance to tyranny . . . recurs again and again.")

433. THE FEDERALIST No. 46, at 90 (James Madison) (Neill H. Alford, Jr. et al. eds., 1983).

434. *Id.*

435. *Id.*

436. *Id.* at 91.

437. James Madison, *J.M.'s Notes for Speaking for Amendmts [sic] in Congress 1789*, reprinted in HARDY, *supra* note 430, at 73.

438. See *id.*

Rights, noting that they were too narrow, because they restricted "arms to Protestants."⁴³⁹ The new Federal Bill of Rights would guarantee the right to keep and bear arms to all Americans, not just to a select group such as Protestants, or to select federal forces such as the National Guard and the army.⁴⁴⁰

The early American concept of a militia-of-the-whole was one whose arms are individually possessed and used to deter both crime and tyranny.⁴⁴¹ The writings of both Federalists and Anti-Federalists belie the Communitarian Network's position that the term "well-regulated militia" must necessarily refer to a "select militia" of uniformed government employees.

The works of early American political authors on the right to arms illuminate the connection in the text of the Second Amendment between the preservation of the well-regulated militia and the right of the people, as the aggregate of American citizens, to keep and bear arms. Furthermore, the Founders did not tie the right exclusively to the militia, for many of their writings take for granted the common law right to keep and bear arms for self-defense.⁴⁴² Corroborative evidence that they believed in the right to arms for self-defense is also found in records pertaining to floor debate of the Second Amendment, in which the Senate rejected an amendment to add the words "for the common defence" following "bear Arms."⁴⁴³

The above paragraphs are, of course, only a brief sketch of the extensive body of historical evidence about the original intent of the Second Amendment that has been published over the last two decades. A few facts related to that corpus of scholarly literature are relevant here. First, the corpus has by now grown quite large. Second, as Glenn Harlan Reynolds observes, the nearly unanimous "stan-

439. *Id.*

440. Perhaps the oddest reinterpretation of the original intent of the Second Amendment is Garry Wills's theory that the Second Amendment, rather than guaranteeing a right of individuals, or a right of state governments, actually means nothing at all. See Garry Wills, *The New Revolutionaries*, N.Y. REV. BOOKS, Aug. 10, 1995, at 50. The Second Amendment has no content whatsoever, Wills argues, and was a conscious fraud perpetrated on the American public by James Madison, who used clever draftsmanship to render the Amendment meaningless. See *id.* Further, according to Wills, Madison's secret intention about the Second Amendment (never before discerned by any scholar other than Wills) should control over the intent of the state legislatures that ratified the Amendment, naively thinking that they were ratifying the right of the American people to keep and bear arms. See *id.*

441. See *supra* note 260 and accompanying text.

442. See HALBROOK, *supra* note 148, at 51, 64-66, 81; Kates, *supra* note 228, at 87.

443. United States Senate, Proceedings on Amendments Proposed by the House (excerpt), Sept. 9, 1789, reprinted in THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 148, at 712.

dard model"⁴⁴⁴ of the Second Amendment among scholars who have actually investigated the issue is that the Second Amendment was intended to guarantee an individual right to keep and bear arms.⁴⁴⁵

444. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 463 (1995).

445. See, e.g., SENATE SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, 97th Cong., 2d Sess., *THE RIGHT TO KEEP AND BEAR ARMS* (1982); E. FONER & J. GARRITY, *THE READER'S COMPANION TO AMERICAN HISTORY 477-78* (1991) (entry on "Guns and Gun Control"); STEPHEN P. HALBROOK, *A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES* 48 (1989); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 341 (1988); MALCOLM, *supra* note 161, at 164; *THE OXFORD COMPANION TO THE UNITED STATES SUPREME COURT 763-64* (Kermit L. Hall et al. eds., 1992) (entry on the Second Amendment); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1284 (1992); Amar, *supra* note 232, at 1164; Charles L. Cantrell, *The Right to Bear Arms*, 53 WIS. B. BULL. 21 (1980); David Caplan, *The Right of the Individual to Bear Arms*, 1982 DET. L. REV. 789 (1982); Cottrol & Diamond, *supra* note 148, at 314-17; Robert J. Cottrol & Raymond T. Diamond, *Public Safety and the Right to Bear Arms*, in *THE BILL OF RIGHTS IN MODERN AMERICA AFTER 200 YEARS* (David J. Bodenhamer & James E. Ely, Jr. eds., 1993); Robert Dowlut, *The Current Relevancy of Keeping and Bearing Arms*, 15 U. BALT. L.F. 32 (1984); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983); Richard Gardiner, *To Preserve Liberty: A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Halbrook, *supra* note 429; Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986); David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL'Y 1 (1987); Kates, *supra* note 323, at 204; Don B. Kates, Jr., *Second Amendment*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1639-40 (Karst & Levi eds., 1986); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143 (1986); Kates, *supra* note 228, at 87; Stephanie A. Levin, *Grassroots Voices: Local Action and National Military Policy*, 40 BUFF. L. REV. 321, 346-47 (1992); Levinson, *supra* note 147, at 637; Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983); Marina, *supra* note 157, at 417; James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 328 (1990); Reynolds, *supra* note 289, at 670-73; Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS., Winter 1986, at 125; Shalhope, *supra* note 401, at 599; William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); David Vandercy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 2007 (1994); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995) (reviewing MALCOLM, *supra* note 161); F. Smith Fussner, *Book Review*, 3 CONST. COMMENTARY 582 (1986) (reviewing HALBROOK, *supra* note 148); Joyce Lee Malcolm, *Book Review*, 54 GEO. WASH. U. L. REV. 582 (1986) (reviewing HALBROOK, *supra* note 148); cf. Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993). But see, e.g., Cress, *supra* note 199; Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989); Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. 141 (1982); Henigan, *supra* note 151, at 107; Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383 (1983).

The more persuasive, serious scholarship arguing that the Second Amendment is not an individual right argues on the basis of changed circumstances,⁴⁴⁶ rather than claiming that the Second Amendment was meant only to protect governments.⁴⁴⁷

One can find proponents of the type of gun policy advocated by the Communitarian Network, but these advocates were precisely the individuals against whom the Americans were revolting. For example, when British victory appeared in sight in 1777, Colonial Undersecretary William Knox authored a plan—"What Is Fit to Be Done in America?"⁴⁴⁸ Knox suggested establishment of a state church, unlimited tax power, a governing aristocracy, a standing army, repeal of the militia laws, a ban on arms manufacture, a ban on arms imports without a license, and that "the Arms of all the People should be taken away."⁴⁴⁹

Domestic Disarmament does not, however, argue that the standard model of the Second Amendment is wrong. *Domestic Disarmament* sim-

446. See Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 *HAMLIN L. REV.* 69, 103 (1986); Williams, *supra* note 6, at 551-615.

447. See HALBROOK, *supra* note 148, at 83. Halbrook observes:

If anyone entertained this [government-only] notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.

Id. One need only read the editorials, letters, speeches, and other documents that survive from the revolutionary era and the early republic to see how deeply the creators of the United States and of the Second Amendment viewed arms as a positive good, and an armed people as a sign of civic virtue. One excellent place to begin such an exploration is *THE ORIGIN OF THE SECOND AMENDMENT*, *supra* note 148, a collection of all known source documents relating to the right to arms, from the opening of the Constitutional Convention to the ratification of the Second Amendment.

448. See Halbrook, *supra* note 429, at 118-19.

449. 1 *SOURCES OF AMERICAN INDEPENDENCE* 176 (1978); see Halbrook, *supra* note 429, at 118-19. It is not unfair to note that the Communitarian agenda is not entirely inconsistent with the nongun portion of Knox's agenda. It is the "paranoid" gun groups that Etzioni mocks which have been among the most concerned about the use of the standing army in domestic law enforcement (such as the "drug war"), while the Communitarian Network has never written a word of objection to such a gross violation of the standards of civil society. See, e.g., Gun Owners of America, *Dole Still Spinning the News—Callers Bring out More Contradictions*, June 19, 1995 (quoting Sen. Feingold's opposition to the military's assuming internal law enforcement responsibilities); The NRA Institute for Legislative Action, *The Right and the Left Have Met in the Middle*, NRA BULLET POINTS, Oct. 30, 1995 (noting that a coalition, including the NRA, ACLU, and other civil rights organizations recommended to Congress that the military never be misused in a domestic law enforcement role). Moreover, the Communitarian Network is not any ally of the tax limitation movement. Although the Communitarian Network certainly is not an advocate of a British-style hereditary aristocracy, much of the movement's thrust does involve a preference for imposing order by a political and intellectual elite, and a snide contempt for the political beliefs of ordinary Americans. See *supra* notes 37-38 and accompanying text.

ply ignores it entirely, brushing it off with the observation that there are diverse opinions about what the Second Amendment means.⁴⁵⁰ There are certainly diverse opinions about the *scope* of the Second Amendment right to keep and bear arms, but in the scholarly world at least, there is little diversity as to what the Second Amendment is fundamentally about.

The ratification period discourses and commentaries on the right to keep and bear arms (too numerous to cite here) stand in stark opposition to the exclusively collective right interpretation. Unfortunately, *Domestic Disarmament* fails to deal with the issue of the Framers' original intent. Instead, *Domestic Disarmament* is based solely on dubious interpretations of several United States Supreme Court cases in which, allegedly, the Court "has repeatedly ruled, for over a hundred years, that it does not prevent laws that bar guns."⁴⁵¹ A closer analysis of these cases yields a quite different conclusion.

