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IT TAKES A MILITIA: A COMMUNITARIAN CASE FOR COMPULSORY ARMS BEARING

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During the last year, both Communitarianism and private militias have received a considerable amount of attention in the popular press and in law reviews; nevertheless, few observers have discussed the similarities between these two seemingly dissimilar movements. In this Essay, the authors demonstrate that Communitarians and militias actually have more in common than it might at first appear. Summarizing the Communitarian agenda, the authors note that Communitarians speak a language that would be readily understood by the Framers, who saw militias as an important vehicle through which civic virtue could be transmitted. The importance the Framers placed upon militias is evidenced by the prominence given to them in the text of the Constitution and in the Second Amendment.

As the authors point out, however, not only do Communitarians fail to acknowledge the connection between their ideology and the classical militia, their platform exhibits a hostility towards the rights guaranteed by the Second Amendment that is at odds with Communitarianism's other tenets. The authors argue that, as traditionally constituted, militias reinforce the same civic virtues that Communitarianism wishes to restore, while at the same time offering to individuals security against tyranny. The decline of the classical militia, say the authors, has led to a renewed interest in the Second Amendment and even the "neomilitia" movement as people search for something to fill the void left by the demise of the militia of republican ideology. That this point is ignored by Communitarians perhaps says something about Communitarianism that its proponents would rather not acknowledge. (pg.186)

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The authors are participants in the Internet Firearms Constitutional Law discussion group moderated by Professor Eugene Volokh of the University of California at Los Angeles Law School, in which many issues related to this Essay's topic are discussed and debated. We have benefited from many comments made there, no doubt sometimes in ways we are entirely unaware. We also have benefited from discussions and exchanges of manuscripts with a number of individuals, including David Kopel, Sanford Levinson, David Williams, Scot Powe, William Van Alstyne, Randy Barnett, Don Kates, and Robert Cottrol.

"We join with those who read the Second Amendment the way it was written, as a Communitarian clause, calling for community militias, not individual gunslingers."—The Communitarian Platform¹

INTRODUCTION

Political discourse in recent years has been dominated by two topics that seemingly have little in common. One is the growth of a "Communitarian" movement among scholars; the other is the growth of a "militia movement" among citizens who, for the most part, are not very scholarly. The two movements would appear to be incompatible, to say the least. Communitarians speak and write about the responsibility of government to foster virtue and responsibility among its citizens;² militia members speak ominously of the need to resist the encroachment of government.³ Yet appearances, in this case at least, are deceptive. As this Essay demonstrates, there is something of a nexus between the self-styled citizen-soldiers of the militia movement and the self-styled virtuous citizens of Communitarianism.

Seen as an attractive alternative to the "radical individualism" of our society, Communitarianism appeals to those on the left⁴ as well as the right.⁵ Communitarianism is touted as a viable third way between a societal egocentrism and a more dangerous collectivism.⁶ Along with interest in "civic republicanism"⁷ among legal academics like Frank Michelman,⁸ Cass Sunstein,⁹ and Mary Ann Glendon,¹⁰ Communitarianism promises to mediate (pg.187) between the desires of the individual and the good of the larger community. Communitarians believe that, properly employed, the government not only can influence moral behavior among its citizens but that it has an obligation

¹ AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES AND THE COMMUNITARIAN AGENDA* 265 (1993).

² *See id.* at 1-11.

³ *See* Patricia King, "Vipers" in the 'Burbs, *NEWSWEEK*, July 15, 1996, at 20-23.

⁴ *See, e.g.*, HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE AND OTHER LESSONS CHILDREN TEACH US* (1996).

⁵ *See* WILLIAM J. BENNETT, *THE BOOK OF VIRTUES: A TREASURY OF GREAT MORAL STORIES* (1993); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996). *See generally* Kevin Merida & Barbara Vobejda, *Promoting a Return to "Civil Society,"* *WASH. POST*, Dec. 15, 1996, at A1 (discussing the ideologically diverse groups promoting Communitarian ideas).

⁶ *See* ETZIONI, *supra* note 1, at 255-56; SANDEL, *supra* note 5, at 317-24.

⁷ The revival of civic republicanism is due in large part to historical studies of colonial ideology done in the 1960s and 1970s. *See, e.g.*, BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1992); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969).

⁸ *See* Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 *HARV. L. REV.* 4 (1986).

⁹ *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1564 (1988) (arguing for an application of republican ideals to contemporary controversies).

