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PROFESSIONAL DISCOURSE, THE SECOND AMENDMENT AND THE "TALKING HEAD CONSTITUTIONALISM" COUNTERREVOLUTION: A REVIEW ESSAY

GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA. By Dennis A. Henigan, E. Bruce Nicholson, and David Hemenway (Aletheia Press, Northampton, Massachusetts 1996) (Pp. xii, 82).

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INTRODUCTION

A. Professional Discourse and the Second Amendment

Just after the nationwide debate over the so-called "Brady Bill," Professor Andrew McClurg wrote an article entitled *The Rhetoric of Gun Control*,¹ in which he highlighted the numerous logical fallacies committed by both sides during deliberations over the various gun control measures offered in the bill.² McClurg, who personally favors gun control,³ was troubled by the "bad rhetoric" employed in that important public debate.⁴ Surveying the field, he found "rational discourse concerning gun control" to be "surprisingly thin."⁵ (pg.228)

One reason for this, McClurg believed, was the lack of "professional discourse"⁶ on gun control.⁷ He noted that the Supreme Court has decided only one case this century interpreting the

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¹ 42 AM. U. L. REV. 53 (1992).

² *See id.* at 59.

³ *See id.* ("As a proponent of gun control, I initially thought [presenting the flaws in both sides' arguments] would prove difficult."). *See also* Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777 (1995).

⁴ *See id.* at 58.

⁵ *Id.* at 60.

⁶ "Professional discourse consists of legal arguments, judicial opinions, and scholarly commentary. Such discourse generally occurs in a more carefully reasoned manner [than public discourse]." *Id.* at 61.

⁷ *Id.* at 63.

Second Amendment⁸ and that scholarly discussion (at the time of his writing), while growing, was virtually nil.⁹ As a result, McClurg wrote, we were left with the "'low road' of popular discourse to guide us toward resolving this vital issue."¹⁰ He added colorfully that "the gun control debate has taken on the 'anything goes' appearance of a professional wrestling match. The rules of intellectually honest debate are ignored."¹¹ McClurg concluded that "a debate in which fallacy so completely obscures reason is not simply unproductive, it is a dangerous way to decide an issue as important as gun control."¹²

McClurg is certainly correct; and in the intervening four years between his article and the present, the quality of *public* debate has gotten no better. Recall, for example, the much-publicized exchange between Representatives Kennedy and Solomon on the House floor during a debate over the proposed repeal of the assault weapons ban in 1995.¹³ On the other hand, the quality of the *professional* discourse regarding gun control and the Second Amendment has improved, but such gains seem to be threatened by those who think that scholars who interpret the Second Amendment as guaranteeing an individual right are arguing their constitutional case a bit too successfully.¹⁴ The authors (pg.229) of *Guns and the Constitution*¹⁵ think so, and have developed an ingenious strategy for dealing with recent Second Amendment scholarship: ignore it.

B. The Talking-Head Counterrevolutionaries

⁸ See *United States v. Miller*, 307 U.S. 174 (1939). 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." U.S. CONST., amend. II.

⁹ McClurg, *supra* note 1, at 61.

¹⁰ *Id.* at 63.

¹¹ *Id.*

¹² *Id.*

¹³ The exchange was emotional, even hostile, with Kennedy invoking the spirit of his dead uncles, and Solomon passionately defending his wife's ability to defend herself while he was away. See L.A. Powe, Jr., *Guns, Words and Interpretation*, WM. & MARY L. REV. (forthcoming 1997) (copy on file with author), at 96-97 [ed. published at 1402-1403].

¹⁴ Until recently, the debate was conducted largely outside the context of constitutional law; and it was not until University of Texas law professor Sanford Levinson published *The Embarrassing Second Amendment* in *The Yale Law Journal*, that the Second Amendment became a respected line of inquiry for "established" law professors. 99 YALE L.J. 637 (1990). What followed has been (forgive the pun) an explosion of Second Amendment scholarship in the years since Levinson's article. See, e.g., CLAYTON E. CRAMER, FOR DEFENSE OF THEMSELVES AND THE STATE (1994); STEPHEN HALBROOK, THAT EVERY MAN BE ARMED (1989); JOYCE LEE MALCOM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994); Symposium, *The Second Amendment*, 62 TENN. L. REV. 443 (1995); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); Robert Cottrol & Raymond Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Brannon P. Denning, *Palladium of Liberty?: Causes and Consequences of the Federalization of State Militias in the Twentieth Century*, 21 OKLA. CITY U. L. REV. (forthcoming 1997); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. L. REV. 107 (1991); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); 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 (1994); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, GA. L. REV. (forthcoming 1997); Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L.J. 1736 (1995); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

¹⁵ DENNIS A. HENIGAN, E. BRUCE NICHOLSON AND DAVID HEMENWAY, GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA (1995) [hereinafter HENIGAN, ET AL.].

If the recent work of gun control advocates (and that of many federal courts)¹⁶ is any guide, there has not been a rise in the level of professional discourse on their side. It appears that many of these scholars are not only allowing their work to be influenced by their strong feelings about the utility of gun control and guns in general, but also are not interested in seriously engaging the constitutional arguments put forth by Second Amendment scholars. Worse still is the blurring of the lines between popular and professional discourse on the part of gun control advocates. It is one thing to write an opinion piece expressing, well, one's opinion on the constitutionality of gun control; it is quite another to present the same argument festooned with a few citations and call it "scholarship."¹⁷ In another context, Professor Glenn Reynolds has termed this "talking head constitutionalism."¹⁸ A few examples help to illustrate the point.^(pg.230)

Andrew Herz, in a recent *Boston University Law Review*¹⁹ article, called on his like-minded colleagues to "clear their hard drives" and "weigh in on gun control." But Herz counsels them to eschew the "insular law review culture," in favor of fulfilling their "social responsibility to venture forth to frame popular arguments"²⁰ — popular arguments that are heavy on emotion and light on fact, judging from Herz's article.

Herz spends about one-third of his article making the argument that the case law on the Second Amendment is settled, and that since the Supreme Court has not granted certiorari on a Second Amendment case since *United States v. Miller*²¹ the issue should be regarded as settled for all time.²² The remainder of Herz's article is devoted to arguing, alternatively, that guns are evil, the NRA bullies Congress into blocking reasonable gun legislation,²³ and that "the visual media of television and film constantly glamorize and even eroticize the gun and gunmen."²⁴ Herz also alleges that the gun industry "caters to criminals"²⁵ and that academics who subscribe to the individual rights view have ignored their responsibility to educate the public regarding the limits of the Second Amendment. He concludes by writing that academics who remain silent will contribute to the "sacrifice [of] more than 100 men, women and children everyday on the altar of exaggerated firearms freedoms."²⁶

¹⁶ See, e.g., Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1996) (criticizing lower federal courts' interpretations of the Supreme Court's *Miller* decision).

¹⁷ See, e.g., Wendy Brown, *Guns, Cowboys and Philadelphia Mayors*, 99 YALE L.J. 661 (1989). For a criticism of the Brown article, ostensibly written as a response to Levinson's article on the Second Amendment and its stereotypes, see Douglas Laycock, *Vicious Stereotypes in Polite Society*, 8 CONST. COMM. 395 (1991).

¹⁸ See Reynolds & Kates, *supra* note 14, at 1767.

¹⁹ Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995). For a critique of Herz's article, including a discussion of its numerous factual errors, see Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1997).

²⁰ *Id.* at 146.

²¹ 307 U.S. 174 (1939).

²² Herz, *supra* note 19, at 77.

²³ *Id.* at 89-90.

²⁴ *Id.* at 97 (footnote omitted).

²⁵ *Id.* at 113-14.

²⁶ *Id.* at 153.