B. *The United States Supreme Court and the Right to Keep and Bear Arms*

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."⁴⁵² *Domestic Disarmament's* legal analysis, written by law student Linda Abdel-Malek, begins with the assertion that the "*Supreme Court has unequivocally stated that [the right-to-keep-and-bear-arms clause] is just a portion of the entire amendment, and should not be taken out of context.*"⁴⁵³ Abdel-Malek confidently states that the High Court, "looking at the Second Amendment as a whole, has repeatedly ruled that it refers to the desire of the constitutional Framers to protect state militias from disarmament by the federal government, not to protect individual citizens against disarmament by the states."⁴⁵⁴

In support of this position, Abdel-Malek cites the four United States Supreme Court cases typically relied upon by advocates of gun prohibition: *United States v. Cruikshank*,⁴⁵⁵ *Presser v. Illinois*,⁴⁵⁶ *Miller v.*

450. DOMESTIC DISARMAMENT, *supra* note 1, at 10.

451. See Platform, *supra* note 5, at 21.

452. U.S. CONST. amend. II.

453. DOMESTIC DISARMAMENT, *supra* note 1, at 29.

454. *Id.*

455. 92 U.S. 542 (1875).

456. 116 U.S. 252 (1886). Abdel-Malek consistently mislabels the case "*Pressner*" v. *Illinois*. See DOMESTIC DISARMAMENT, *supra* note 1, at 30, 32, 34, 38.

Texas,⁴⁵⁷ and *United States v. Miller*.⁴⁵⁸ In addition, *Domestic Disarmament* references three recent actions of the High Court—*Lewis v. United States*,⁴⁵⁹ *Quilici v. Morton Grove*,⁴⁶⁰ and *Farmer v. Higgins*⁴⁶¹—to buttress the assertion that “the Supreme Court has [recently] maintained its strong stance against interpreting the Second Amendment as a protection of an individual citizen’s right to possess weapons.”⁴⁶² Much of the remainder of this Article discusses the cases cited by *Domestic Disarmament*, as well as other Supreme Court cases that *Domestic Disarmament* fails to cite.

1. *Dred Scott v. Sandford and Its Aftermath*.—The infamous 1857 decision of *Dred Scott v. Sandford*⁴⁶³ held that free blacks are not citizens.⁴⁶⁴ If blacks were actually citizens of the United States, the Court warned, they would enjoy the right to “the full liberty of speech . . . ; [and the rights] to hold public meetings upon political affairs, and to keep and carry arms wherever they went.”⁴⁶⁵

In the years following the Civil War, the South engaged in a systematic program to deprive freedmen of their civil rights, including the right to keep and bear arms.⁴⁶⁶ Senator Henry Wilson supported civil rights legislation aimed at curbing these injustices by voiding all laws that mandated inequality of rights based on race.⁴⁶⁷ Senator Wilson explained: “In Mississippi, rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them”⁴⁶⁸ Several Congressmen argued that the scheme

457. 153 U.S. 535 (1894).

458. 307 U.S. 174 (1939).

459. 445 U.S. 55 (1980).

460. 464 U.S. 863 (1983), *denying cert. to* 695 F.2d 261 (7th Cir. 1982), *aff’g* 531 F. Supp. 1169 (N.D. Ill. 1981).

461. 498 U.S. 1047 (1991), *denying cert. to* 907 F.2d 1041 (11th Cir. 1990).

462. DOMESTIC DISARMAMENT, *supra* note 1, at 32.

463. 60 U.S. (19 How.) 393 (1856).

464. *Id.* at 404 (“We think [blacks] are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”).

465. *Id.* at 417.

466. See MORISON, *supra* note 101, at 705-25.

467. See Stephen P. Halbrook, *Personal Security, Personal Liberty, and “The Constitutional Right to Bear Arms”: Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341, 351 (1995).

468. CONG. GLOBE, 39th Cong., 1st Sess. 674 (1866), *cited in* Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1, 21 (1981).

to disarm blacks was contrary to the Second Amendment, with which the southern states should be forced to comply.⁴⁶⁹

It was in response to this version of “domestic disarmament” and other unconstitutional abuses that the Civil Rights Act of 1866⁴⁷⁰ was passed.⁴⁷¹ Later, Congress sought to bolster the provisions of that legislation through the Fourteenth Amendment.⁴⁷² The debates over that Amendment clearly reveal that its drafters wanted to ensure that the Second Amendment’s guarantee of an individual right to keep and bear arms would apply to all United States citizens. During the debate, Senator Jacob Howard (R., Mich.) referenced “the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; . . . [and] the right to keep and bear arms.”⁴⁷³ He added: “The great object of the first section of (the Fourteenth) amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”⁴⁷⁴

This evidence of legislative intent directly contradicts the Communitarian Network’s notion that the Second Amendment does not guarantee an individual right. These quotations illustrate that the Reconstruction Congress, which enacted the Civil Rights Act of 1866 and later the Fourteenth Amendment, meant to protect freedmen against deprivation of their Second Amendment right to keep and bear arms, in effect reversing the result of *Dred Scott*. Clearly, the High Court in *Dred Scott* also believed the Second Amendment to be a guarantee of an individual right to keep and bear arms, although not a right that

469. Representative Henry Raymond (R., N.Y.), for example, stated: “Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and Constitution of the United States. . . . [among which is] a right to bear arms.” *Id.* at 23. Representative Roswell Hart (R., N.Y.) argued during these debates that the Constitution established a “republican form of government” in which “the right of the people to keep and bear arms shall not be infringed.” *Id.* Hart contended that it was the duty of the federal government to guarantee that the states maintain a similar form of government. *See id.* Complaining of the actions of the white Mississippi militia, Representative Sidney Clarke (R., Kan.) declared: “Sir, I find in the Constitution of the United States an article which declares that ‘the right of the people to keep and bear arms shall not be infringed.’ For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws.” *Id.*

470. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982 (1994)).

471. *See* Halbrook, *supra* note 467, at 347-51.

472. U.S. CONST. amend. XIV.

473. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866), *cited in* Halbrook, *supra* note 468, at 24.

474. *Id.*; *see also* Amar, *supra* note 445, at 1225.

extended beyond the white population.⁴⁷⁵ Unfortunately, *Domestic Disarmament* devotes the same consideration (none) to evidence of the original intent of the drafters of the Fourteenth Amendment as it pays to the original intent behind the Second Amendment.

2. *United States v. Cruikshank*.—Perhaps no Supreme Court case relating to the Second Amendment is as violently ripped out of context by *Domestic Disarmament* (or by other gun-prohibition advocates) as *United States v. Cruikshank*.⁴⁷⁶ *Cruikshank* involved the prosecution of white terrorists for infringing the First and Second Amendment rights of blacks in Louisiana.⁴⁷⁷ The Court held that the Fourteenth Amendment granted Congress no power to legislate against private actors who were interfering with the exercise of constitutional rights.⁴⁷⁸ Consistent with the then-recently decided *Slaughter-House Cases*,⁴⁷⁹ the Court stated in dicta that the Privileges and Immunities Clause of the Fourteenth Amendment⁴⁸⁰ did not protect Americans against state or local infringement of most federal constitutional rights.⁴⁸¹ *Cruikshank* stands for the proposition that the Bill of Rights operates as a restraint upon the government only, and not upon private citizens.

If the Communitarian Network were merely citing *Cruikshank* for the proposition that the Second Amendment does not protect Americans against *state* (rather than federal) gun confiscation, it would have a respectable argument. The Communitarian Network, however, reads *Cruikshank* as proving far more—that there is no individual right at all in the Second Amendment.⁴⁸² Having criticized standard model Second Amendment theorists for taking the Amendment's phrase "the right of the people to keep and bear Arms" out of context,⁴⁸³ Abdel-Malek's *Domestic Disarmament* performs a brazen decontextualization of its own. She writes that the Court in *Cruikshank* opined that

475. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1856).

476. 92 U.S. 542 (1875).

477. *Id.* at 550.

478. *Id.* at 554.

479. 83 U.S. (16 Wall.) 36 (1873).

480. The Privileges and Immunities Clause of the Fourteenth Amendment provides that "[no] State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

481. Dicta in several modern Supreme Court cases suggest that the Court views the Second Amendment as one of the "specifically enumerated" guarantees in the Bill of Rights that are protected by incorporation through the Due Process Clause of the Fourteenth Amendment. See *infra* notes 549-552, 555-565 and accompanying text.

482. DOMESTIC DISARMAMENT, *supra* note 1, at 30.

483. *Id.* at 29-30.

the right to keep and bear arms “is not a right granted by the Constitution.”⁴⁸⁴ Therefore, Abdel-Malek asserts, it is not an individual right.⁴⁸⁵

The Supreme Court reached no such conclusion. Nothing in *Cruikshank* states that the right to arms is not protected against *federal* infringement; a review of that section of the opinion in which this quote is found makes this clear:

The right of the people peaceably to assemble for lawful purposes *existed long before* the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It “derives its source,” to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, “from those laws whose authority is acknowledged by civilized man throughout the world.” It is found wherever civilization exists. *It was not, therefore, a right granted to the people by the Constitution.* The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection.⁴⁸⁶

Similarly, the Court added:

The right . . . of “bearing arms for a lawful purpose” . . . is not a right granted by the Constitution. *Neither is it in any manner dependent upon that instrument for its existence.* The second amendment declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress . . . leaving the people to look for their protection against any violation by their fellow-citizens [not by Congress] to what is called . . . the “powers which relate to merely municipal legislation”⁴⁸⁷

When the Supreme Court in *Cruikshank* opined that the right to keep and bear arms “is not a right granted by the Constitution,”⁴⁸⁸ it was stating that the right to arms (like the right to assembly) existed prior to the Constitution. Hence, the right is not “granted” by the Constitution. The Constitution does not “grant” the right to keep and bear arms any more than it grants the right to peaceably assemble. This is so because under American political theory the Bill of Rights does not grant any rights; the Bill of Rights merely gives explicit recog-

484. *Id.* at 30 (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1875)).