¹⁰ *See* GLENDON, *supra* note 5, at x-xi.

to do so.¹¹ In other words, Communitarians believe that not only can government legislate morality, but that in many settings it *ought* to.¹²

Contrast such a positive view of government with the often virulent anti-government rhetoric espoused by many in the so-called "militia movement."¹³ Under scrutiny like never before¹⁴—particularly in the wake of the Oklahoma City bombing case in which the prime suspects have alleged "links" to militia groups in Michigan¹⁵—most people now associate militias with the "angry white male"¹⁶ or with what historian Richard Hofstadter once referred to as the "paranoid style in American politics."¹⁷ Not surprisingly, the extravagant claims of various members of these

¹¹ See ETZIONI, *supra* note 1, at 11-14.

¹² *Id.* at 31-35.

¹³ See, e.g., MORRIS DEES, GATHERING STORM: AMERICA'S MILITIA THREAT 4-5 (1996) (describing how hatred of the federal government is driving the militia movement); David Corn, *The New Minutemen*, THE NATION, May 6, 1996, at 4 (describing militia members as "paranoid government-haters"); King, *supra* note 3, at 21-23 (describing members of Team Viper, a Phoenix militia group, as having "convinced themselves that their right to bear arms was in jeopardy and that the Feds were out to get them").

¹⁴ See Christopher John Farley, *Patriot Games:irate, Gun-Toting White Men Are Forming Militias—Are They Dangerous, or Just Citizens Defending Their Rights?*, TIME, Dec. 19, 1994, at 48; Richard A. Serrano, *Militias: Ranks Are Swelling*, L.A. TIMES, Apr. 18, 1996, at A1.

¹⁵ See Robert D. McFadden, *Links in Blast: Armed 'Militia' and a Key Date*, N.Y. TIMES, Apr. 22, 1995, at A1 (detailing alleged links of Oklahoma bombing suspects James Douglas Nichols and Terry Lynn Nichols with the Michigan Militia).

The militia movement also has attracted the attention of Klanwatch and the Anti-Defamation League, which are both concerned with connections between the new militias and traditional white supremacist groups. See ANTI-DEFAMATION LEAGUE REPORT, ARMED AND DANGEROUS: MILITIAS TAKE AIM AT THE FEDERAL GOVERNMENT (Nov. 16, 1994), available in LEXIS, News Library, Curnws File (suggesting adoption of a uniform Anti-Paramilitary Training Statute); see also ANTI-DEFAMATION LEAGUE REPORT, BEYOND THE BOMBING: THE MILITIA MENACE GROWS (June 19, 1995), available in LEXIS, News Library, Curnws File (describing results of national survey suggesting that the militia movement is growing).

¹⁶ See Dave Skinner, *In Defense of the Militia*, USA TODAY (Magazine), July 1, 1996, at 16 (discussing the right to bear arms and maintain a citizens' militia).

¹⁷ See Richard Hofstadter, *The Paranoid Style in American Politics*, in RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 3, 3-41 (Harvard Univ. Press 1996) (1965).

neomilitias¹⁸ and (pg.188) their hostility toward the federal government and its agents¹⁹ have caused alarm among members of the press²⁰ and among lawmakers.²¹ (pg.189)

What most people (including many neomilitia members) fail to appreciate is that not so very long ago service in one's local militia was as much an expression of civic commitment as voting or serving on a jury.²² Further, the anti-government bent of many of these neomilitias obscures the true origins and intended role of the militia.²³ Likewise, the role of the militia in civic life is largely overlooked both by Communitarians²⁴ and by those law professors advocating a reevaluation of "civic republicanism."²⁵ Far from attempting to reintroduce the militia into state and local civic life,

¹⁸ See, e.g., John Branton, *Clark County Militia*, COLUMBIAN, Nov. 13, 1994, at A1, available in LEXIS, News Library, Curnews File (quoting David Darby, head of the Clark County, Washington militia, as saying, "The federal government is slowly trying to take away our Second Amendment, the right to bear arms."); Keith Stone, "Patriot Movement" Fights Licenses, Taxes, Zip Codes—Government "Tyranny" Expert Estimates that 5 Million Are Believers, Holding that Their Rights Are Being Trampled, ST. LOUIS POST DISPATCH, Dec. 27, 1994, at 5b, available in 1994 WL 8216539 (discussing how Patriot Movement "[m]embers mistrust federal government and believe it is invading their privacy and saddling them with unconstitutional laws, including those that impose income taxes"); Allan Turner, *Militias Willing to Take Up Arms to "Save" the Constitution*, HOUS. CHRON., Nov. 27, 1994, at A1, available in 1994 WL 4605127 (quoting Kyle Norman, lieutenant commander of the Victoria County Constitutional Militia, who purports to know of a 1961 State Department memo that "details the steps to replacing the military of sovereign states with a United Nations peacekeeping force" and who insists that United Nations forces are "all over the place").