Another recent example is Garry Wills' essay in *The New York Review of Books*, in which he criticizes recent Second Amendment scholarship.²⁷ Wills is a Pulitzer Prize-winning historian and an adjunct professor at Northwestern University—just the type of scholar upon whom one might count to elevate the debate. That is, until one reads Wills' op-eds on handguns, which evince an anti-gun bias so profound as to approach the irrational.²⁸ Unfortunately, like his (pg.231) op-eds, Wills' essay is a polemic—this time masked as high-brow historical analysis.²⁹ He ridicules the scholarship of those who support the position that the Second Amendment guarantees an individual right,³⁰ discusses his own view of history (which he seems to assume the reader will accept on faith)³¹ and ultimately concludes that Madison proposed the Second Amendment simply as a rhetorical ploy to quiet the Constitution's anti-federalist critics, knowing all the while that the practical effect of the amendment would be nil.³² Unfortunately, Wills' conclusions have been cited approvingly in influential law review articles whose distinguished authors have evidently not studied the matter in depth, and who are probably unaware of Wills' bias.³³

A final distressing example of talking-head constitutionalism is the subject of this review essay, which purports to contribute to the debate surrounding the Second Amendment and the constitutional limits of gun control. As I show in this Essay, the book not only contributes nothing to the debate, but is in fact a hodge-podge of faulty reasoning, appealing to emotion and irrelevant arguments masquerading as "professional discourse."

It appears that gun control advocates are employing this sort of scholarship as a substitute for constitutional discourse in a rear-guard action—a counterrevolution—against those "Standard Model" Second Amendment scholars³⁴ who have taken the time to substantiate their views (often

²⁷ Garry Wills, *To Keep and Bear Arms*, N.Y. REV. OF BOOKS, September 21, 1995, at 62.

²⁸ See Garry Wills, *The Terrorists Who Pack an NRA Card*, TIMES UNION (Albany, NY), April 22, 1996 (describing the NRA as a "shill for terrorists" and as "little better than a terrorist organization itself"); Garry Wills, ... *Or Worldwide Gun Control*, PHILA. INQUIRER, May 17, 1981, at 8-E (describing "gun nuts" as "haters of their fellow Americans" and writing that "[e]very civilized society must disarm its citizens against each other"); Garry Wills, *Handguns That Kill*, WASH. STAR, January 13, 1981 ("Patriots who arm themselves against Americans are enemies of their own *patria*, traitors, anti-citizens. The killing will go on as long as gun nuts defend the killers' right to keep their guns."); Garry Wills, *John Lennon's War*, CHI. SUN-TIMES, December 12, 1980, at 56 (writing that "[e]very handgun owned in America is an implicit declaration of war against one's neighbor" and again blaming "gun nuts" and "gun fetishists" for their proliferation.).

The tone of Wills' op-eds is anything but scholarly; it is remarkable that *The New York Review of Books* would entrust the review of the works Wills reviewed to someone with such an intense bias. On the other hand, Wills' bias certainly explains the peculiar conclusions he reaches in his essay.

²⁹ Perhaps most curious is Wills' disquisition on the Latin etymology of the terms "arms" and "bear," as used in the Second Amendment, and how Latin word origins "prove" that the "context of the amendment was always military," thus precluding the use of the amendment to support a right to private ownership of arms. See Wills, *supra* note 27, at 64. For a more detailed critique of Wills' article, see Powe, *supra* note 13, at 50-56 [ed. published at 1356-1360].

³⁰ See Wills, *supra* note 27, at 62.

³¹ See *id.* at 66-70.

³² See *id.* at 72.

³³ See Charles Fried, *Foreword: Revolutions*, 109 HARV. L. REV. 13, 37 n.134 (1995) (citing Wills); Henry P. Monaghan, *We the People[s]*, *Original Understanding and Constitutional Amendment*, 96 COLUM. L. REV. 121, 133 (1996) (citing Wills).

³⁴ The term "Standard Model," used in the context of the Second Amendment, was coined by Glenn Reynolds and describes what Reynolds believes is now the accepted view of the Second Amendment among scholars, i.e., that it guarantees an individual right to keep and bear arms. See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 464-488 (1995) (describing the Standard Model) [hereinafter Reynolds, *Critical Guide*]. Note that I did not use the term "unqualified" or "absolute," most all Second Amendment scholars admit limits to the Second Amendment.

against (pg.232) their personal predilections).³⁵ This "talking-head constitutionalism counterrevolution," if left unchallenged, represents an unfortunate degradation of legal scholarship.

Each chapter of *Guns and the Constitution* is a transcript of one of three conversations between one of the persons given credit as an author, and an editor from the book's publisher. In addition to Henigan, who is the general counsel for Handgun Control, Inc., the other authors are the legislative counsel for the American Bar Association (Nicholson) and a lecturer at the Harvard School of Public Health (Hemenway). Their book wastes little time actually attempting to *prove* that there is a Second Amendment "myth"—every contributor to the book accepts as an article of faith that the Second Amendment adds nothing to the debate over gun control. In criticizing the book, therefore, one runs the risk of arguing past the authors.

I. FRAMING THE DEBATE

The tone for the rest of the book is set in the Foreword, written by Ira Helfand, an emergency room physician in Northampton, Massachusetts. While it might seem strange to open a book allegedly about gun control and constitutional law with a Foreword written by a physician, the Foreword introduces themes to which the co-authors return throughout the book.

A. Recharacterizing the Debate

Dr. Helfand begins by noting the tremendous social cost of firearm violence. He writes that "the United States is dealing with a major epidemic of gun violence."³⁶ Efforts to reduce gun violence have been blocked, he writes, by "three powerful myths":³⁷ that the Second Amendment prohibits gun control, that "Guns Don't Kill People, People Kill People," and that widespread gun ownership deters crime.³⁸

The main enemy of effective gun control, Helfand asserts, is the National Rifle Association. The perpetuation of these "myths" is due to "a very deliberate and dishonest campaign of disinformation by the gun industry and (pg.233) their public relations front, the National Rifle Association."³⁹ The NRA's efforts to block gun control measures are all the more insidious, according to Helfand, because "they do not faithfully reflect the views of the majority of gun owners ... or even, ... the views of their own membership."⁴⁰ Helfand concludes with an analogy that the other authors will employ: the NRA is like the tobacco lobby. He writes:

The success of the gun industry and the NRA in blocking efforts to enact stricter gun-control laws is a shocking story of the triumph of private financial and political fortunes over public health needs. It is rivaled only by the success of the tobacco industry in blocking efforts to limit the terrible death toll caused by smoking. These are cautionary tales for those who

³⁵ See, e.g., Levinson, *supra* note 14, at 655-56; Powe, *supra* note 13, at 56 [ed. published at 1360].

³⁶ HENIGAN, ET AL., *supra* note 15, at ix.

³⁷ *Id.*

³⁸ *Id.* at x-xi.

³⁹ *Id.* at x.

⁴⁰ *Id.* at xii.

would believe that government is the root of our problems, and that a market free of societal and governmental regulation can be counted upon to promote the public good.⁴¹

In a few pages, Helfand lays out the book's *leitmotif*: Gun violence is an issue of public health, not constitutional law; and this "epidemic" requires strict gun control laws and increased governmental regulation. The Second Amendment is no bar to the desired restrictions, the argument goes, because important people, like Erwin Griswold and Elliot Richardson, have so opined, and because lower federal courts have said the Second Amendment is meaningless. Since there is no *constitutional* barrier to gun control, the only reason stricter gun control laws have not been enacted is that lawmakers are beholden to, or scared of, the NRA. Just like the tobacco lobby or the automotive industry, giant firearms corporations are making huge profits by the manufacture and sale of dangerous products, and using a portion of these profits to ensure they are not prohibited from making more money. Therefore, greater governmental regulation is needed to curb the disproportionate influence exerted by the "gun lobby."

While that argument may have a certain emotional appeal, the presence of the Second Amendment in the text of the Constitution has provided constitutional ammunition to those who oppose such a "common sense" call for gun control, since an equally "common sense" reading of the Constitution suggests that such measures might be unconstitutional. Therefore, it has always been imperative that the Second Amendment be explained away—hence the (pg.234) appearance of the "collective rights" theory of the Second Amendment, which is explained in more detail by Dennis Henigan.⁴²

II. DENNIS HENIGAN: DOWN THE SLIPPERY SLOPE

A. Henigan's Collective Right Interpretation of the Second Amendment

Henigan devotes much of his portion of the book summarizing his collective right view of the Second Amendment,⁴³ in which the introductory phrase of the Second Amendment ("[a] well regulated Militia, being necessary for the security of a free state") operates as a limitation upon "the right of the people to keep and bear arms."⁴⁴ According to Henigan, only a "well regulated" militia—which Henigan maintains is the modern National Guard—has the right to "keep and bear arms." Moreover, Henigan's theory of the Second Amendment locates the right with states, as opposed to individuals. The main problem with Henigan's theory is not only that it finds little support in either the text⁴⁵ or the original understanding of the amendment's adoption; but also, Henigan himself does not really take his own argument seriously. If he did, he might be supporting,

⁴¹ *Id.*

⁴² See notes 43-73, *infra* and accompanying text.