485. *Id.*

486. *Cruikshank*, 92 U.S. at 551 (emphasis added) (citation omitted).

487. *Id.* at 553 (emphasis added) (citation omitted).

488. *Id.*

nition to preexisting common law or natural law rights, many of which were previously enumerated in state constitutions.⁴⁸⁹ Reading the actual language of *Cruikshank* leaves no room for *Domestic Disarmament's* assertion that there is no such thing as a right to arms guarantee in the Constitution.

3. *Presser v. Illinois*.—*Domestic Disarmament* cites *Presser v. Illinois*⁴⁹⁰ as an instance in which the High Court reaffirmed *Cruikshank*. The issue in *Presser*, however, had nothing to do with whether the Second Amendment protected an individual right, but rather the constitutionality of a particular gun control measure—a ban on parading a privately formed, armed group down public streets.⁴⁹¹

The Court had no difficulty upholding the law. First, it ruled that that type of legislation does not infringe upon the right of the people to keep and bear arms.⁴⁹² In addition, as *Cruikshank* made clear, the Second Amendment “is a limitation only upon the power of Congress and the National government, and not upon that of the States.”⁴⁹³ (*Presser* and *Cruikshank*, of course, far predate the Supreme Court’s enforcement of provisions of the Bill of Rights against state governments by incorporation into the Fourteenth Amendment.)

Article I, Section 8 of the Constitution grants Congress certain powers over the militia.⁴⁹⁴ In dicta, the Court in *Presser* noted that,

489. Under the *Cruikshank* Court’s theory, preexistent natural rights, such as peaceable assembly and the bearing of arms, were not among the privileges and immunities of American citizens protected by the Fourteenth Amendment; privileges and immunities consisted only of the small class of rights that actually were created—not just recognized—by the Constitution, such as the right of interstate travel. *See id.* at 551-53.

Having written on the gun issue for over a decade, the authors of this Article must emphasize their frustration at the frequency with which gun prohibition advocates take the phrase from *Cruikshank* out of context, citing it for the opposite of its original meaning. Perhaps this is poetic justice for the *Slaughter-House Cases/Cruikshank* Court, which just as blithely (but somewhat more artfully) inverted the intended meaning of the Privileges and Immunities Clause of the Fourteenth Amendment.

490. 116 U.S. 252 (1886).

491. *Id.* at 254.

492. *Id.* at 265-66. Arguably, the Court was wrong in its brusque conclusion, but the Court’s determination that a particular law does not infringe upon the right to bear arms is not relevant to the issue of whether there is any right at all.

493. *Id.* at 265.

494. Article I, Section 8, Clause 15 of the Constitution gives Congress the power “[t]o provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions.” U.S. CONST. art. I, § 8, cl. 15. In addition, Article I, Section 8, Clause 16 gives Congress the power to

provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the states respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

even if there were no Second Amendment, the states could not disarm their citizens, because such disarmament would deprive Congress of its Article I power to regulate militia training and, in certain circumstances, to call forth the militia: “[T]he States cannot, even laying the constitutional provision in question [the Second Amendment] out of view, prohibit the people from keeping and bearing arms”⁴⁹⁵ The “militia,” furthermore, is not a term that refers to a select fighting force, such as the National Guard, but instead to “all citizens capable of bearing arms.”⁴⁹⁶

Once again, a case cited by the Communitarian Network in support of the proposition that the government may totally disarm individuals sets forth exactly the opposite proposition.

4. *Miller v. Texas*.—*Domestic Disarmament* cites *Miller v. Texas*⁴⁹⁷ in support of the proposition that “a state law forbidding the carrying of dangerous weapons on the person . . . does not abridge the privileges or immunities of citizens of the United States,”⁴⁹⁸ and seizes upon this language in a further attempt to support the exclusively collective right interpretation.

Miller v. Texas arose from a criminal proceeding in which a resident of Texas had been convicted of and sentenced to death for murder.⁴⁹⁹ Having lost in state district and appellate courts, the defendant appealed to the United States Supreme Court, “assigning as error” that his Second, Fourth, Fifth, and Fourteenth Amendment rights had been violated.⁵⁰⁰

Consistent with *Cruikshank* and *Presser*, the Court stated that “the restrictions of these amendments operate only upon the Federal power.”⁵⁰¹ Yet the Court also appeared to view the incorporation issue as not entirely resolved, but also not appropriately before the Court in the instant case: “[I]f the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court.”⁵⁰²

U.S. CONST. art. I, § 8, cl. 16.

495. *Presser*, 116 U.S. at 265.

496. *Id.*

497. 153 U.S. 535 (1894).

498. DOMESTIC DISARMAMENT, *supra* note 1, at 31 (citing *Miller v. Texas*, 153 U.S. 535 (1894)).

499. *Miller v. Texas*, 153 U.S. at 535.

500. *Id.* at 535-36.

501. *Id.* at 538.

502. *Id.*

As with *Cruikshank* and *Presser*, there is absolutely nothing in *Miller v. Texas* to support *Domestic Disarmament's* assertion that the Second Amendment is not an individual right.

5. *Robertson v. Baldwin*.—Three years after *Miller v. Texas*, the Supreme Court in *Robertson v. Baldwin*,⁵⁰³ consistent with *Dred Scott*, *Cruikshank*, *Presser*, and *Miller v. Texas*, indicated in dicta that the Second Amendment guarantees an individual right, albeit not an unlimited right. Referring to the “fundamental law” as reflected in the Bill of Rights, the Court noted:

The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case.⁵⁰⁴

The Court added that these exceptions constituted such things as legislation prohibiting libel, which the Court observed does not abridge the First Amendment right to freedom of speech, and the prohibition of carrying concealed weapons, which does not abridge the Second Amendment right to keep and bear arms.⁵⁰⁵ The latter statement reveals that the Court believed the Second Amendment protects an individual right, for there were no statutes prohibiting state militias from carrying concealed weapons. Concealed carry proscriptions are aimed only at private citizens, not at militias.⁵⁰⁶

Domestic Disarmament does not discuss *Robertson v. Baldwin*, which, obviously, is fatal to the assertion that the Supreme Court has always treated the Second Amendment as less than an individual right.

6. *United States v. Miller*.—The 1939 case of *United States v. Miller*⁵⁰⁷ is the most recent Supreme Court decision addressing in depth the Second Amendment. *Domestic Disarmament* devotes one par-

503. 165 U.S. 275 (1897).

504. *Id.* at 281.

505. *Id.* at 281-82.

506. *Cf. Cramer & Kopel, supra* note 373, at 685-86 (“Since 1987, states have increasingly adopted a new breed of concealed handgun permit laws that make easier the process for many adults to get a permit to carry a concealed handgun. While most residents of these states are unlikely ever to apply for a concealed weapon permit, the process is a matter of choice.” (footnotes omitted)).

507. 307 U.S. 174 (1939).

agraph to the case, seizing, as it did with *Cruikshank*, on a single phrase from the opinion and turning that phrase into meaning its opposite.⁵⁰⁸ *United States v. Miller* deserves more thorough analysis. This decision is “[t]he nearest the U.S. Supreme Court has come to a direct construction of the Second Amendment.”⁵⁰⁹

In *United States v. Miller*, defendant bootleggers Jack Miller and Frank Layton were arrested for carrying an unregistered sawed-off shotgun,⁵¹⁰ a weapon controlled by the National Firearms Act of 1934 (NFA).⁵¹¹ In the trial court, the defendants alleged, *inter alia*, that the NFA violated the Second Amendment.⁵¹² The federal district court agreed and quashed the indictment.⁵¹³ The government petitioned the Supreme Court for review of the case, which was granted.⁵¹⁴

One corollary of Article III’s requirement that federal courts hear only “cases or controversies” is that litigants must have standing.⁵¹⁵ Thus, a defendant in a criminal case cannot object to evidence discovered as a result of an illegal search of someone else’s property. If the Second Amendment guaranteed only a right of states to have their militias, the Supreme Court could have resolved the case in a single paragraph by observing that Layton and Miller were not the governments of Oklahoma or Arkansas and, therefore, had no standing to bring the case. Alternatively, if the Second Amendment guaranteed some kind of collective right of individuals to participate in state militias,

Miller would have rejected the defendant’s Second Amendment argument for lack of standing. Since the accused (a bootlegger) did not claim to be in the military or the National Guard nor otherwise acting “in defense of the nation,” the Court would have denied him standing to be heard challenging a law as supposedly violating the Second Amendment. . . . But *Miller* does not treat the issue as one of standing at all nor does it suggest that individuals cannot invoke the Amendment or that it is not a matter of fundamen-

508. DOMESTIC DISARMAMENT, *supra* note 1, at 31.

509. HALBROOK, *supra* note 148, at 164.

510. *United States v. Miller*, 307 U.S. at 175.

511. Ch. 757, 48 Stat. 1236.

512. *United States v. Miller*, 307 U.S. at 176.

513. *Id.* at 177.

514. At the time, the Criminal Appeals Act allowed direct appeal to the Supreme Court when a federal statute was declared unconstitutional. See Criminal Appeals (Nelson) Act of Mar. 2, 1907, ch. 2564, 34 Stat. 1246 (repealed).