¹⁹ See, e.g., Adam Parfrey & Jim Redden, *Patriot Games: Linda Thompson, A Gun-Toting Broad from Indianapolis Wants to Know "Are You Ready for the Next American Revolution?"*, VILLAGE VOICE, Oct. 11, 1994, at 26 (detailing activities of Linda Thompson's American Justice Federation); Sam Walker, "Militias" Forming Across U.S. to Protest Gun Control Laws, CHRISTIAN SCI. MONITOR, Oct. 17, 1994, at 1 (describing militia groups' denunciation of the Waco assault and the raid on Randy Weaver's Idaho compound); Tim Weiner, *F.B.I. Hunts 2d Bombing Suspect and Seeks Links to Far Right; Rain Stalls Search of Rubble*, N.Y. TIMES, Apr. 23, 1995, at A1 (linking Oklahoma City bombing suspect Timothy McVeigh to the militia group Arizona Patriots and describing him as having voiced "extreme anger" over the assault by federal law enforcement agents on the Branch Davidian compound).

²⁰ Several recent books describe in lurid detail the American militia "menace"; see, e.g., DEES, *supra* note 13. Dees's organization, the Southern Poverty Law Center, established a "Militia Task Force" to combat the perceived militia threat. Dees is now lobbying for states to adopt and enforce anti-paramilitary statutes like those advocated by the Anti-Defamation League. See *supra* note 15; see also KENNETH S. STERN, *A FORCE UPON THE PLAIN: THE AMERICAN MILITIA MOVEMENT AND THE POLITICS OF HATE* 127 (1996) (exploring the American militia movement).

²¹ The most notable effort at the federal level aimed at stopping militias is the Effective Death Penalty and Anti-Terrorism Act of 1995. See H.R. 2768, 104th Cong. (1995). As originally envisioned, the Act granted the United States' Attorney General wide latitude to declare certain federal crimes "federal crime[s] of terrorism" if the Attorney General believed that such crimes were committed in an attempt to "influence or affect the conduct of government by intimidation or coercion." See H.R. 2768 § 101(d), (f)(5). These provisions were deleted from the final version signed by the President, due in part to opposition from groups as diverse as the ACLU and the NRA. See Brannon P. Denning, *Anti-Terrorism Bill Hits Civil Liberties*, COM. APPEAL (Memphis), Mar. 10, 1996, at B4, available in 1996 WL 3206999; David Kopel, *Terrifying Terror Legislation?*, WASH. TIMES, Feb. 6, 1996, at A14, available in 1996 WL 2945818; Glenn Harlan Reynolds, *Unleashed Federal Power is No Cure for Terrorism*, L.A. TIMES, Mar. 13, 1996, at B9. Not all of the bill's objectionable provisions, however, were deleted. Its unfortunate "reforms" of *habeas corpus* remained. See Robert Cottrol & Glenn Reynolds, *Greasing the Skids at Start of Death Row*, WASH. TIMES, Apr. 1, 1996, at A15, available in 1996 WL 2950835.

²² See *infra* text following note 155.

²³ See Glenn Harlan Reynolds, *Up in Arms About a Revolting Movement*, CHI. TRIB., Jan. 30, 1995, § 1, at 11, available in 1995 WL 616195 (warning against forgetting militias' necessary connection to state authority); Skinner, *supra* note 16, at 17-18.

²⁴ The substitute most often advocated is community service. See, e.g., WILLIAM F. BUCKLEY, JR., *GRATITUDE: REFLECTIONS ON WHAT WE OWE OUR COUNTRY* (1990) (advocating "voluntary" public service for all high school graduates); Amitai Etzioni, *The New Rugged Communitarianism: Maybe Americans Are Just Too Free*, WASH. POST, Jan. 20, 1991, at B1 (discussing importance of national service in Communitarian movement).