⁴³ As Glenn Reynolds describes it:

The states' rights theory is normally brought out as part of an argument that the Second Amendment does not provide an individual right to keep and bear arms; such a right, it is argued, exists only as part of a state militia. The purpose of such militias is to maintain a military counterweight to the federal government's standing army, and the right is thus assertable only by states, not individual citizens.

Reynolds, *Critical Guide*, *supra* note 34, at 488.

⁴⁴ See Henigan, *supra* note 14; see also Dennis Henigan & Keith A. Erhman, *The Second Amendment and Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989).

⁴⁵ See Van Alstyne, *supra* note 14, at 1237-38.

among other things, the right of states to nullify federal gun control regulations, like the assault weapons ban.⁴⁶

To get around this, Henigan interprets the "well regulated Militia" mentioned in the introductory clause of the Second Amendment as "federally regulated," or in his words, today's National Guard.⁴⁷ Conveniently, his interpretation has the practical effect of rendering the Second Amendment (pg.235) a nullity since, according Henigan, the Supreme Court has held that the National Guard is the equivalent of the militia.⁴⁸ Since "gun-control laws typically exempt the National Guard," Henigan argues, "the Second Amendment has been essentially irrelevant in terms of an actual constitutional barrier to gun-control laws...."⁴⁹ Unfortunately, as many noted scholars have demonstrated, the National Guard is not the "Militia" the Framers of the Second Amendment had in mind.⁵⁰

Henigan attempts to counter the textualist and originalist arguments by appealing to *stare decisis*. Henigan claims that the United States Supreme Court,⁵¹ all the federal lower courts,⁵² many states courts,⁵³ as well as history⁵⁴ support his conclusion that the amendment poses no constitutional problem for gun control measures. Henigan states that "in *United States v. Miller* the [Supreme] Court laid out the basic Second Amendment analysis that has informed judicial decision-making on this issue to this day."⁵⁵ As I have argued elsewhere, the *Miller* decision raised more questions than

⁴⁶ See Reynolds & Kates, *supra* note 14, at 1751-52.

⁴⁷ See HENIGAN, ET AL., *supra* note 15, at 2. Henigan writes:

"[T]he militia was infected with substantial governmental regulation, and it was government regulation of a military force designed to be used for collective defense. In the modern era, the only such military force we have, that is, the only such militia we have, is the National Guard."

Id.

⁴⁸ See *Perpich v. Department of Defense*, 496 U.S. 334, 348 (1990). It is worth noting that *Perpich* did not deal with the term "militia" in the context of the Second Amendment.

⁴⁹ HENIGAN, ET AL., *supra* note 15, at 2; see also *id.* at 4 ("[T]he only well regulated militia we have ... is the National Guard.").

⁵⁰ "Today's national guard is a very different force from the colonial-era militia. With 178,000 full-time federal employees and almost all of its budget drawn from the federal government, the National Guard is, for all practical purposes, a federal force." Col. Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 384-85 (1994). See also Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1166 (1991):

Nowadays, it is quite common to speak loosely of the National Guard as "the state militia," but 200 years ago any band of paid, semiprofessional, part-time volunteers, like today's Guard, would have been called "a select corps" or "a select militia"—and viewed in many quarters as little better than a standing army. In 1789, when used without any qualifying adjectives, "the militia" referred to all Citizens capable of bearing arms.... [Thus], the "militia" is identical to "the people."

Id. (citations omitted).

⁵¹ See HENIGAN, ET AL., *supra* note 15, at 1-2 (citing *United States v. Miller*, 307 U.S. 174 (1939) as standing for the proposition that "there is no constitutional right to own guns for purposes unrelated to the organized militia").

⁵² See *id.* at 4-6.

⁵³ See *id.* at 13.

⁵⁴ See *id.* at 14 (discussing the evolution of the colonial militia into the modern-day National Guard). Of course, Henigan's use of history is selective. He makes no attempt to answer the claims Joyce Lee Malcolm puts forth in her book *To Keep and Bear Arms*, regarding the origin and development of the right. See MALCOLM, *supra* note 14.

⁵⁵ HENIGAN, ET AL., *supra* note 15, at 1.

it answered, and its (pg.236) application by lower federal courts has been less than completely faithful to the Supreme Court's actual holding.⁵⁶

Henigan also writes confidently of having "constitutional policy" on his side when it comes to applying the Second Amendment to actual cases. He states that:

a strong argument can be made, in terms of constitutional theory and constitutional policy, that it makes absolutely no sense to apply the same constitutional standards in free speech cases to right-to-bear-arms cases because of the nature of the right, and the effect on the community's interest of unrestricted exercise of that right.⁵⁷

Henigan declines to outline such an argument, or otherwise answer contrary persuasive arguments that have been made, which conclude that there is no reason to treat the Second Amendment any differently than, for example, the First Amendment.⁵⁸

What Henigan *does not* have on his side is much in the way of scholarly support;⁵⁹ nor does he seem to need it. He makes no attempt to refute those scholars who advocate the individual rights position with persuasive evidence supporting his position. Instead, he maintains that anyone supporting the Standard Model view is either a stooge for the National Rifle Association, or is irresponsibly giving aid and comfort to the various "neo-militias" whose presence around the country has been (pg.237) widely publicized of late.⁶⁰ He argues as if the National Rifle Association was the only organization promoting an individual rights position.⁶¹

B. The Insurrectionist Theory of the Second Amendment

⁵⁶ See Denning, *supra* note 16, at 972. See also McClurg, *supra* note 1, at 102 ("To present *Miller* as standing clearly for either the collective right view or the individual right view is to commit the fallacy of one-sided assessment, because such a presentation depends on ignorance of strong competing evidence and arguments.") (footnote omitted).

⁵⁷ HENIGAN, ET AL., *supra* note 15, at 14.

⁵⁸ See, e.g., Powe, *supra* note 13, at 9-10 [ed. published at 1317-1319]. Many influential nineteenth century commentators rejected the "collective rights" interpretation proffered by Henigan, and explicitly compared the Second Amendment to other constitutional guarantees, like the First Amendment. See, e.g., THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 298 (3rd ed. 1898) ("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.... 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."); JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 239 (5th ed. 1880) (describing the limits on the Second Amendment by reference to the First: "The clause is analogous to the one securing freedom of speech and of the press. Freedom, not licence, is secured; the fair use, not the libelous abuse, is protected.").

⁵⁹ The entire book (especially Henigan's sections) is devoid of helpful citations. A bibliography is included, but interestingly enough, no mention is made of the works of any individual rights scholars other than Sanford Levinson.

⁶⁰ HENIGAN, ET AL., *supra* note 15, at 21 ("I can't imagine any reasonable person taking [the insurrectionist] view of our Constitution, and yet it seems to me to be a view that is the logical extension of Levinson's theory of the Second Amendment, as well as the NRA's theory of the Second Amendment, and the logical extension of all the rhetoric we hear about having the right to keep and bear arms in order to resist tyranny.").

⁶¹ According to my count, "NRA" or the "National Rifle Association" is mentioned over 80 times in 24 pages. In contrast, Henigan mentions only one law review article taking a position contrary to his, Sanford Levinson's *The Embarrassing Second Amendment*, which he tries to discredit by claiming that Levinson finds a constitutional right to revolution embodied in the Second Amendment. See HENIGAN, ET AL., *supra* note 15, at 20-22.