515. For a critique of the standing doctrine as not based on the text or original intent of the Framers of the Constitution, see Glenn H. Reynolds, *Penumbra Reasoning on the Right*, 140 U. PA. L. REV. 1333 (1992).

tal individual right. Rather, the Court dealt with the challenge on its merits—implicit in which is that the accused did have standing to invoke the Amendment.⁵¹⁶

Until *Miller v. United States*, the Court had said virtually nothing about the history of the Second Amendment. *Cruikshank* did observe that the right to keep and bear arms predated the Constitution,⁵¹⁷ and *Robertson* had noted that all of the Bill of Rights, including the Second Amendment, implicitly included exceptions found in English common law (such as the permissibility of a prohibition on carrying concealed weapons).⁵¹⁸ In *United States v. Miller*, however, the Supreme Court offered several paragraphs of historical analysis of the Second Amendment, paragraphs that to this day are the last words the Court has spoken on the Amendment's history.

The Court observed: "The sentiment of the time [of the ratification of the Second Amendment] strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—*civilians primarily, soldiers on occasion*."⁵¹⁹ The Court then commented at length upon American political writings of the eighteenth century,⁵²⁰ which "show plainly enough that the Militia comprised *all males physically capable of acting in concert for the common defense* . . . [a]nd further, that . . . these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time."⁵²¹ The Court included long guns and attachable bayonets in its description of personally owned weapons.⁵²²

Thus, *United States v. Miller* contains the following propositions about the well regulated militia:

1. It is composed of all male citizens, and is not a "select" body of uniformed federal or quasi-federal troops. (The current United States Code defines the "unorganized" militia in essentially the same terms.);⁵²³

516. Don B. Kates, Jr., et al., "Amicus Brief of International Wound Ballistics Association, Doctors for Integrity in Research and Public Policy, Colorado Association of Law Enforcement Firearms Instructors, National Association of Chiefs of Police, Congress on Racial Equality, American Federation of Police, Independence Institute, Second Amendment Foundation, and Veterans of Foreign Wars," *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994) (No. 93SA91).

517. *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

518. *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

519. *United States v. Miller*, 307 U.S. 174, 179 (1939) (emphasis added).

520. See *supra* notes 431-443 and accompanying text.

521. *United States v. Miller*, 307 U.S. at 179 (emphasis added).

522. *Id.* at 181.

523. 10 U.S.C. § 311 (1994).

2. Militia firearms were generally not supplied by a state armory, but were personally owned firearms brought to militia service,⁵²⁴

3. These firearms were to be used for hostile purposes, rather than for recreation.⁵²⁵

Consistent with its definition of the militia, the Court in *United States v. Miller* then asked whether these self-armed civilians—that is, these two members of the unorganized militia—had been denied their Second Amendment right by a law making the unregistered possession of a sawed-off shotgun illegal. The Court answered:

In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.⁵²⁶

Not only was the militia’s usefulness of sawed-off shotguns beyond the scope of common knowledge for which a court could take judicial notice, no one had offered any argument to the Court suggesting that such a shotgun had militia utility. The reason that no argument was offered was that neither Layton, Miller, nor their counsel appeared before the Court. The defendants had disappeared while free pending appeal, and, accordingly, their attorney was not allowed to make an appearance before the Court.⁵²⁷ Had an attorney been allowed to argue (before the Court, or on remand, if Miller and Layton had ever been captured, which they were not), she could have proven that short-barreled shotguns had been used during World War I⁵²⁸ and, thus, are “part of the ordinary military equipment.” In the absence of this evidence, however, the Court concluded that the NFA’s requirement to register the personal ownership of sawed-off shotguns was not shown to be facially unconstitutional.⁵²⁹ The case was remanded for further factfinding concerning whether sawed-off shotguns were “part

524. *United States v. Miller*, 307 U.S. at 180-82.

525. *Id.* at 178.

526. *Id.*

527. *Id.* at 175.

528. See Kevin M. Cunningham, *When Gun Control Meets the Constitution*, 10 ST. JOHN’S J. LEGAL COMMENT. 59, 69 (1994); NRA-ILA, ILA RESEARCH & INFORMATION FACT SHEET: TEN MYTHS ABOUT GUN CONTROL 11 (visited Mar. 28, 1997) <<http://www.nra.org/research/10myths.html>>.

529. *United States v. Miller*, 307 U.S. at 178.

of the ordinary military equipment."⁵³⁰ Miller and Layton having vanished, the factfinding on remand never took place.

As *Domestic Disarmament* avers, the Supreme Court's historical analysis begins in *United States v. Miller* with the assertion that the Second Amendment focuses on the preservation of a well-regulated militia and that the Amendment "must be interpreted and applied with that end in view."⁵³¹ *Domestic Disarmament's* selective quotation of *United States v. Miller*, however, evades the fact that the opinion treats ordinary, self-armed citizens as possessing Second Amendment rights.

All of the Supreme Court cases discussed thus far are useful cases for gun control advocates. *Dred Scott* could bolster a ban on gun ownership by noncitizens.⁵³² *Presser, Cruikshank*, and *Miller v. Texas* all provide some support for the position that the Fourteenth Amendment does not forge the Second Amendment into a barrier to state gun controls. *Robertson* supports laws banning or regulating the carrying of concealed weapons. *United States v. Miller* endorses bans on whatever types of weapons can be determined not to be useful in a militia context, such as weapons only useful for sports.⁵³³

530. *Id.* at 178, 183.

531. *Id.* at 178.

532. *Dred Scott* has never formally been overruled, although other portions of it are no longer law as a result of the Fourteenth Amendment. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1303 (1995).

533. The conclusion follows from the Court's language that the individual ownership of a firearm that *does* bear a reasonable relationship to the preservation or efficiency of the civilian militia is protected by the Second Amendment. See *United States v. Miller*, 307 U.S. at 178. Notably, the Court did not state that the type of gun in question must be essential to the militia; the type of gun need only bear a reasonable relationship to the preservation of this reserve, self-armed fighting force called the militia. See *id.* Today, nearly every type of firearm in America bears this type of relationship, because nearly every gun—including most handguns and hunting rifles—either has a military pedigree or was adopted by the military after attaining civilian popularity, and can still today be considered "part of the ordinary military equipment," *id.*, especially because familiarity with its use could translate into enhanced ability to use more purely military arms. *Id.* The evolution of small arms technology reveals that advances in firearms design were usually made in connection with the needs of the military. Single shot breech loaders were improvements over muzzle loaders, and the former were later superseded by higher capacity guns with lever and bolt actions. These have been superseded by semiautomatic and automatic firearms with multiround capacity. Most of today's hunting rifles are merely variants of the battle rifles used in the last century, such as the Mauser. See EDWARD CLINTON EZELL, *SMALL ARMS OF THE WORLD* 844 (12th ed. 1983). There is little difference, furthermore, between a high-powered deer rifle and the modern sniper rifle; both were designed to kill large mammals (human or nonhuman) at a distance.

Had the Court in *United States v. Miller* performed a more extensive analysis of the writings of the Framers, it would have discovered that the right to keep and bear arms at common law is connected just as much with the right to self-defense as with the perpetuation of the civilian militia. See Shalhope, *supra* note 401, at 612. It would, therefore, be

What none of these cases comes close to supporting is the gun *prohibition* viewpoint that the Second Amendment does not protect the right of ordinary citizens to possess firearms. Unfortunately, the incessant repetition in *Domestic Disarmament* that the Supreme Court has “repeatedly held” that the Second Amendment does not guarantee an individual right achieves a certain degree of credibility to its audience—at least the large portion of the audience that never bothers to read the cases for which the proposition is cited.

United States v. Miller is the last substantive gun case to be reviewed by the Supreme Court. *Domestic Disarmament* asserts, however, that three recent actions by the Supreme Court have “maintained its strong stance against interpreting the Second Amendment as a protection of an individual citizen’s right to possess weapons.”⁵³⁴ The three actions referred to are *Lewis v. United States*⁵³⁵ and the Court’s refusal to hear two substantive gun rights cases—*Quilici v. Morton Grove*⁵³⁶ and *Farmer v. Higgins*.⁵³⁷ Three more recent cases, in which the Supreme Court actually does mention the Second Amendment—*United States v. Verdugo-Urquidez*,⁵³⁸ *Moore v. City of East Cleveland*,⁵³⁹ and *Planned Parenthood v. Casey*⁵⁴⁰—are not mentioned. All six shall be discussed herein.

7. *Lewis v. United States*.—Here, at last, *Domestic Disarmament* actually does have a case that could be read as implying that the Second Amendment does not guarantee an individual right. In *Lewis v. United*

wrong to infer from the Court’s language about interpreting and applying the right “with that end in view” that it must be done *solely* with that end in view. *United States v. Miller*, 307 U.S. at 178. If that was what the Court meant, the Court was wrong. Even if the Court meant that the Second Amendment relates solely to the militia, *United States v. Miller* affirms the right of ordinary Americans, as individuals, to possess militia-type firearms. *See id.* at 179.

The historical evidence concerning the dual purpose of the right to arms was taken into account by the Oregon Supreme Court in 1980, when it ruled that the constitutional history behind both the Oregon and federal rights to arms plainly guarantees that individual ownership of “the modern day equivalents of the weapons used by colonial militiamen” as well as of “handcarried weapons commonly used for defense” is protected. *State v. Kessler*, 614 P.2d 94, 98-99 (Or. 1980).

534. DOMESTIC DISARMAMENT, *supra* note 1, at 32.

535. 445 U.S. 55 (1980).