²⁵ See David C. Williams, *Civic Republicanism and the Civic Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 610-12 (1991) (advocating national service as a way to fulfill the role left empty by the decline of the militia); see also Sunstein, *supra* note 9, at 1564-65 & n.140 ("In other forms, republican thought is militaristic and heroic But efforts to assimilate politics

the Communitarian platform, drafted by movement founder Amitai Etzioni, University of Maryland professor of public affairs William Galston,²⁶ and Harvard law professor Mary Ann Glendon, calls for domestic disarmament to counter the "clear and present danger" that it claims guns present to the health and safety of Americans.²⁷ This Communitarian hostility toward private ownership of guns,²⁸ as well as a continued unwillingness to acknowledge the possible utility of reinvigorating state and local militias, is inconsistent with the tenets of their philosophy. In fact, it seems evident that militias embody the very ideal of the Communitarian project and that (pg.190) Communitarians' reluctance to embrace the militia and to attempt to remake it as it once was—an essential civic institution—ensures the continuation of a Gresham's law²⁹ of guns and militias in which the bad inevitably drives out the good. Further, the rise of neomilitias represents a dark side of Communitarianism that its enthusiasts seem unwilling to acknowledge.³⁰

The failure of both Communitarians and militia theorists to acknowledge these issues indicates a great deal about the narrowness of their respective views regarding both community and arms-bearing. It also indicates some unfortunate things about the state of constitutional discourse today.³¹ This Essay briefly summarizes the history and viewpoints of the Communitarian movement—including its express statement that arms-bearing should be understood in the context of militias—and the surprisingly Communitarian history of militias themselves. This Essay then suggests solutions to contemporary problems involving arms-bearing and militias that are unlikely to please either mainstream Communitarians or members of neomilitia groups, but that nonetheless should be considered.

I. THE COMMUNITARIAN MOVEMENT

A. *Communitarian First Principles*

While influential critiques of liberalism have come in the last few years from Jean Bethke Elshtain³² and the late Christopher Lasch,³³ the driving force behind Communitarianism is Amitai Etzioni, professor of sociology at George Washington University. Etzioni envisioned Communitarianism as a transpartisan political movement bringing together those from various

to war will often lead to undesirable directions. There is also an issue of gender here: the military metaphor traditionally operated to exclude women."). *But see infra* note 142 and accompanying text (noting that some states have amended their militia statutes to include women).

²⁶ William Galston recently served as Deputy Assistant to President Clinton on the Domestic Policy Council.

²⁷ *See infra* Part I.B.

²⁸ *See* CLINTON, *supra* note 4, at 133-34; GLENDON, *supra* note 5, at 43 ("The language of the second amendment ... [has] promoted the belief in many quarters that an absolute, or nearly absolute, individual right was thereby created.... [T]he starkness of some of the language in the Bill of Rights has helped to legitimate intemperate arguments made by those who have a particular attachment to one of the rights framed in such terms.").

²⁹ Named for English merchant and financier Sir Thomas Gresham, Gresham's law is the tendency of the inferior of two forms of currency to circulate more freely than, or to the exclusion of, the superior, because of the hoarding of the latter. Hence its popular formulation: "the bad money drives out the good."

³⁰ *See infra* notes 165-69 and accompanying text.

³¹ *See infra* notes 174-75 and accompanying text.

³² *See* JEAN BETHKE ELSHTAIN, *DEMOCRACY ON TRIAL* (1995).

³³ *See* CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* (1995).

ideological camps to forge a national community.³⁴ Etzioni brought together law professors, philosophers, and other social scientists at a conference in 1990 to formulate principles for this "ideology of the nineties."³⁵ The group founded a quarterly journal devoted to the promulgation of Communitarian (pg.191) thinking³⁶ and drew up a platform of principles.³⁷

Communitarianism seeks to change an entire way of thinking about the citizen's relationship to the government.³⁸ Instead of the us-versus-them "rights-talk" common to our modern society,³⁹ the Communitarians seek to encourage the citizen to see her fate as inexorably linked to that of her fellow neighbors, coworkers, and citizens at the local, state, and national level. As Etzioni wrote in his book *The Spirit of Community*, Communitarians "adopted the name ... to emphasize that the time had come to attend to our responsibilities to the conditions and elements we all share, to the community."⁴⁰ With rights, the Communitarians remind us, come responsibilities, and the latter, they believe, are overlooked in the rush to secure new rights for increasingly atomized groups of individuals.⁴¹ Not only has such radical individualism taken its toll on the moral fabric of the country,⁴² with alarming increases in illegitimacy and divorce,⁴³ but due to "excessive regard" for the institution of private property, things like the environment have suffered as well.⁴⁴

Contemporary law already recognizes that everyone's exercise of rights necessarily requires limits,⁴⁵ but this balancing takes place largely in courts and out of sight of the lay community, thus tending to keep hidden the application of limits to one's rights.⁴⁶ Further, despite what goes on in the courts, our political dialogue of rights tends to be absolute. "Rights-talk," then, takes the form of a zero-sum conversation in which, according to Communitarians, every admission of limits is seen as a surrender.⁴⁷ Communitarians seek to make plain that the exercise of rights entails the (pg.192) acceptance of responsibilities and that rights themselves have limits.⁴⁸

The Communitarian project is an ambitious one; it seeks to change the way Americans think about their relationship to others. It seeks, in the words of the Communitarian platform, to

³⁴ See ETZIONI, *supra* note 1, at 14.