Henigan characterizes the arguments made by those who have suggested that the Second Amendment ought to be taken seriously as supporting an "insurrection theory" of the Second Amendment,⁶² and a "constitutional right to revolution."⁶³ Might such a theory (which he unfairly attributes to Texas law professor Sanford Levinson), Henigan asks, encompass "an individual's right to determine when government has gone too far?"⁶⁴ "Who," he asks, poised on the edge of his slippery slope, "is to determine when government has gone too far?"⁶⁵ Having taken the first step, Henigan picks up speed on the way down, darkly warning that

[i]f [the insurrectionist theory] is seriously being suggested as a constitutional right, then these advocates ... are sowing the seeds of anarchy in this country. I believe that ... their position is a prescription for anarchy—anarchy that is inconsistent with the protection of the other rights in the Bill of Rights.⁶⁶

A glance at Levinson's article shows that nowhere in the text does he suggest that there is a "constitutional right" to revolution.⁶⁷ It simply does not follow from (pg.238) Levinson's observations about the ideological context in which the right to bear arms was articulated that an individual right interpretation of the Second Amendment would require "the courts to determine whether the government has become sufficiently 'tyrannical' so that armed insurrection becomes constitutionally protected."⁶⁸ Neither does Henigan's assertion that "[t]he logical extension of Levinson's position is

⁶² The insurrectionist theory, according to Henigan, posits that the Second Amendment guarantees a constitutional right to revolt against the government—in essence it provides a legal defense for acts which might otherwise be treasonous. *See* Henigan, *supra* note 14, at 110 (characterizing the "insurrectionist theory" as "a startling assertion of a generalized constitutional right of all citizens to engage in armed insurrection against their government" and stating that such a theory "represents a profoundly dangerous doctrine of unrestrained individual rights which, if adopted by the courts, would threaten the rule of law itself").

⁶³ HENIGAN, ET AL., *supra* note 15, at 21.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Levinson does, however, correctly locate the ideological origins of the Constitution in the civic republican tradition in which the Founders were schooled. *See* Levinson, *supra* note 14, at 650 ("[T]he implications of republicanism might push us in unexpected, even embarrassing directions: just as ordinary citizens should participate actively in governmental decision-making through offering their own deliberative insights, rather than be confined to casting ballots once every two or four years for those very few individuals who will actually make decisions, so should ordinary citizens participate in the process of law enforcement and defense of liberty rather than on professionalized peacekeepers, whether we call them standing armies or police.").

⁶⁸ Historian J.G.A. Pocock described the republican civic tradition in the following terms:

The Whig canon and the neo-Harringtonians, Milton, Harrington, and Sidney, Trenchard, Gordon and Bolingbroke, together with the Greek, Roman, and Renaissance masters of the tradition as far as Montesquieu, formed the authoritative literature of this culture; and its values and concepts were those with which we have grown familiar—a civic and patriot ideal in which the personality was founded in property, perfected in citizenship but perpetually threatened by corruption; government figuring paradoxically as the principle source of corruption and operating through such means as patronage, faction, standing armies (as opposed to the ideal of the militia), established churches (opposed to the Puritan and deist modes of American religion) and the promotion of a monied interest A neoclassical politics provided both the ethos of the elites and the rhetoric of the upwardly mobile, and accounts for the singular cultural and intellectual homogeneity of the Founding Fathers and their generation. Not all Americans were schooled in this tradition, but there was (it would almost appear) no alternative tradition in which to be schooled.

J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 507 (1975).

So the ideas Levinson expresses are certainly not new with him; however much Mr. Henigan finds them unpleasant, the idea of armed resistance to tyranny is central to the founding of our American republic. Henigan, *supra* note 14, at 123.

that courts are powerless to punish armed insurrection against the government so long as the revolutionaries believe in good faith that the government has become a tyranny"⁶⁹ necessarily follow either.

Either Henigan is being deliberately obtuse in order to arouse sympathy for his "common sense" view of the Second Amendment, or else in reading all the scholarship dealing with the ideological origins of the Second Amendment, Henigan has just missed the point. The scholars who have written on the Second Amendment have been quite circumspect when it comes to writing about revolution—particularly in light of the appearance of private militias and an increase in the level of general antipathy towards the government.⁷⁰ None would argue for the existence of a constitutionally protected right to revolution, because the existence of such a right might mean the state would be rendered helpless to engage in self-preservation. Moreover, the Constitution itself (pg.239) explicitly empowers the federal government to oppose rebellion on a national scale, as well as within the states.⁷¹

The Second Amendment, however, seems to offer citizens an assurance that should the government attempt to move against real or imagined rebels unreasonably or prematurely, the citizenry would have the means to oppose it. University of Texas law professor and noted First Amendment scholar, L.A. Powe, Jr., has made a useful analogy between the First Amendment's traditional prohibition against prior restraint and the Second Amendment.⁷² According to Powe, outlawing prior restraint did not confer immunity from prosecution for seditious libel *after* publication, but merely left the decision whether punishment would be imposed up to a jury.⁷³ As for the Second Amendment, the analogy works something like this: should someone (mis)use the Second Amendment and start a rebellion when the government was not acting oppressively, the conspirators could (and should) be punished. But disarming the population because someone *might* endanger the existence of the state would be a form of prior restraint that the Second Amendment prohibits.⁷⁴

Yet, confident that Henigan's critique of Sanford Levinson's article is a sufficient repudiation of the entire Standard Model school; and believing that the parade of presumed legal luminaries quoted at the beginning of the book who claim the Second Amendment is meaningless makes it so, the rest of the book proceeds to discuss gun control with only bare mention of the Second Amendment.

III. THE ABA AND THE SECOND AMENDMENT

⁶⁹ *Id.*

⁷⁰ *See, e.g.*, Glenn H. Reynolds, *Up in Arms About a Revolting Movement*, CHI. TRIB., Jan. 30, 1995, § 1, at 11.

⁷¹ *Compare* U.S. CONST. Art I, § 8, cl. 16 ("The Congress shall have Power ... To provide for calling forth the Militia to ... suppress Insurrections") *with* Art. III, § 3 (defining treason as "levying War against [the United States]"); *and* Art. IV, § 4 (guaranteeing each state a "Republican Form of Government," and guaranteeing the protection of each state against "domestic Violence" on application of either the legislative branch or the executive branch, should the former be unavailable).

⁷² *See* Powe, *supra* note 13, at 58-60 [ed. published at 1364-65].

⁷³ *Id.* at 33 [ed. published at 1342] (emphasis added).

⁷⁴ *Id.* at 75 [ed. published at 1384] (emphasis added).

Like other members of the "elite bar," the American Bar Association has gone to great lengths to deny the Second Amendment a place in the pantheon of individual rights.⁷⁵ It has even instituted a campaign to "educate" the laity about the Second Amendment's modern irrelevance.⁷⁶ Like his co-authors, Bruce Nicholson, the ABA's legislative counsel, assumes that opposition to gun control is monolithic, beginning and (pg.240) ending with the NRA.⁷⁷ In addition, Nicholson accuses those who object to gun control measures on Second Amendment grounds of having an hidden agenda. According to Nicholson, legislators have long used the Second Amendment as a "smoke screen ... to avoid action,"⁷⁸ because "lawmakers know quite well that the Second Amendment, with regard to gun-control legislation affecting private individuals, is not relevant in a prohibitive sense."⁷⁹ A combination of news media "negligence" and "electoral politics behind the gun control issue," argues Nicholson, has kept alive the "myth of the Second Amendment."⁸⁰

Nicholson thinks that *more* comprehensive gun control legislation is needed to prove that gun control legislation works. The reason such has not been forthcoming is because of the political clout of the NRA and the timidity of lawmakers in opposing the gun lobby.⁸¹ Echoing Dr. Helfand, Nicholson draws comparisons between the NRA and the tobacco lobby,⁸² again invoking the "public health" arguments against guns.⁸³

Nicholson then advocates passage of the so-called Brady II bill that would, *inter alia*, restrict gun ownership to those twenty-one years and up,⁸⁴ institute extensive licensing requirements,⁸⁵ restrict gun purchases to one a month⁸⁶ and prohibit those who are currently under a restraining order from owning firearms.⁸⁷

What is missing from Nicholson's dialogue is any discussion of whether or not such measures are constitutional. While it may be true that Brady II is a "moderate piece of legislation" when compared to the "firearms laws in other industrialized countries,"⁸⁸ those countries do not offer guarantees for the right to bear arms in their constitutions. The ABA's willingness to pronounce the Second Amendment a dead letter rests upon the fact that all lower federal courts presented with Second Amendment challenges to federal gun control regulations have chosen to interpret

⁷⁵ See Denning, *supra* note 16, at 963-65 (quoting the Congressional testimony of Edward Kallgren of the American Bar Association).