536. 464 U.S. 863 (1983), *denying cert. to* 695 F.2d 261 (7th Cir. 1982), *affg* 532 F. Supp. 1169 (N.D. Ill. 1981).

537. 498 U.S. 1047 (1991), *denying cert. to* 907 F.2d 1041 (11th Cir. 1990).

538. 494 U.S. 259 (1990).

539. 431 U.S. 494 (1976).

540. 505 U.S. 833 (1992).

States,⁵⁴¹ the Court upheld a federal statute prohibiting gun possession by convicted felons.⁵⁴² The Court averred:

These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States v. Miller* (the Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the preservation or efficiency of a well regulated militia").⁵⁴³

There are two ways to interpret this statement. According to Halbrook: "Since felons were always excluded from the militia, the Court's wording of the holding in *Miller* clearly indicates its acceptance of a Second Amendment right of law-abiding individuals to possess any firearms with any militia uses."⁵⁴⁴ Alternatively, it is possible that the Court's words could be construed to mean that, because no one has a right to have a gun, a law against felons owning guns does not infringe on constitutional rights. The *Lewis* case is, in a sense, the high-water mark for the anti-individual view of the Second Amendment, because one can read the Court's words as gun prohibitionists want them read, without doing violence to the Court's plain meaning or taking the words out of context.⁵⁴⁵ Several other cases, however, two of which were decided after *Lewis*, make *Domestic Disarmament's* reading of *Lewis* appear untenable.

8. *United States v. Verdugo-Urquidez*.—Although *United States v. Verdugo-Urquidez*⁵⁴⁶ was decided two years before *Domestic Disarmament* was published, Abdel-Malek omitted it from her analysis. Because the case is one in which the Court interpreted the meaning of constitutional language by referring to "the community,"⁵⁴⁷ the case's absence from a communitarian position paper is surprising.

541. 445 U.S. 55 (1980).

542. *Id.* at 67.

543. *Id.* at 65 n.8.

544. HALBROOK, *supra* note 148, at 172.

545. The only Supreme Court opinion that clearly agrees with *Domestic Disarmament's* legal thesis is a 1972 dissent written by Justice Douglas in the Fourth Amendment case of *Adams v. Williams*, 407 U.S. 143 (1972). Outraged at the warrantless frisk of a person who was found to be carrying a firearm illegally, Justice Douglas suggested that the real problem was not a lack of police search powers, but the ease with which handguns could be acquired. *Id.* at 150 (Douglas, J., dissenting). He quoted and cited *United States v. Miller* for the proposition that the Second Amendment would not prohibit a ban on all pistols. *Id.* at 150-51.

546. 494 U.S. 259 (1990).

547. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

Although *Verdugo-Urquidez* does not address firearms directly, it is nonetheless squarely opposed to the exclusively collective-right theory. The issue before the Court in *Verdugo-Urquidez* was whether a warrantless search by American drug agents of a residence in Mexico, whose Mexican owner had been arrested on drug charges in the United States, was a violation of the Fourth Amendment's provision that the people be protected against unreasonable searches and seizures.⁵⁴⁸ The Court found it necessary to define the phrase "the people" as it occurs in the Bill of Rights.⁵⁴⁹ In doing so, the Court specifically enumerated those amendments in which the term "the people" is used, namely the First (with regard to right of assembly), Second, Fourth, Ninth, and Tenth Amendments.⁵⁵⁰ In these five Amendments, "the people" is "a term of art" referring to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."⁵⁵¹ Therefore, by implication, just as the other Amendments protect individual rights, the Second Amendment guarantees the individual right to keep and bear arms.⁵⁵²

9. *The Modern Fourteenth Amendment Cases.*—Having used nineteenth-century Fourteenth Amendment cases to build the rather

548. *Id.* at 261-63. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

549. *Verdugo-Urquidez*, 494 U.S. at 264-66.

550. *Id.* at 265.

551. *Id.*

552. As Halbrook observed regarding the exclusively collective right interpretation: "The phrase 'the people' meant the same thing in the Second Amendment as it did in the First, Fourth, Ninth and Tenth Amendments—that is, each and every free person." HALBROOK, *supra* note 148, at 83.

While the Ninth Amendment is a reservation of rights, specifying that unenumerated rights are retained by "the people," U.S. CONST. amend. IX, the Tenth Amendment is a reservation of power, specifying that "powers not delegated" to the federal government "are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Tenth Amendment reservation of rights to the people does not arise today in litigation, because a lawsuit claiming that the federal government has exceeded its enumerated powers can proceed directly to a discussion of the scope of whatever enumerated power is at issue. See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 322-26 (1819) (discussing the scope of various legislative powers enumerated in the Federal Constitution). The fact that the reservation of powers "to the States" in the Tenth Amendment creates a right for state governments does not mean that the alternative reservation of powers to the people creates a right for state governments.

shaky foundation for the thesis that the Second Amendment does not protect individual rights, *Domestic Disarmament* surprisingly ignores three twentieth-century Fourteenth Amendment Supreme Court cases in which the Second Amendment is mentioned.

Starting in the mid-twentieth century, the Court began undoing the damage of the *Slaughter-House Cases* and *Cruikshank*, and began making the Bill of Rights enforceable against the states, holding that the Due Process Clause of the Fourteenth Amendment⁵⁵³ forbade states to infringe upon fundamental liberties.⁵⁵⁴ Exactly what kind of substantive liberties were within the scope of due process was not easy to settle. Starting in the 1960s and continuing to the present, the Court has wrestled with the question of whether various reproductive or family rights should be protected by the Fourteenth Amendment. In these cases, the Second Amendment has made a recurring guest appearance.

In the 1961 case *Poe v. Ullman*,⁵⁵⁵ the Court considered whether married persons had a right to use contraceptives. The second Justice Harlan, in a dissent that gained ascendancy a few years later in *Griswold v. Connecticut*,⁵⁵⁶ wrote that the Fourteenth Amendment did guarantee a right of privacy.⁵⁵⁷ Developing a theory of exactly what the Fourteenth Amendment Due Process Clause did protect, Justice Harlan wrote that the Clause covered, but was not exclusively limited to, "the precise terms of *the specific guarantees elsewhere provided in the Constitution*," such as "the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures."⁵⁵⁸

It is impossible to read Justice Harlan's words as anything other than a recognition that the Second Amendment protects the right of individual Americans to possess firearms. Obviously, the Due Process Clause of the Fourteenth Amendment protects a right of individuals *against* government; it does not protect government, nor is it some kind of collective right. It is notable that Justice Harlan felt no need to defend or elaborate his position that the Second Amendment guaranteed an individual right. Despite *Domestic Disarmament's* assertion that "[o]ver the past 114 years the Supreme Court has ruled at least

553. U.S. CONST. amend. XIV, § 1.

554. See generally Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982) (discussing how the United States Supreme Court came to hold certain guarantees of the Bill of Rights applicable to the states).

555. 367 U.S. 497 (1961).

556. 381 U.S. 479 (1965).

557. *Poe*, 367 U.S. at 539 (Harlan, J., dissenting).

558. *Id.* at 549 (emphasis added).

three times that the Second Amendment has nothing to do with individual rights to bear arms,"⁵⁵⁹ it was unremarkable to Justice Harlan that the Second Amendment guaranteed the right of individual people to keep and bear arms.

Justice Harlan's opinion in *Poe* was a dissent, but like some other famous dissents, one that later became law.⁵⁶⁰ In the 1976 case of *Moore v. City of East Cleveland*,⁵⁶¹ the Court heard a challenge to a zoning regulation that made it illegal for extended families to live together.⁵⁶² In a plurality opinion, the Court struck down the ordinance.⁵⁶³ To explain the content of the Fourteenth Amendment's Due Process Clause, the plurality opinion quoted Justice Harlan's earlier words, including his words about the Second Amendment.⁵⁶⁴

The statement that the Second Amendment right to keep and bear arms is one of the "specifically enumerated" individual rights that are part of the "full scope of liberty" guaranteed by the Fourteenth Amendment against state infringement appeared yet again in the majority opinion in *Planned Parenthood v. Casey*.⁵⁶⁵ Although *Planned Parenthood* appeared the same year as *Domestic Disarmament*, *Poe* and *Moore* long predated *Domestic Disarmament*.

Notwithstanding the claim of *Domestic Disarmament*,⁵⁶⁶ the Court has *never* affirmed, much less *repeatedly* affirmed, that the Second Amendment is not an individual right. To the contrary, it is impossible to read the Court's (meager) writings about the Second Amendment as anything but a recognition that the Amendment guarantees individual Americans a right that complete federal gun prohibition would abridge.

559. DOMESTIC DISARMAMENT, *supra* note 1, at 11.

560. See *Griswold*, 381 U.S. at 479, 499 (Goldberg, J., concurring) (citing with approval Justice Harlan's dissenting opinion in *Poe*).

561. 431 U.S. 494 (1976).

562. *Id.* at 496 & n.2, 497.

563. *Id.* at 506.

564. *Id.* at 501-02. After retiring from the bench, Justice Powell, who had written the *Moore* opinion, commented that "it is not easy to see why the Second Amendment, or the notion of liberty, should be viewed as creating a right to own and carry a weapon [handguns] that contributes so directly to the number of murders in our country." Lewis F. Powell, Jr., *Capital Punishment*, 102 HARV. L. REV. 1035, 1045 (1989). Justice Powell apparently believed that the Second Amendment guarantees an individual right to keep and bear arms, but only long guns and not handguns. See *id.* Thus, his position is consistent with strict gun control, but not with *Domestic Disarmament's* call for gun prohibition.