³⁵ *Id.*

³⁶ *Id.* at 16. The journal, *The Responsive Community: Rights and Responsibilities*, was first published in January 1991.

³⁷ *Id.* at 18.

³⁸ *Id.* at 23-53.

³⁹ GLENDON, *supra* note 5, at x-xi.

⁴⁰ ETZIONI, *supra* note 1, at 15. Conservative enthusiasts tend to use the term "civil society" instead of the term "Communitarianism"; see, e.g., James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 319 (1990).

⁴¹ See ETZIONI, *supra* note 1, at 5 ("We should, for a transition period of, say, the next decade, put a tight lid on the manufacturing of new rights."); GLENDON, *supra* note 5, at xi ("A tendency to frame nearly every social controversy in terms of a clash of rights ... impedes compromise, mutual understanding, and the discovery of common ground. A penchant for absolute formulations ... promotes unrealistic expectations and ignores both social costs and the rights of others."); SANDEL, *supra* note 5, at 25-28.

⁴² See ETZIONI, *supra* note 1, at 14.

⁴³ See CLINTON, *supra* note 4, at 39.

⁴⁴ See GLENDON, *supra* note 5, at 9.

⁴⁵ *Id.* at 20.

⁴⁶ *Id.* at 42-43.

⁴⁷ *Id.* at 40-46.

⁴⁸ *Id.* at 76-77; ETZIONI, *supra* note 1, at 4-11.

"recognize[] both individual human dignity and the social dimensions of human existence."⁴⁹ It eschews simple majoritarianism but emphasizes its support for democratic solutions to common societal problems.⁵⁰ Communitarianism seeks to restore America's "moral voice"⁵¹ through the use of non-governmental social units through which values have been traditionally transmitted: neighborhoods, churches, families, and the public schools.⁵² Moreover, Communitarians advocate direct action at the smallest societal unit capable of addressing societal problems. Their platform states that

no social task should be assigned to an institution that is larger than necessary to do the job. What can be done by families should not be assigned to an intermediate group—school, etc. What can be done at the local level should not be passed on to the state or federal level, and so on.⁵³ (pg.193)

Further, members of the community ought not hesitate to "speak up and express our moral concerns to others when it comes to issues we care about deeply and share with one another."⁵⁴ In addition, obligations such as that of community service ought to be institutionalized as a way to inculcate the young with community ideals as well as offering other members of the community the opportunity to "foster mutual respect and tolerance" for those from different backgrounds.⁵⁵ Thus, Communitarian first principles encourage (1) the use of social, as opposed to necessarily governmental, units to address social problems at the smallest level possible and (2) the involvement of the largest number of community members possible in transmitting the community's values to younger generations.

The Communitarian platform also encourages "duties to the polity."⁵⁶ Those duties include staying informed about matters of concern to the community;⁵⁷ voting, so as to ensure that the representatives retain a sufficient identity of interest with the community's constituent members;⁵⁸

⁴⁹ ETZIONI, *supra* note 1, at 253 (quoting the Communitarian platform). Etzioni drafted the platform while Mary Ann Glendon and William Galston rewrote it. *Id.* at 251.

⁵⁰ *Id.* at 255 ("The success of democratic experiment in ordered liberty (rather than unlimited license) depends not on fiat or force, but on building shared values, habits and practices that assure respect for one another's rights and regular fulfillment of personal, civic, and collective responsibilities."). Likewise, civic republicanism enthusiasts champion the notion of "dialogue" as a means of achieving consensus. Through dialogue, in which no point of view is privileged and in which even "outsider" groups may participate equally, neorepublicans claim to minimize the dangers inherent in pluralism. *See* Sunstein, *supra* note 9, at 1548.

⁵¹ ETZIONI, *supra* note 1, at 256.

⁵² These are termed "intermediate organizations." *See* Sunstein, *supra* note 9, at 1574; *see also* ETZIONI, *supra* note 1, at 256-59 (emphasizing that rebuilding America's moral foundations begins with the basic institutions of society). Some family-strengthening tools include making workplaces family friendly, *see id.* at 257, and using the influence of the community "not to prevent divorce, but to signal society's concern" about divorce. *Id.* at 258. Etzioni suggests that schools at all levels should "recognize and take seriously the grave responsibility to provide moral education." *Id.* (emphasis omitted); *see also* GLENDON, *supra* note 5, at 109 (describing families, neighborhoods, religious associations, and other communities as "the seedbeds of civic virtue").