⁷⁶ *Id.*

⁷⁷ See HENIGAN, ET AL., *supra* note 15, at 26-27 ("Perhaps, though, the most important influence on American public opinion has been the National Rifle Association. The NRA, in our system of lawmaking, is one of the best-funded organizations in the country, and one of the most powerful lobbies.").

⁷⁸ *Id.* at 27.

⁷⁹ *Id.*

⁸⁰ *Id.* at 27-28. It is interesting that Nicholson assumes that because the belief that the Second Amendment protects an individual right to bear arms is so widespread among citizens, there has been a failure on the part of news media organizations (which are not particularly anti-gun control as a whole) to "expose" the Second Amendment "myth."

⁸¹ See *id.* at 29.

⁸² See *id.* at 33.

⁸³ See *infra* notes 101-30 and accompanying text.

⁸⁴ See HENIGAN, ET AL., *supra* note 15, at 40.

⁸⁵ *Id.* at 41.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 42.

(pg.241) *Miller* as holding that the Second Amendment protects no individual right. But, as I have shown in another article,⁸⁹ a casual glance at these federal court opinions show them to be at best misleading⁹⁰ and at worst, error-filled⁹¹ and intellectually dishonest.⁹² Furthermore, as Professor Powe writes: "[C]onstitutional law scholars have never been in the habit of deferring on constitutional issues to the random panels of lower courts and why [the Second Amendment] should be the one area where we would choose to do so escapes me."⁹³

It is a curious feature of the book that the lawyer-lobbyist for a gun control group (Henigan) is held forth as the objective expert on the constitutional history of the Second Amendment, while the spokesman for the "premier" legal professional association, for his part, blithely assigns a portion of our nation's legal charter to join the Privileges and Immunities Clause of the Fourteenth Amendment,⁹⁴ the Ninth Amendment⁹⁵ and the Guarantee Clause⁹⁶ in constitutional purgatory—destined forever to be what Lawrence Sager termed "underenforced constitutional norms."⁹⁷ Neither the rule of law, nor public perception of the legal profession is well served by treating a provision of the Bill of Rights as meaningless, particularly when doing so is out of line not only with public opinion,⁹⁸ but also with the opinions of legal scholars who have considered the issue thoughtfully.⁹⁹ As the final chapter shows, the authors' solutions to America's gun "problem" requires that the Second Amendment be neutralized, preferably by lawyers who have the authority to influence public opinion. Otherwise, the analogies to automobile licensure and the contrasts between the United States and the strict gun control laws of other "industrialized" countries lose their force. There is, after all, no constitutional guarantee to a driver's license, and other countries have not chosen to guarantee explicitly the right to bear arms in their constitutions.(pg.242)

IV. THE SECOND AMENDMENT AND THE "PUBLIC HEALTH" GAMBIT

In the final chapter of the book, David Hemenway, a lecturer at Harvard's school of public health, analyzes gun violence from a "public health" point of view.¹⁰⁰ Hemenway's public health

⁸⁹ See Denning, *supra* note 16.

⁹⁰ See *id.* at 981.

⁹¹ See *id.* at 997-98 (criticizing *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996)).

⁹² See *id.* at 991-93 (criticizing *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992)).

⁹³ See Powe, *supra* note 13, at 24 [ed. published at 1334].

⁹⁴ See U.S. CONST. amend. XIV ("No state shall enforce or make any law which shall abridge the privileges and immunities of citizens of the United States").

⁹⁵ See U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.")

⁹⁶ See U.S. CONST., Art. IV, § 4 (guaranteeing each state a "Republican Form of Government").

⁹⁷ See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV.L.REV. 1212,1213 (1978).

⁹⁸ See, e.g., *The Fight to Bear Arms*, U.S. NEWS & WORLD REP., May 22, 1995, at 29 (citing a poll in which 75% of persons surveyed believed the Constitution protected the right to own a gun).

⁹⁹ See *supra* note 14.

¹⁰⁰ See HENIGAN, ET AL., *supra* note 15, at 49. "Public health brings a broad to the issue of violence. As it has in the areas of cigarette smoking and motor vehicle injuries, public health has the ability to help change social norms; in this case, norms that accept lethal violence as a normal part of life in America." *Id.* at 50. Hemenway frequently makes comparisons between gun manufacturers and the automotive and tobacco industries, both in terms of the potential lethality of their respective products and in terms of their relative political strength. See *id.* at 33, 51.

approach differs from that of the "medical establishment"¹⁰¹ in that the former "focuses directly on prevention—stopping the problem before it happens.... [and] tends to look at the community as a whole, rather than one individual at a time."¹⁰²

Hemenway believes that empirical evidence supports his claim that gun ownership increases accidental deaths due to, among other things, improper storage,¹⁰³ and has even led to an increase in adolescent suicides in the last twenty years.¹⁰⁴ Lest one think firearms safety education might help reduce the number of accidental deaths due to firearms, Hemenway quickly adds that "gun owners who had received formal training were more likely to store their guns in [an] unsafe condition";¹⁰⁵ that is, loaded and unlocked.

Hemenway also believes that the approaches taken to make automobiles safer could be applied to make guns safer. The creation of a federal agency empowered to promulgate strict gun safety standards is a start.¹⁰⁶ Hemenway finds it "ridiculous that so many of the rules regulating firearms have to go through the legislative rather than the administrative process."¹⁰⁷ Hemenway notes that as Congress should not spend its time "determining the side-impact performance standards for automobiles," it likewise should not "be in the business of deciding which firearms are and are not assault weapons."¹⁰⁸ To pay for the necessary oversight involved and for the "huge costs on (pg.243) society" imposed by "the medical treatment of gunshot wounds," Hemenway believes a high tax on guns and ammunition is warranted.¹⁰⁹ Reducing the number of firearms dealers should likewise be effected, again by a higher tax on dealer licenses.¹¹⁰

Again, the Second Amendment is bypassed altogether,¹¹¹ the discussion proceeding immediately to a comparison of the United States' lack of gun control laws, relative to England and Canada.¹¹² Hemenway enthusiastically pursues this line of argument by describing the number of

¹⁰¹ Hemenway is not a physician.

¹⁰² *Id.* at 50.

¹⁰³ *Id.* at 54. "Pediatric morbidity and mortality due to accidental gunshot wounds are often the result of spontaneous happenings when children find and play with a loaded weapon." *Id.*

¹⁰⁴ *Id.* at 55. "Between 1970 and 1990 the suicide rate for youth aged fifteen to nineteen increased 90 percent. The increase in the adolescent suicide rate can be largely accounted for by the increase in firearm suicides." *Id.* This is a breathtaking statement, but one for which Hemenway offers no support.

¹⁰⁵ *Id.* at 54-55.

¹⁰⁶ *See id.* at 68.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 69. "[T]he revenues from a firearms and ammunition tax should be earmarked for medical care of gunshot wounds, for research, and for education." *Id.*

¹¹⁰ *Id.*

¹¹¹ This time Hemenway's "interviewer" poses the following question:

A[letheia] P[ress]: I hope that, at this point, we have a foundation for a substantive discussion of the more contentious issues that are being debated today by advocates and opponents of gun control. Even some of your basic observations are contested by the NRA leadership; for example, the NRA rejects the motor vehicle analogy on constitutional grounds, that is, on Second Amendment grounds. This is a frivolous argument, and it is clear that there is no constitutional barrier to regulating firearms.

Id. (citations omitted).