565. 505 U.S. 833 (1992). The portion of the opinion of the Court (Part II) was written by Justices O'Connor, Kennedy, and Souter. *Id.* at 843. Justices Blackmun and Stevens joined in Part II of the opinion. *Id.* at 922.

566. See *supra* note 454 and accompanying text.

C. Lower Federal Courts

Two lower federal court cases are discussed in *Domestic Disarmament*.⁵⁶⁷ The cases, as far as they go, are not inconsistent with the thesis of *Domestic Disarmament*, neither can they support the heavy burden that *Domestic Disarmament* demands of them. In both cases, the Supreme Court denied certiorari.⁵⁶⁸ *Domestic Disarmament* insists that the certiorari denial is an "affirmation" of the Court's "century" of "repeatedly" holding that the Second Amendment is not an individual right.⁵⁶⁹ As detailed above, the Court has done nothing of the kind, and as the Supreme Court has stated, certiorari denials are not decisions on the merits.⁵⁷⁰

Because the two circuit court cases cited by *Domestic Disarmament* are frequently mentioned in the gun control debate, they shall be discussed herein. In terms of whether federal prohibition of all firearms is constitutional, however, nothing in these lower court opinions can change the plain language of the Second Amendment, as recognized repeatedly by the Supreme Court, that individual Americans have a right to keep and bear arms.

1. *Farmer v. Higgins*.—*Farmer v. Higgins*⁵⁷¹ arose as a result of Congress's enactment of the Firearms Owners' Protection Act,⁵⁷² aimed at correcting abuses stemming from enforcement of the 1968 Gun Control Act.⁵⁷³ A rider was tacked onto the bill prohibiting the possession or transfer of machine guns manufactured after May 19, 1986, unless such possession or transfer occurred "under the authority of the United States."⁵⁷⁴ J.D. Farmer, a Georgia firearms manufacturer, interpreted this to mean that, as long as a gun manufacturer applied to the BATF for permission to transfer or possess a machine

567. DOMESTIC DISARMAMENT, *supra* note 1, at 32-33 (discussing *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) and *Farmer v. Higgins*, 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991)).

568. *See supra* note 567.

569. DOMESTIC DISARMAMENT, *supra* note 1, at 33.

570. *See* *Ponte v. Real*, 471 U.S. 491, 501-02 (1985); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366 n.1 (1973); *United States v. Carver*, 260 U.S. 482, 490 (1923).

571. 907 F.2d 1041 (11th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991).

572. 18 U.S.C. § 921 (1994).

573. 26 U.S.C. §§ 5801-5812 (1994).

574. *See* 27 C.F.R. § 179.105(a), (b) (1989) (defining the implementing regulations prescribing private possession of machine guns and the applicable "grandfather clause"); *id.* § 179.105(e) (defining the exception for transfer or possession "by or under the authority of" the United States).

gun pursuant to federal regulations, the BATF's permission would subsequently be granted "under the authority of the United States."⁵⁷⁵

The BATF believed, contrarily, that the 1986 law banned the possession or transfer of post-1986 machine guns to anyone but law enforcement officials, who by the nature of their jobs would be acting "under the authority of the United States."⁵⁷⁶ (It was not clear how state or local law enforcement officials would be acting "under authority of the United States.") BATF consequently denied Farmer's application to manufacture a machine gun for his own possession.⁵⁷⁷ Farmer brought suit in response.

The complicated legislative history of federal machine gun regulations viewed in its relationship to constitutional issues led District Court Judge J. Owen Forrester to conclude that, while Farmer's "proffered interpretation [of the 1986 statute] . . . is not without flaws of its own, it is clearly the proper choice between the two."⁵⁷⁸ One reason for preferring Farmer's interpretation was that courts should construe statutes so as not to render them unconstitutional, and BATF's interpretation would be constitutionally defective. Judge Forrester concluded:

The most obvious constitutional challenge to [the BATF's interpretation] is presented by the second amendment. A particular weapon need only bear some reasonable relationship to the preservation or efficiency of a well-regulated militia to fall within the scope of the second amendment. As noted by plaintiff, "Machineguns manufactured and registered after May 19, 1986 are part of the ordinary military equipment; their use could contribute to the common defense; and lawful transfer and possession thereof have a reasonable relationship to the preservation or efficiency of a well-regulated militia."⁵⁷⁹

Here Forrester dutifully followed the *United States v. Miller* decision, holding that Farmer, as a member of the popular militia, had a right under the Second Amendment's guarantee to possess any military-type small arm.⁵⁸⁰

575. *Farmer*, 907 F.2d at 1043.

576. *Id.* at 1042.

577. *Id.*

578. *Farmer v. Higgins*, Civil Action No. 1:87-CV-0440-JOF, slip op. at 12 (N.D. Ga. Jan. 5, 1989).

579. *Id.* at 11.

580. *Id.* (citing *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (citing *United States v. Miller*, 307 U.S. 174, 178 (1939))).

The government appealed the decision,⁵⁸¹ and Farmer's attorney briefed both the statutory and the constitutional issues. Circuit judges Joseph Hatchett, Thomas Clark, and Lewis Morgan issued a brief opinion, addressing primarily the statutory question, finding for the BATF, and reversing Forrester's decision.⁵⁸²

As to the constitutional issue, the Eleventh Circuit judges had much less to say—one sentence, in fact: "We have considered Farmer's remaining arguments and find them to be without merit."⁵⁸³ With that facile pronouncement, the court simply dodged the central issue.

The *Farmer* court's silence helped it avoid what might have been an insurmountable problem. *United States v. Miller*,⁵⁸⁴ which the Eleventh Circuit had no authority to overrule, had devised its militia-weapon test in order to uphold a law regulating a particular type of weapon (a sawed-off shotgun),⁵⁸⁵ but the rationale of *United States v. Miller* would appear to protect under the Second Amendment those guns with the greatest firepower, including especially machine guns. Curtly side-stepping *United States v. Miller's* precedent was a sensible decision for a court that wanted to uphold the machine gun ban.

Although gun prohibition groups sometimes cite *Farmer* as one of the supposed litany of circuit court of appeals cases holding that there is no individual right to bear arms, the three-judge panel's single sentence is being asked to carry a heavy burden. Equally consistent with the Eleventh Circuit's single sentence is the view that there is an individual right to arms, but the right is not infringed by a ban on machine guns.

The Supreme Court rarely grants certiorari in questions of federal statutory interpretation if there is not a circuit split and the Solicitor General is not urging review. Because only the Eleventh Circuit had interpreted the 1986 statute, the Supreme Court, unsurprisingly, denied certiorari.

2. *Quilici v. Village of Morton Grove*.—The highlight of the small case-law foundation for handgun prohibition is *Quilici v. Village of Morton Grove*,⁵⁸⁶ a 1982 case from Illinois. Unfortunately, *Domestic Disarmament* misconstrues the case, making it into one in which the

581. *Farmer*, 907 F.2d at 1042.

582. *Id.* at 1042-45.

583. *Id.* at 1045.

584. 307 U.S. 174 (1939).

585. *Id.* at 178.

586. 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

Supreme Court "maintained its strong stance" in favor of gun prohibition.⁵⁸⁷ Again, certiorari denials are not decisions on the merits.⁵⁸⁸ Although Abdel-Malek claims that denial of certiorari occurs because the appealed decision "is consistent with Supreme Court precedent,"⁵⁸⁹ denial occurs due to many other reasons as well, as the Supreme Court grants only one out of every one hundred petitions for writs of certiorari.⁵⁹⁰ If the certiorari denials in the 99 out of 100 cases were taken as proof that the lower court decision was found by the High Court to be "consistent with Supreme Court precedent," we would live in a confused legal world indeed.

In cases that the Supreme Court does not want to hear, but still wants to make a statement about the law, the Court issues a summary affirmance.⁵⁹¹ The summary affirmance makes the result (but not the rationale) of the lower court into national law.⁵⁹² Notably, the Supreme Court did not issue a summary affirmance in either the *Farmer* case or the *Quilici* case. In 1969, the Court did issue a summary affirmance in another gun case, *Burton v. Sills*,⁵⁹³ in which the New Jersey Supreme Court upheld New Jersey's strict (but not prohibitory) gun licensing law.⁵⁹⁴ Thus, to the extent anything can be inferred from the Supreme Court's treatment of lower court cases, there exists support for the constitutionality of state gun regulation, but no support for the proposition that there is no right at all to possess a firearm.

In *Quilici*, the Village of Morton Grove, Illinois, banned the sale and possession of handguns.⁵⁹⁵ A lawsuit was filed based largely upon state and federal constitutional guarantees of the right to keep and bear arms.⁵⁹⁶ The trial court judge ruled, *inter alia*, that Morton Grove's exercise of its police power permitted the ban on handguns,

587. DOMESTIC DISARMAMENT, *supra* note 1, at 32.

588. "The refusal of the Supreme Court to hear such cases cannot be taken as indicative of the Court's view of the Second Amendment." Robert J. Cottrol, *Introduction to GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT* XXX (Robert J. Cottrol ed., 1994).

589. DOMESTIC DISARMAMENT, *supra* note 1, at 32.

590. See Stephen R. McAllister, *Practice Before the Supreme Court of the United States*, KANSAS BAR ASS'N, Apr. 1995, at 5.

591. See 16 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4014 (1977).

592. See *id.*

593. 394 U.S. 812 (1969) (per curiam), *dismissing appeal from* 248 A.2d 521 (N.J. 1968).

594. *Burton*, 248 A.2d at 530-31.