⁵³ ETZIONI, *supra* note 1, at 260. Communitarians recognize, however, that certain tasks demand action on a macro level. *Id.* (mentioning environmental matters as an example).

⁵⁴ *Id.*

⁵⁵ *Id.* at 261.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

paying taxes;⁵⁹ and serving on juries.⁶⁰ The platform encourages a recognition that possessing the "right to do X" does not mean that "X is the right thing ... to do."⁶¹ Forbearance both in speech and in actions toward one's fellow citizens will help foster "social justice," which requires the presence of "responsible individuals in a responsive community."⁶² In addition to the responsibility to their local communities, Communitarian citizens also have a responsibility to the larger "community"—the polity.⁶³

B. *Communitarians and Guns*

Because Communitarians realize they cannot rely solely on the good will of citizens to counter the effects of radical individualism, they call for narrowed judicial interpretations of rights to take into account the "need to protect the health and safety of the public."⁶⁴ This includes, among other things, allowing the community to take action to prevent the spread of AIDS⁶⁵ and "domestic disarmament" to protect the community from intentional (pg.194) or accidental deaths inflicted through the use of firearms.⁶⁶ This empowering of the community to take collective action in ways that might marginalize the dignity of individuals or abrogate certain constitutional rights (such as domestic disarmament) has given some commentators pause.⁶⁷

The Communitarian solution with regard to guns is puzzling, and it is inconsistent with proposed Communitarian solutions to society's other ills. Elsewhere in his book, for example, Etzioni indicates that he would rely on social pressure and community education, what he terms "suasion," as opposed to governmental regulation to encourage the responsible exercise of rights.⁶⁸

⁵⁹ *Id.*

⁶⁰ *Id.* at 261-62.

⁶¹ *Id.* at 263.

⁶² *Id.*

⁶³ *Id.* at 265-66.

⁶⁴ *Id.* at 264.

⁶⁵ *Id.*; see also Ronald Bayer & Kathleen E. Toomey, *Preventing HIV: Rights, Duties, and Partner Notification*, in RIGHTS AND THE COMMON GOOD: THE COMMUNITARIAN PERSPECTIVE 75, 75-87 (Amitai Etzioni ed., 1995) (urging the adoption of contact-tracing programs as a method of notifying partners of HIV-infected individuals).

⁶⁶ The Communitarian platform states that [t]here 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 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 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 gunslingers.*

ETZIONI, *supra* note 1, at 265.

⁶⁷ See, e.g., Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U.PA.L.REV. 801, 811 (1993) ("Civic republicanism is by nature a collectivist political theory [It] gives primary empirical and ethical significance to collective, rather than individual human endeavors.").

⁶⁸ See ETZIONI, *supra* note 1, at 39 ("Much of what Communitarians favor has little to do with laws and regulations, which ultimately draw upon the coercive powers of the state, but with being active members of a community."); see also *id.* at 48 ("[T]he law as a deterrent has its place in any moral order. Morality rests on intricate interactions among three factors: individual conscience, the moral voice of the community, and the state. Each one helps to sustain the others. Hence while it is best to build up

Further, Etzioni emphasizes that the government's power ought to be used only as a last resort and not merely because the exercise of certain rights is deleterious to the public.⁶⁹ Yet the proposed Communitarian solution to gun violence shows no such restraint. Such a rush to criminalize gun ownership certainly smacks of the authoritarian approach that Etzioni disclaims.⁷⁰ (pg.195) This approach is also inconsistent with the Communitarian platform, which allegedly calls for a "Communitarian" interpretation of the Second Amendment.⁷¹ One will find no plan for implementing such an interpretation in Etzioni's book,⁷² however, and there is little mention of it in other Communitarian literature.⁷³ This Essay supplies such an interpretation, although it is doubtful that the call for such an approach was meant to be acted upon. Yet, taken seriously, a Communitarian approach to community militias raises some interesting questions, especially about Communitarianism itself.

To support the claim that armed militias might serve to uphold the aims of Communitarianism, one first needs to realize that arms-bearing and militias traditionally were not the purview of disaffected fringe elements. On the contrary, the militias of the eighteenth and nineteenth centuries *were* the community. Operating with the imprimatur of state governments, an armed citizenry was regarded not as a dangerous crowd of gunslingers but as a necessary precondition to a virtuous republic.