¹¹² *Id.* at 59. [ed. note: Footnote 112 exists twice in the printed edition. Second instance reads "*Id.* at 66."]

other "developed countries" that have "heavily restricted" handgun ownership.¹¹³ Nor does Hemenway restrict his calls for strict gun control to handguns. Discounting the Swiss model of gun ownership, Hemenway says "guns available in Switzerland are not handguns, nor are they personally owned by the civilian population. Rather, they are military weapons assigned to a militia for use in the event of war. In Switzerland, gun ownership comes with a burden of civic responsibility."¹¹⁴

Instead of making the plausible argument that Americans should try to instill that type of social responsibility in their gun owners,¹¹⁵ Hemenway summarily dismisses American motives for gun ownership: "[A] large proportion of guns in private households in the United States are handguns. These guns are not for national defense, (pg.244) but are truly personal weapons, designed for use against other citizens. They are under the domain of the individual owner and are owned for personal gratification, with no obligation to the state."¹¹⁶ Yet Hemenway neither calls for the reinstatement of universal military service, nor does he believe that allowing citizens to purchase military weapons vitiates the need to regulate private gun ownership heavily. Later in the chapter he notes approvingly that "[t]he ban on machine guns, the weapons mobsters used in the 1930s, successfully eliminated this weapon from criminal and noncriminal use."¹¹⁷

There are, however, plausible interpretations of the Second Amendment that would uphold restrictions upon certain types of handguns like the much-maligned "Saturday Night Specials," while striking down the legislation of the 1930s that banned unlicensed possession of machine guns because such are the types of military weapons the amendment was intended to protect.¹¹⁸ Hemenway does not examine the contradictory implications of his statements.

¹¹³ *Id.* at 66-67.

¹¹⁴ *Id.* at 67. Actually, Hemenway is incorrect about the firearms not being owned individually by the Swiss people. See BENJAMIN R. BARBER, *THE DEATH OF COMMUNAL LIBERTY: A HISTORY OF FREEDOM IN A SWISS MOUNTAIN CANTON* 269-71 (1974). Barber writes:

To this day, the population is armed in a manner scarcely imaginable in any other country of the world, dictatorship or democracy. Every male owns a rifle and fifty rounds of ammunition, which he is required to keep in good working order at home and to practice with every year. Younger men who have undergone basic training in the recent period of weapons modernization have been issued heavy automatic weapons (like the American M-16), which can also be found nestling in houses and apartments throughout Switzerland.

Id. at 270.

¹¹⁵ For such an argument, see Brannon P. Denning & Glenn Harlan Reynolds, *It Takes a Militia: A Communitarian Case for Arms Bearing*, WM. & MARY BILL RTS. J. (forthcoming 1997) (criticizing the Communitarian movement's call for domestic disarmament in their platform as inconsistent with other basic tenets of their agenda).

¹¹⁶ HENIGAN, ET AL., *supra* note 15, at 67. Note the implication of Hemenway's contrast between weapons kept in Switzerland, where an obligation to the state attaches to ownership of that firearm, and those in the United States, who keep them for "personal gratification." Hemenway's gross generalization aside, there is an important point that Hemenway does not consider: the connection between the right of personal defense, and the right of the body politic to defend itself against tyranny. Don Kates has argued that there was a close fit in the minds of the Framers among the Second Amendment, the use of the militia to defend the state, and the individual's natural right to self-defense. See Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMM. 87, 89 (1992) (describing the importance of self-defense to the Framers). According to Kates, as a collective polity had the natural "right" to defend itself against enemies, foreign and domestic, by force of arms if necessary, an individual had a similar natural right. This right was the political right writ small. See *id.* at 89-90.

¹¹⁷ HENIGAN, ET AL., *supra* note 15, at 71.

¹¹⁸ Cf. Glenn H. Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647, 665 (1994); see also *Aymette v. State*, 27 Tenn. [errata: 21 Tenn.] 156, 157 (1840) (holding that "the arms the right to keep which is secured [under the Tennessee Constitution] are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment").

Hemenway also alludes to studies purporting to show "a general link between handgun availability and handgun use in violent crime."¹¹⁹ According to Hemenway, claims about the deterrence of crimes by an armed populace and prevention of crimes during their commission by armed victims are "uncertain."¹²⁰ Moreover, Hemenway discounts the studies of Gary Kleck,¹²¹ who has published studies suggesting that gun possession deters crime¹²² in favor of a study by Arthur Kellerman, which stated that (pg.245) "[p]eople who keep guns in their homes appear to be at greater risk of homicide in the home than people who do not."¹²³

The Kellerman study cited by Hemenway has been much criticized¹²⁴ and there is a recent study out that alleges a connection between gun ownership and a drop in the overall violent crime rate.¹²⁵ Moreover, there is considerable evidence that the public health establishment is, despite its scientific pretensions, driven solely by an anti-gun agenda.¹²⁶ My primary objection to Hemenway's chapter, though, is the same as to Dr. Helfand's Foreword: it is irrelevant to the supposed subject of the book. Hemenway never answers the objections to his let's-treat-guns-like-cars analogy: that there is no constitutional right to drive a car.¹²⁷ Further, he never speculates on what types of gun control limitations might, consistent with the Second Amendment, be; or conversely, what kinds of gun control measures might warrant invalidation under the Second Amendment.¹²⁸

Hemenway's faith in the ability of bureaucracy to regulate firearms without becoming oppressive seems hopelessly retrograde not only in light of the prevailing political climate of the country right now, but also in light of the recent work by "public choice" scholars who question the assumption that executive agencies are best suited to act in the public interest.¹²⁹ Moreover, Hemenway seems oblivious to the (pg.246) dangers inherent in similar "common sense" solutions to

¹¹⁹ See HENIGAN, ET AL., *supra* note 15, at 60.

¹²⁰ *Id.* at 61.

¹²¹ See GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA (1991).

¹²² HENIGAN, ET AL., *supra* note 15, at 61 (stating that Kleck's work was analyzed by unnamed "University of Maryland researchers" and that "[n]one of it held up under scrutiny").

¹²³ *Id.* at 64.

¹²⁴ See, e.g., Don B. Kates, Jr., et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda*, 62 TENN. L. REV. 513, 584-595 (1994) [hereinafter Kates, et al., *Guns and Public Health*].

¹²⁵ See, e.g., John R. Lott & David D. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997) (arguing that allowing citizens to carry concealed weapons not only did not increase accidental deaths or suicides, but had the effect of lowering incidents of violent crime as opposed to states without "right to carry" laws).

¹²⁶ See, e.g., Kates, et al., *Guns and Public Health*, *supra* note 124, at 518 (noting the irrational approach toward guns exhibited by health advocates).

¹²⁷ When the question is posed to him by the interviewer (who just pages before dismissed the idea that the Second Amendment circumscribed the potential scope of gun control laws as "frivolous") Hemenway dodges it. The interview asks about Wayne LaPierre's (the chief of the NRA), objections to the motor vehicle analogy on constitutional grounds, Hemenway responds that, "[L]aPierre also stated that the right for Americans to own guns is a 'God-given right.' I wonder how he knows that?" HENIGAN, ET AL., *supra* note 15, at 70. He then characterizes the argument that gun registration will lead to confiscation as "a red-herring," the purpose he assures us, "is to disrupt the supply of guns to the black market." *Id.* Note he never answers the original question.

¹²⁸ Again, Hemenway constructs the Second Amendment Absolutist straw man to tear down. Many prominent supporters of the Second Amendment acknowledge that the Second Amendment is subject to limits, as is the First Amendment. See Kates, *Handgun Prohibition*, *supra* note 14, at 257 ("Recognizing that the [Second] amendment guarantees an individual right applicable against both federal and state governments by no means forecloses all gun control options.").

¹²⁹ See DANIEL FARBER & PHILLIP FRICKEY, PUBLIC CHOICE THEORY: A CRITICAL GUIDE (1991); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 99-134 (1994) (describing how excessive delegation by the Congress to executive agencies can weaken democracy, endanger liberty, and result in unreasonable laws).

perceived public health problems that denigrate individual liberties. For example, a common sense solution for controlling the AIDS epidemic might be to require mandatory testing for members of high-risk groups, then to quarantine all those who test positive for the virus. Not surprisingly, when addressing *these* problems, other public health experts have been much more concerned with fashioning solutions that do not involve the creation of additional bureaucracy or onerous governmental regulations.