595. *Quilici v. Village of Morton Grove*, 695 F.2d 261, 263 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

596. See *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169, 1171 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

as long as it did not ban all guns.⁵⁹⁷ Before hearing the appeal, Chief Judge Bauer, who would author the *Quilici* opinion, had refused to disqualify himself after he stated on a television talk show that he thought the law was constitutional.⁵⁹⁸ The case was appealed, and the trial court was upheld by two-to-one, Chief Judge William Bauer and Senior Circuit Judge Harlington Wood voting to affirm⁵⁹⁹ and Circuit Judge John Coffey dissenting.⁶⁰⁰

Quilici pertains only to the issue of handguns, and not to the issue of the individual right to keep guns in general. It cannot be cited, therefore, in support of the Communitarian Network's assertion that "the Supreme Court has repeatedly ruled, for over a hundred years, that [the Second Amendment] does not prevent laws that bar guns."⁶⁰¹ Even the majority in *Quilici* agreed that a wholesale ban on firearms, such as the Communitarian Network desires, would be unconstitutional.⁶⁰²

Thus, *Quilici* does not support *Domestic Disarmament's* claim that there is no individual right to own a gun at all; nevertheless, it will be discussed in more detail because it is so commonly cited by gun prohibitionists.

Chief Judge Bauer and Senior Circuit Judge Wood were clearly unhappy with the appellants' arguments in *Quilici*.⁶⁰³ In the discussion of the Second Amendment, for example, Bauer and Wood chided the appellants for "reluctantly conceding" that *Presser* ruled that the Second Amendment was only a restraint upon the federal government.⁶⁰⁴ In spite of this concession, the appellants "nevertheless assert that *Presser* also held that the right to keep and bear arms is an attribute of national citizenship which is not subject to state restriction."⁶⁰⁵ This assertion "is based on dicta out of context."⁶⁰⁶ The appellants merely offered an argument, sniffed Bauer and Wood, that "borders on the frivolous and does not warrant any further consideration."⁶⁰⁷

597. *Quilici*, 695 F.2d at 265.

598. See Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 70 n.77 (1989).

599. *Quilici*, 695 F.2d at 263.

600. *Id.* at 271 (Coffey, J., dissenting).

601. *Platform*, *supra* note 5, at 21.

602. *Quilici*, 695 F.2d at 268.

603. *Id.* at 267-69.

604. *Id.* at 269.

605. *Id.*

606. *Id.*

607. *Id.*

Domestic Disarmament defends the majority's charge that the appellants took certain utterances in *Presser* out of context.⁶⁰⁸ The Court in *Presser* wrote that "the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms."⁶⁰⁹ The appellants' attorneys quoted this statement in support of the proposition that a state may not enact gun bans.⁶¹⁰ Abdel-Malek retorts: "In its entirety, the phrase reads that the states cannot prohibit people from bearing arms, 'so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.'"⁶¹¹ This, she claims, is a reference to the role of the standing army.⁶¹² Abdel-Malek's claim is logically untenable; when citizens serve in the standing army, they are supplied with weapons by the federal government. No state law could possibly affect the federal government's supplying weapons to the federal army or navy, and the *Presser* Court would not have wasted a drop of ink on such a bizarre proposition. The *Presser* Court was not discussing the federal army power at all; rather, the Court was discussing the federal militia power, which appears in constitutional clauses separate from those involving the army.⁶¹³

The full paragraph from *Presser* reads:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserve military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But, as already stated, we think it clear that the sections under consideration do not have this effect.⁶¹⁴

Clearly, the standing army is not in view here, but rather the "reserve" or "unorganized" militia, which is composed of "all citizens capable of

608. DOMESTIC DISARMAMENT, *supra* note 1, at 32.

609. *Presser v. Illinois*, 116 U.S. 252, 265 (1896).

610. *Quilici*, 695 F.2d at 269.

611. DOMESTIC DISARMAMENT, *supra* note 1, at 32-33 (quoting *Presser*, 116 U.S. at 265).

612. *Id.* at 33.

613. U.S. CONST. art. I, § 8, cl. 12 (army); cl. 15-16 (militia).

614. *Presser*, 116 U.S. at 265-66.

bearing arms.”⁶¹⁵ The quotation above, in essence, says that, because the Constitution grants the federal government certain powers to use the militia, the states may not disarm the reserve force or unorganized militia, which is a self-armed force (as the Court in *United States v. Miller* would observe). State laws forbidding the parading of private organizations, however, do not have this effect—that is, the effect of disarming the civilian militia.⁶¹⁶ Abdel-Malek is correct in her assertion that to quote *Presser's* language about the common law right to keep and bear arms is to quote dicta, but it is dicta near the heart of the decision, and it is most certainly not taken out of either the immediate textual or the broader historical context. In fact, it is the majority in *Quilici* and its defenders, such as the communitarians, who have disregarded both. Therefore, it is not so much that the appellants’ argument borders on the frivolous as it is that the majority opinion borders on judicial malfeasance.

After correctly noting that *Presser* is still good law and that incorporation of the Second Amendment is an issue yet to be decided by the Supreme Court, Judges Bauer and Wood, in their majority opinion in *Quilici*, took up *United States v. Miller*.

In an attempt to avoid the *Miller* holding that the right to keep and bear arms exists only as it relates to protecting the public security, appellants argue that “[t]he fact that the right to keep and bear arms is joined with language expressing one of its purposes in no way permits a construction which limits or confines the exercise of that right.” They offer no explanation for how they arrived at this conclusion.⁶¹⁷

In fact, *United States v. Miller* never stated “that the right to keep and bear arms exists *only* as it relates to protecting the public security.”⁶¹⁸ As the Court in *Miller v. United States* did say, and as the *Quilici* court conspicuously avoided quoting, the militia’s arms protected by the Second Amendment were to be “supplied by themselves.”⁶¹⁹ The

615. *Id.* at 265.

616. As to what *Presser* means by “public security,” Halbrook (one of the losing attorneys in *Quilici*) wrote that “[t]he ‘public security’ concept at common law included justifiable homicide of violent felons and citizens’ arrests of fleeing felons who could not otherwise be apprehended.” HALBROOK, *supra* note 148, at 161. Thus, there is no reason to maintain that *Presser's* connecting of the right to keep and bear arms with “public security” implied an exclusively collective right. The well-regulated militia mentioned in the Second Amendment was a self-armed force in the 1700s and was reaffirmed to be such by the Supreme Court in *United States v. Miller*, 307 U.S. 174, 179-80 (1939).

617. *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982) (citation omitted), *cert. denied*, 464 U.S. 863 (1983).

618. *Id.*

619. *United States v. Miller*, 307 U.S. at 179.

Court in *United States v. Miller* clearly viewed defendants Miller and Layton as reserve militia members to whom the Second Amendment's protection applied.⁶²⁰ The decision merely excepts sawed-off shotguns from "the ordinary military equipment" constitutionally possessable by American citizens.⁶²¹

Because the logic of *United States v. Miller* is clear concerning the type of small arms the Second Amendment protects, Judges Bauer and Wood lastly addressed whether handguns are military weapons.⁶²² Their finding is expressed in an astounding footnote:

Appellants devote a portion of their briefs to historical analysis of the development of English common law and the debate surrounding the adoption of the second and fourteenth amendments. This analysis has no relevance on the resolution of the controversy before us. Accordingly, we decline to comment on it, other than to note that we do not consider individually owned handguns to be military weapons.⁶²³

Like *Domestic Disarmament* (which ignores all historical evidence and scholarship), the *Quilici* majority dismissed the original intent behind the Second and Fourteenth Amendments as irrelevant.⁶²⁴

In contrast to sawed-off shotguns (whose possible militia use was not common knowledge to the Court in *United States v. Miller*), it is well known that handguns are useful in combat,⁶²⁵ and, hence, would seem to be, by the *United States v. Miller* test, plainly covered by the Second Amendment. The *Quilici* court slides around this fact by stating that "individually owned handguns" are not "military weapons."⁶²⁶ *Quilici's* formulation violates *United States v. Miller*. Layton and Miller owned their own sawed-off shotguns.⁶²⁷ The Court in *United States v. Miller* did *not* rule against Miller and Layton simply by pointing out that Miller and Layton's privately owned, sawed-off shotguns were not "military weapons" (in that the guns were not owned by the United States Army).⁶²⁸ For the *Quilici* court to assert that the mere fact the

620. *Id.* at 179-81.

621. *Id.* at 178.

622. *Quilici*, 695 F.2d at 270-71.

623. *Id.* at 270 n.8.

624. *Id.* at 269-70.

625. See Ted Shelsby, *Beretta to Increase Output at Gun Plant; Military Contract to Bring More Work to Accokeek Plant*, BALT. SUN, July 30, 1996, at 1C, available in 1996 WL 6630129; Ted Shelsby, *Beretta Wins Navy Contract; \$18.5 Million Worth of Guns Ordered*, BALT. SUN, Sept. 21, 1995, at 1C, available in 1995 WL 2464978.

626. *Quilici*, 695 F.2d at 266-67.

627. *United States v. Miller*, 307 U.S. at 175.

628. *Id.* at 178-82. In fact, the Court in *United States v. Miller* clearly implied that military-style small arms are constitutionally possessable by American citizens. See *id.*

handguns were individually owned was proof that the guns were outside the protection of *United States v. Miller*⁶²⁹ was directly contrary to it.