II. MILITIAS AND THE COMMUNITARIAN IDEAL

A. A Brief History of the Militia in the United States

Though largely forgotten, militias were once an important institution in America.⁷⁴ The Constitution, for example, mentions militias in several places,⁷⁵ most notably in the Bill of Rights.⁷⁶

individual consciences and community voices, communities must on occasion fall back on the law.").

⁶⁹ *Id.* at 48.

⁷⁰ *See id.* at 255.

⁷¹ *See id.* at 265.

⁷² *See id.* at 139-41 (describing ways of "Enhancing Public Safety the Communitarian Way," which include neighborhood patrols, sentencing nonviolent offenders to community service, and using public shaming to deter crime, but making no mention of armed citizen militias).

⁷³ *See, e.g.,* NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES (Amitai Etzioni ed., 1995); RIGHTS AND THE COMMON GOOD: THE COMMUNITARIAN PERSPECTIVE (Amitai Etzioni ed., 1995). Neither book discusses the application of Communitarian principles to the Second Amendment.

⁷⁴ *See generally* JOHN K. MAHON, HISTORY OF THE MILITIA AND NATIONAL GUARD 35-38 (1983); Scott Bursor, Note, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEX. L. REV. 1125, 1131-39 (1996) (describing how an armed populace historically served important military, political, civil, and moral functions).

⁷⁵ *Compare* U.S. CONST. art. I, § 8, cl. 15 (giving Congress power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"), *with id.* § 8, cl. 16 (giving Congress power "[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, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"), *and id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief of ... the militia of the several States, when called into the actual service of the United States").

⁷⁶ *See* U.S. CONST. amend. II ("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.").

James Madison considered the (pg.196) militia to be one of the bulwarks of American liberty.⁷⁷ Madison's sentiment was echoed by the famous nineteenth century constitutional commentators Joseph Story⁷⁸ and Thomas Cooley.⁷⁹ But what was the "militia" of which the Framers wrote? In a nutshell, the Framers' militias were "comprised [of] all males physically capable of acting in concert for the common defense,"⁸⁰ or, in other words, they were "citizens primarily, soldiers on occasion."⁸¹

Militias were part of an inherited, English, radical Whig ideology vigorously opposed to "standing armies"—those armies comprised of professional soldiers—as being inimical to the liberties of the people.⁸² The historian (pg.197) J.G.A. Pocock described the tradition as

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 principal source of corruption and operating through such means as patronage, faction, standing armies (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 Not all Americans were schooled in this tradition, but there was (it would almost appear) no alternative tradition in which to be schooled.⁸³

⁷⁷ See THE FEDERALIST No. 46 (James Madison) (Isaac Kramnick ed., 1987). Madison wrote, Let a regular army, fully equal to the resources of the country be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence.

Id. at 301.

⁷⁸ See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 746 (DaCapo Press 1970) (1833). Story wrote that [t]he militia is the natural defense of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people.

Id. at 746.

⁷⁹ See 1 THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 729 (8th ed. 1927) ("The alternative to a standing army is 'a well-regulated militia'; but this cannot exist unless the people are trained to bearing arms.").

⁸⁰ United States v. Miller, 307 U.S. 174, 179 (1939) (describing militias in the context of the Second Amendment).

⁸¹ *Id.*

⁸² See generally BAILYN, *supra* note 7, at 62 (quoting the English pamphleteer Trenchard as writing that "'unhappy nations have lost the precious jewel liberty ... [because] their necessities or indiscretion have permitted a standing army to be kept amongst them'").

⁸³ See J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 507 (1975).

Not surprisingly, this Whig tradition, also called republicanism or civic republicanism,⁸⁴ is an intellectual antecedent of Communitarianism.⁸⁵

Independent militias were sometimes organized prior to the Revolution, in part as a counterweight to the Tory-controlled regular militias,⁸⁶ and worked closely with the military force of the Continental Army.⁸⁷ During the Revolutionary War, these colonial militias performed admirably,⁸⁸ particularly when operating close to their home towns and villages, although they often were disparaged by professional military officers as ill-disciplined and unsuited for extended campaigning. This clearly illustrates that militias were primarily intended to be defensive; indeed, those who refused to leave their homes and towns still played an important role in preventing any counterrevolutionary activity from establishing a foothold. Nevertheless, as Professor Robert Cottrol has written, it is important to keep in mind "that the armed population and the militia were intended to serve more than a simple military function. They were seen as fulfilling political and perhaps moral purposes as well."⁸⁹ This latter point seems lost on most modern critiques (pg.198) of the militia as an institution, which seem solely concerned with the militia's military capabilities, or lack thereof.⁹⁰

As previously mentioned,⁹¹ the militia was featured prominently in the text of the Constitution, and heated debates occurred regarding the extent of federal government control over the state militias.⁹² In the end, there was a compromise:⁹³ the federal government retained the power

⁸⁴ See generally WOOD, *supra* note 7, at 46-90 (describing the intellectual foundations of republicanism); Richard H. Fallon, Jr., *What is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1734 (1989) (contrasting republicanism with liberalism).