V. THE RHETORICAL FALLACIES OF THE TALKING-HEAD CONSTITUTIONALISTS

In the article mentioned earlier in this Essay, Professor McClurg maintained that professional discourse should serve as "an anchor of reason" in the debate surrounding gun control.¹³⁰ "[N]o matter how bombastic or outrageous the popular discourse becomes, a foundation of rationality exists in the professional dialogue that is available to guide the decision making of those vested with power to reform the law."¹³¹ I would qualify the foregoing sentence with the word "should." As I have shown, the contributors to *Guns and the Constitution* commit some of the same logical and rhetorical errors McClurg catalogued in his survey of the public discourse surrounding the passage of the Brady Bill.

A. Appeals to Improper Authority

McClurg notes that

speakers can promote the credibility of their arguments by aligning themselves with persons of outstanding character and reputation who share their views. This is not fallacious if these authorities have specialized knowledge concerning the problems they address.... But where the person is not qualified as an expert ... appealing to that person's judgment as a basis for deciding an issue commits the fallacy of ... an improper appeal to authority.¹³²

Many of those quoted in *Guns and the Constitution*, however well-qualified they might be in the fields of medicine or public health, are simply *unqualified* to impart useful information regarding whether or not there is, as the subtitle of the book states, a "myth" that the Second Amendment is a barrier to gun control. However moving Dr. Helfand's anecdotes, taken from his experiences as an emergency room doctor, are, (pg.247) they are wholly irrelevant to the debate over constitutional limitations on gun control measures. Similarly irrelevant is the public health approach to gun violence, which characterizes it as an "epidemic" or similar sort of health problem that requires governmental restrictions on the supposed "cause" of the violence; that is, handguns and assault weapons.

Moreover, the authors' use of quotations from respected members of the legal community¹³³ who happen to believe that the Second Amendment offers nothing to the individual in the way of

¹³⁰ See McClurg, *supra* note 1, at 63.

¹³¹ *Id.*

¹³² *Id.* at 71.

¹³³ Among those quoted in the opening pages of the book are Erwin M. Griswold, the late Warren Burger, two past presidents of the American Bar Association, and a number of former Attorneys General of the United States.

a judicially-enforceable guarantee is similarly misleading. First, one might note that all those statements were made in the context of *public*, as opposed to *professional* discourse. All the quoted statements were apparently made either in public remarks or in newspaper opinion pieces. Further, it should be emphasized that none of those persons quoted have published a scholarly article on the Second Amendment, or have given the "unanimous" federal court opinions a close reading. It is likely that these men were simply repeating the conventional wisdom regarding the Second Amendment as they learned it. But just because *they* think the Second Amendment is meaningless does not make it so, nor should their opinions be regarded as somehow more persuasive than those of say, Sanford Levinson or William Van Alstyne, both of whom have made their claims about the Second Amendment while engaging in professional discourse.

B. The Ever-Popular Ad Hominem

Andrew McClurg also observes that "[a] time-honored rule of effective persuasion is that it may be more profitable to attack the arguer than it is to attack the argument."¹³⁴ This is particularly true of *Guns and the Constitution*. The authors of the book use every opportunity to heap scorn upon the National Rifle Association as the fountainhead of error regarding the Second Amendment, and as the chief corrupter of politicians who would, but for the bullying of the NRA, vote for "reasonable" gun control legislation. Repeated comparisons to the tobacco companies and the automotive industry reveal the extent to which the authors believe guns and the gun lobby are grave threats to the health of the nation. The authors spend so much time tearing down the NRA that they conveniently ignore the *arguments* that both the NRA and those who are not NRA members are making about the Second Amendment guaranteeing an individual right. That the NRA has taken what some may consider extreme positions in the past, and has used its political muscle to target certain (pg.248) politicians unfairly as "gun grabbers," does not mean that it is incapable of being on the winning side of an argument such as the one over the meaning of the Second Amendment.

C. Slippery Slopes, Red Herrings and Straw Men

In his article, McClurg included a discussion of "Fallacies of Diversion."¹³⁵ These fallacies "operate by distorting the reasoning process in ways intended to make the audience lose track of or ignore the real point. This is accomplished through overstatement and understatement, by making irrelevant connections between premises and conclusions, and by drawing irrelevant analogies."¹³⁶

1. The Slippery Slope

The slippery slope "consists of attacking a proposal by raising the spectre of terrible results that will follow if the proposal is adopted."¹³⁷ As McClurg points out, this is used with great effectiveness by both sides in the Brady Bill debate.¹³⁸ It is a favorite of federal courts, which never

¹³⁴ McClurg, *supra* note 1, at 74 (footnote omitted).

¹³⁵ *Id.* at 80.

¹³⁶ *Id.* at 81 (footnotes omitted).

¹³⁷ *Id.*

¹³⁸ *See, e.g., id.* at 87-88.

tire of straining the limits of logic when asked to recognize an individual right to keep and bear arms.¹³⁹ Similarly, Dennis Henigan's "insurrectionist theory of the Second Amendment" similarly invokes a parade of horrors as the natural result of recognizing an individual's right to bear arms.

2. *The Second Amendment Absolutist: A Straw Man*

The authors of *Guns and the Constitution* also never tire of contrasting the "common sense" of various "reasonable"¹⁴⁰ gun control measures with "Second Amendment absolutists" who oppose every gun control measure. Alternatively, they contrast themselves (and other "reasonable" people) with the "radical" NRA that supports cop-killer bullets, plastic guns and other "extreme" positions.¹⁴¹ While this (pg.249) might be a valid complaint if the NRA was the only one making an argument for giving meaning to the Second Amendment, it is not and has not been for several years now. Moreover, most who have looked at the Second Amendment readily admit that it is no more absolute than the First Amendment.¹⁴² The relevant questions are: "How much regulation is constitutionally permissible?" or "Is it permissible to ban an entire class of weapons based on certain physical characteristics the weapons possess?" These are questions that deserve attention in the course of meaningful professional dialogue of the sort eschewed by the authors of the book.

3. *The Red Herring*

A close relative of the straw man, the red herring "divert[s] attention by sending the audience chasing down the wrong trail after a non-issue."¹⁴³ For example, to the extent that the debate centers around the question of whether the Second Amendment protects an individual right to keep and bear arms, or whether that right belongs to an undifferentiated mass citizenry, the whole "public health" argument is a red herring. It is simply constitutionally irrelevant. Similarly, pro-gun control arguments that concentrate on how much *less* restrictive gun control proposals like Brady II are as compared to the gun control policies of other countries are similarly misleading because other countries have not protected firearms in their constitutions the way the United States has.

4. *The Faulty Analogy*

A related fallacy of diversion is the faulty analogy. In *Guns and the Constitution*, the faulty analogy most often made is between guns and automobiles. Bruce Nicholson and David Hemenway both make the case for the creation of a federal bureaucracy to promulgate safety standards for guns similar to that which issues safety standards for automobiles. As Professor McClurg points out, "[f]or an analogy to be valid, the situations being analogized must be truly similar. Moreover, they

¹³⁹ See, e.g., *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (implying that sustaining a Second Amendment challenge could lead to persons claiming a right to keep and bear nuclear weapons).

¹⁴⁰ See, e.g., HENIGAN, ET AL., *supra* note 15, at 12 ("[O]ver and over again, you are seeing courts reject the view that there is some kind of fundamental constitutional right to own guns that stands in the way of elected representatives making reasonable judgments about gun regulation in the interest of public safety.").

¹⁴¹ See *id.* at 29-30.

¹⁴² See *Kates*, *supra* note 14, at 264-65.

¹⁴³ McClurg, *supra* note 1, at 90 (footnote omitted).

must be alike in ways that are important to the reason why the analogy is being drawn."¹⁴⁴ In the guns-cars comparison, the situations are inapposite.

Guns often perform exactly how they are supposed to: one pulls the trigger and the gun discharges. On the other hand, safety standards for cars often result from design flaws that cause automobiles to react in ways consumers *do not* expect, like when they explode in rear-end collisions. Encumbering guns with devices ostensibly to make (pg.250) them "safer" might have the result of rendering them as effective for their intended purpose as the blunted safety scissors used by preschoolers.