In a dissenting opinion in *Quilici*, Judge Coffey criticized the majority opinion for "impermissibly interfer[ing] with basic human freedoms" and for "cavalierly dismiss[ing] the argument that the right to possess commonly owned arms for self-defense and the protection of loved ones is a fundamental right protected by the Constitution."⁶³⁰ After citing a number of Supreme Court decisions supporting the notion that the right to privacy and self-defense are interwoven fundamental rights, Judge Coffey wrote:

A fundamental part of our concept of ordered liberty is the right to protect one's home and family against dangerous intrusions Morton Grove, acting like the omniscient and paternalistic "Big Brother" in George Orwell's novel, *1984*, cannot, in the name of public welfare, dictate to its residents that they may not possess a handgun in the privacy of their home. To so prohibit the possession of handguns . . . renders meaningless the Supreme Court's teaching that "a man's home is his castle."⁶³¹

The Supreme Court refused to hear the case.⁶³² Again, there is no inference to be drawn from this fact in favor of the exclusively collective-right theory advanced by the Communitarian Network. It is certainly possible to agree with Sanford Levinson, however, that the repeated refusal of the High Court to hear substantive gun rights cases such as *Quilici* and *Farmer* is almost shameful.⁶³³

That the Supreme Court has avoided a direct Second Amendment case since 1939 suggests that the Court is not interested in investing the same kind of institutional energy in protecting the Second Amendment that it has invested in protecting other rights, such as freedom of speech or equal protection. For many of the gun controls that might come before the Court, we would not be surprised to see

629. *Quilici*, 695 F.2d at 270-71.

630. *Id.* at 278 (Coffey, J., dissenting).

631. *Id.* at 280. Because Judge Coffey apparently viewed *Presser* as preventing any direct application of the Second Amendment against a subdivision of the State of Illinois, he argued that the right to own a handgun in one's home was among the unenumerated personal liberties protected by the Ninth and Fourteenth Amendments. *Id.* at 278-80. For more on the Ninth Amendment as an arms guarantee independent of the Second Amendment, see Johnson, *supra* note 445, at 2-12.

632. *Quilici v. Village of Morton Grove*, 464 U.S. 863 (1983), *denying cert. to* 695 F.2d 261 (7th Cir. 1982).

633. Levinson, *supra* note 147, at 654.

the Rehnquist Court treat the Second Amendment the same way it treats the Fourth Amendment: to acknowledge the individual right and then to uphold almost any particular control or infringement the government would propose.⁶³⁴ Complete prohibition and confiscation, as proposed by *Domestic Disarmament*, could not be upheld as moderate regulation. It could only be upheld by holding that the Second Amendment guarantees no individual right at all. That holding would be inconsistent with everything that the Supreme Court has said about the Second Amendment.

The notion advanced by the Communitarian Network that the Second Amendment protects "community militias" but not individual citizens⁶³⁵ is an "either/or" fallacy. In guaranteeing the preservation of the militia, the Second Amendment thereby guarantees the individual right to keep and bear arms. It is both community militias and individuals, not either/or.

CONCLUSION

In conclusion, this Article answers the questions posed at its beginning by prodisarmament writer Ronald Goldfarb:⁶³⁶

"Is there an individual right to self-defense that cannot be abrogated?"⁶³⁷ Common law, the original intent of the Framers, and case law indicate that there is a right to self-defense against both criminal and government predators, and as Blackstone notes, the logical corollary of that right is the individual right to keep and bear arms.⁶³⁸ Contrary to the Communitarian Network, the United States Supreme Court has never denied this. Although courts often grant governments considerable leeway in enacting gun control, total gun prohibition appears to be plainly unconstitutional.⁶³⁹

634. See, e.g., *Arizona v. Evans*, 115 S. Ct. 1185 (1995) (allowing searches without probable cause when based on reliance on erroneous computer data).

635. *DOMESTIC DISARMAMENT*, *supra* note 1, at 29-35.

636. See *supra* text accompanying note 88.

637. See *supra* note 88 and accompanying text.

638. See 1 *WILLIAM BLACKSTONE, COMMENTARIES* 136 (1765) (stating that the right to bear arms is one of five "auxiliary subordinate rights of the subject, which serve principally . . . to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property").

639. See *Rabbitt v. Leonard*, 413 A.2d 489, 491-92 (Conn. 1994) (interpreting state constitutional right to arms provision as upholding ban on so-called assault weapons, but stating that a ban on all guns would be unconstitutional); cf. *Robertson v. City & County of Denver*, 874 P.2d 325, 328 (Colo. 1994) ("[T]he state may regulate the exercise of that right [to bear arms] under its inherent police power so long as the exercise of that power is reasonable.").

"How do we balance the necessary policing with the public's right of privacy and its constitutional protections against illegal searches and seizures?" "How would disarmament be accomplished?" In light of the certain resistance to the imposition of domestic disarmament, these are anybody's guess. Goldfarb perhaps senses the impossibility of the endeavors when he asks: "Would a real ban on guns fail as dismally as the attempt to ban alcohol?"⁶⁴⁰ Indeed, a repeat of the alcohol prohibition disaster would be the best-case scenario. The worst case—almost a certainty if the government actually attempts to confiscate all guns—would be a civil war, in which at least some elements of the military and police would join the resistance.

"What would be done with the existing 200 million firearms?"⁶⁴¹ This question assumes that the government could successfully collect 200 million firearms. All empirical considerations show this to be a flight of fancy.

"What about hunters and other sportsmen?"⁶⁴² The legislative assaults upon recreational firearms advocated by the Communitarian Network will only bring hordes of heretofore uninvolved gun owners into an already large and irate resistance movement.

"What is the danger of creating a disarmed public?"⁶⁴³ The first danger of successful gun prohibition is that it leaves the public at the mercy of violent criminals who, being criminals, will not disarm. Second, successfully disarming the American public would indeed, to answer Goldfarb's query, "make the law enforcement establishment too powerful."⁶⁴⁴ This was, in fact, the fear of those who insisted upon enshrining the right to arms in both state and federal constitutions as a check and balance upon the power of government. More fundamental, further disconnecting citizens from responsibility for the safety of themselves and their communities will foster the learned helplessness, alienation, and moral degeneration that the Communitarian Network attempts to combat.⁶⁴⁵

If personal responsibility is to remain an important theme in communitarian thought, then communitarians should come to realize what most people realize: only personal beings capable of moral be-

640. See *supra* note 88 and accompanying text.

641. See *supra* note 88 and accompanying text.

642. See *supra* note 88 and accompanying text.

643. See *supra* note 88 and accompanying text.

644. See *supra* note 88 and accompanying text.

645. Radical criminologist Raymond Kessler criticized gun control as an effort to make poor people more dependent on the state and, hence, less likely to challenge assertively the social order. See Raymond G. Kessler, *Gun Control and Political Power*, 5 L. & POL'Y Q. 381, 383 (1983).

havior can be responsible for harm inflicted on others. Social responsibility, especially in America, is not engendered by legal constraints imposed upon individuals from the outside, but rather by self-regulation and virtue. The demonization of the gun must end if rational policies are to be formulated and implemented.

For these reasons, a policy of domestic disarmament would not serve communitarian interests. Conversely, policies encouraging responsible gun ownership in society would not only preserve the current crime-inhibiting effect, but would also contribute to the re-creation of a healthy militia-of-the-whole, which the Framers believed necessary for a sound republican order.⁶⁴⁶

That the American people should be encouraged to be armed and trained in order to counter violence seems radical and runs directly counter to the notion that more gun control equals less gun crime. The initial reaction to the proposition that an armed and well-trained America reacquainted with republicanism will be a kinder and gentler nation may be incredulity. Such a reaction is, however, merely a gauge of how far we have departed from our roots.

Etzioni and the Communitarian Network recognize (rightly so) the worthlessness of the vanilla-pale agenda of the gun control lobbies. *Domestic Disarmament* performs a tremendous service to the debate on gun control because it forces one to think strategically—to look beyond the raging, but often trivial, debates over the vanilla-pale gun control measure-of-the-month. Once vanilla-pale measures are abandoned, there remain three options. First, there is the Communitarian Network's gun confiscation proposal. Second, there is the option of simply getting the government out of the gun policy business. This second choice has been the status quo in America for most of its history. This policy at least has the advantage of avoiding the disastrous consequences of coercive domestic disarmament.

There is a third, better option, however, and that is for the government—particularly local governments—to take an active role in encouraging firearms responsibility. If Americans are to remain free—and to live as securely as freedom allows—then it must be recognized that guns play an important and necessary role in American society, and that Americans have inherited the right to arm themselves against those foreign or domestic enemies who would deprive them of life and liberty.

There is much in the Communitarian Network's agenda that is meritorious from the standpoint of neorepublicanism. Policies do

646. See Williams, *supra* note 6, at 563-86.

need to be formulated that help heal families and reform government schools. To the extent that communitarianism is serious about the need for a restored sense of community, it will commit itself to the decentralization necessary to achieve it. Strong rights do presume strong responsibilities in republican ideology, as well as in communitarian ideology.

Unfortunately, the kind of responsibility that the Communitarian Network and its followers like President Clinton advocate (in spite of claims to the contrary) seems to be a government-enforced, authoritarian version, which of course does not advance the cause of civic responsibility at all. Individual rights need not be traded for communal security. Indeed, according to republican theory, "the common good was not in opposition to individual freedoms. Republicans typically believed that part of the common good was individual liberty for all."⁶⁴⁷

Although gun ownership does currently exact a significant toll on society, it by no means follows that the right to arms should be effaced in the name of collective security. The costs of that solution are not only significant, but communally disastrous. Domestic disarmament is not the answer. Rather, the answer to gun-related violence in America is to be found in the spiritual and civic renewal of its citizenry and in the citizenry's rediscovery of its republican heritage as a responsible, arms-bearing people.

647. *Id.* at 564 n.56.