Moreover, the arguments that guns ought to be registered and licensed just like cars suffers from the same faulty analogy.¹⁴⁵ Bruce Nicholson states that registration "provide[s] the public interest with a certain measure of protection and accountability for individual ownership, and it provides a system that addresses public safety and public concern about ownership."¹⁴⁶ Yet such an argument again ignores the constitutional dimension to gun ownership expressed in the Second Amendment. Note that, at least in the context of the First Amendment, similar regulation by governmental authorities has been held to be unconstitutional.¹⁴⁷ Were it not for the fact that the right to bear arms were at issue, one wonders whether Bruce Nicholson and the American Bar Association would be so sanguine about extensive federal licensure and registration requirements as a precondition to the exercise of other rights guaranteed in the Constitution.

Professor McClurg concluded his article by locating the origin of fallacies in "unconscious self-deception."¹⁴⁸ He wrote:

[w]e often believe ideas or principles not so much because they have been proven to us, but because our passion, interest, and self-love allow us to deceive ourselves. In other words, we believe what we want to believe; truth and utility become one and the same. This self-deception allows us to kill or at least suppress any doubts we might have in forming opinions about an issue. The result is that the judgments we make and accept concerning the issue are false..., [and] the more an issue stimulates our passion or threatens our personal interests, the more likely it is that we will resort to faulty reasoning in debating the issue and the more likely it is that we will accept faulty reasoning from others.¹⁴⁹

Of course, Professor McClurg was looking at the debate through the lens of public discourse. While legal scholars and law professors are still human, and are thus still susceptible to emotion, in the conduct of their professional discourse they should aspire to control those passions in favor of a disinterested approach that provides illumination for public discourse. It seems that disciplining our professional discourse is not an unreasonable goal. Otherwise the whole scholarly process is undermined—what good is it to spend hours researching, thinking and writing about a topic if one's peers have made up their minds on a subject and refuse to entertain other points of view?(pg.251)

¹⁴⁴ *Id.* at 92.

¹⁴⁵ See HENIGAN, ET AL., *supra* note 15, at 39.

¹⁴⁶ *Id.*

¹⁴⁷ See *NAACP v. Alabama*, 357 U.S. 449, 461 (1958) (holding that a production order served by the State of Alabama on the NAACP "must be regarded as entailing the likelihood of a substantial restraint upon the exercise by [the NAACP's] members of their right to freedom of association").

¹⁴⁸ McClurg, *supra* note 1, at 109.

¹⁴⁹ *Id.* at 109-10 (footnotes omitted).

"When no common ground can be found regarding an issue," McClurg wrote, "there is no room for compromise. To acknowledge that there are reasonable and meritorious arguments on the other side in such a case is to discredit one's own beliefs."¹⁵⁰ Professional discourse on the Second Amendment, gun control, or any other issue, is best served it seems when a participant in the dialogue approaches her subject a little unsure of the "rightness" of her position.

VI. THE PRICE OF "TALKING HEAD" CONSTITUTIONALISM

Describing the "'anything goes'" atmosphere of the gun control debate, McClurg compared it to "a professional wrestling match."¹⁵¹

The rules of intellectually honest debate are ignored. Illicit stratagems designed to gain competitive advantage are as likely to be cheered as jeered. I have never been quite sure whether to sit back and laugh at the absurdity of it all or jump into the ring swinging a chair.¹⁵²

Unfortunately, despite McClurg's faith in the ability of professional discourse to elevate public discourse, the opposite appears to be true in the debate over the meaning of the Second Amendment: the emotional appeals of public discourse are finding their way into the pages of law reviews, and are jeopardizing the ability to maintain meaningful professional discourse on the matter. Instead of reacting with amusement, scholars, whatever their views, should resist vigorously the encroachment of talking-head constitutionalism wherever it surfaces.¹⁵³ But it should be resisted in a dispassionate, reasoned manner that requires the discipline and detachment it foreswears. For however viscerally satisfying it might be to swing a chair in the ring of discourse, the aftermath impoverishes both sides, and leaves the public no more knowledgeable on the issue than before. Worse, the name-calling, faulty logic, and inability to find common ground breeds cynicism and distrust in the people scholars are supposed to be educating. Thus, in addition to dumbing down the dialectic, we debase our own profession as well.^(pg.252)

Moreover, I believe that Henigan and his fellow-travelers are wrong to attempt to squelch debate on the meaning of the Second Amendment, or any other provision of the Constitution for that matter, by saying that the courts have "settled" the issue. The implication is that further discussion is a waste of time. Scholars too frequently equate the Constitution with outcomes of Supreme Court cases,¹⁵⁴ even though the Supreme Court itself has recognized that it is the *Constitution* and not the

¹⁵⁰ *Id.* at 110.

¹⁵¹ McClurg, *supra* note 1, at 63.

¹⁵² *Id.*

¹⁵³ One scholar who, though he does not subscribe to the Standard Model view of the Second Amendment, has managed to maintain high levels of intellectual integrity and decorum in presenting his views is David C. Williams of the Indiana University School of Law. See David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879 (1996); Williams, *supra* note 14.

¹⁵⁴ See Sager, *supra* note 97, at 1221 (describing the contemporary tendency to "equate the existence of a constitutional norm with the possibility of its enforcement against an offending official" and attributing the prevalence of that view to "the practical dominance of the Supreme Court as the final arbiter of our constitutional affairs") (footnote omitted).

judicial gloss placed upon it by judges that is the law of the land.¹⁵⁵ Such strong appeals to *stare decisis* often occur only when one is satisfied with how the Court has decided the issue. Allowing erroneous decisions to stand unexamined by scholars, and to be cited over and over again by courts, thus acquiring the status of "settled law," creates a *judicial sclerosis* where error ossifies and is venerated in the name of continuity and stability.¹⁵⁶ The irony is that such an attitude can undermine stability by producing outcomes that seem absurd from the point of view of the laity.

In fashioning rules for constitutional discourse, scholars should neither "abandon the law review culture," as suggested by Andrew Herz, nor should they produce one-sided opinion pieces like Messrs. Henigan, Hemenway and Nicholson, which fail to engage, or even acknowledge, reasonable arguments that run counter to their position. Scholars do have a "dialogic responsibility," but it is neither a derelict nor irresponsible exercise of that responsibility to question old assumptions about "settled law."

Those looking for a strong constitutional counter argument to the arguments made by an ever-growing number of Standard Model scholars should be disappointed in this book. At best, the book presents an emotional "take-it-to-the-people" argument of the sort Andrew Herz urged in his article.¹⁵⁷ Its tone is that of public, not professional discourse, yet without the honesty of an op-ed, for *Guns and the Constitution* purports to be a work of scholarship. The approach is one likely to be adopted in the future by anti-Standard Modelers of all stripes, and might prove frustrating to those wanting straightforward engagement of the issue.^(pg.253)

There is a price to be paid for this conscious blurring of the lines between public and professional discourse, and the deliberate attempt to marginalize a provision of the Bill of Rights. Dialogue implies a two-way conversation; when parties are talking at, and not with, one another, common ground can never be discovered, and progress is never made. However "insular" the "law review universe" may be, it is the forum in which ideas are discussed among those who are supposed to provide structure for legal debates. When we settle for less rigorous standards, we risk a subtle, possibly imperceptible, but inevitable lowering of standards that has wreaked havoc in American politics, in the news media, and which now perhaps imperils legal scholarship. The Constitution, and the People, deserve better.

¹⁵⁵ See Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1348 (1990) ("Both Justice Douglas and Justice Scalia have maintained that judges take an oath to uphold the Constitution, and 'not the gloss which [the Court] may have put on it.'") (quoting *South Carolina v. Gathers*, 109 S. Ct. 2207, 2218 (1989) (Scalia, J. dissenting) (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949))).

¹⁵⁶ Recall the admonition of Oliver Wendell Holmes: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since...." Oliver Wendell Holmes, *The Path of the Law*, in RICHARD A. POSNER, ED., *THE ESSENTIAL HOLMES* 170 (1992).

¹⁵⁷ See note 19, *supra* and accompanying text.