⁸⁵ See generally WOOD, *supra* note 7, at 46-90; Gey, *supra* note 67, at 804-06.

⁸⁶ See STEPHEN HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 60 (1984).

⁸⁷ *Id.* at 61-63.

⁸⁸ *Id.* at 63.

⁸⁹ GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT XXXVI (Robert J. Cottrol ed., 1994). The same observation might be made about arms-bearing by individuals in general, which was felt to promote virtue and encourage responsibility. Thomas Jefferson extolled the virtues of guns in a letter to his nephew:

As to the species of exercise, 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.

1 THE JEFFERSON CYCLOPEDIA 318 (John P. Foley ed., Russell & Russell 1967) (1900). See also MCDONALD, *supra* note 7, at 74 ("Virtue meant manliness, and manliness meant independence.... [A]nd this independence ... was 'in the last analysis measured by his ability to bear arms and use them in his own quarrels.'") (quoting J.G.A. Pocock); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 771-72 (1994) (discussing the connection between a militia composed of the body of the people and the meaning of a "republican" government).

⁹⁰ See, e.g., Colonel Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 659 (1995) (arguing that "[r]eliance upon civilian militias during the Revolution ... proved to be 'militarily disastrous.'") (quoting BRUCE D. PORTER, *WAR AND THE RISE OF THE STATE* 249 (1994)). But see 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) (noting that although criticized by professional soldiers, the militias proved adept at inflicting considerable losses on the British and, due to their close ties with their communities, preventing significant counterrevolutionary activity).

⁹¹ See *supra* notes 75-79 and accompanying text.

⁹² See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 384-89 (Max Farrand ed., 1966) (1937).

⁹³ See *id.* at 387-88.

to call up the militia and to prescribe its training;⁹⁴ the states retained the power over the militia members' actual training and could prescribe the method by which officers were chosen.⁹⁵

Initially, Congress took seriously its responsibility toward the militia,⁹⁶ passing an act in 1792 that detailed uniform standards for the militia of all (pg.199) states, down to the number of rounds of ammunition a militiaman was expected to have on hand.⁹⁷ As Hamilton foresaw,⁹⁸ by the mid-nineteenth century, the militia had declined.⁹⁹ The federal government came to rely more on a professional military, and the states simply were unwilling to shoulder the financial burden of maintaining militias.¹⁰⁰ Nevertheless, the militia was still seen as a valuable community institution.¹⁰¹ The decline, no doubt, accelerated as the United States began to aspire to empire in the late nineteenth century. National authorities, frustrated by their inability to send state militias outside the country's boundaries, sought a new organization—one that could remain under the nominal control of the states until such time as it was called into service of the United States.¹⁰² In 1909, the National Guard was born.(pg.200)

B. *The National Guard and the Death of the Universal Militia*

⁹⁴ See *id.* at 388 (describing the militia clauses of the Constitution).

⁹⁵ *Id.*

⁹⁶ See David P. Currie, *The Constitution in Congress: The Second Congress 1791-1793*, 90 NW. U.L. REV. 606, 640-44 (1996) (describing the debates over a uniform militia bill).

⁹⁷ The Militia Act provided:

That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutered and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.

Militia Act, ch. 33, 1 Stat. 271 (1792) (repealed 1903). This represented the major Congressional action regarding the militia until the twentieth century.

⁹⁸ THE FEDERALIST No. 29, at 209-10 (Alexander Hamilton) (Issac Kramnick ed., 1987) (arguing that any attempt to "disciplin[e] all of the militia of the United States" through national musters and compulsory exercises would be regarded as "a real grievance to the people and a serious public inconvenience and loss").

⁹⁹ In his influential treatise on the Constitution, Joseph Story editorialized about the decline of the militias and the attendant dangers accompanying such attitudes:

[T]hough ... the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.

3 STORY, *supra* note 78, at 677.

¹⁰⁰ Of course, one also might argue that there was a noticeable decline in "civic virtue," with more and more citizens seeking to escape their militia duties as the threat of invasions and insurrections began to subside. See *id.* at 746.

¹⁰¹ For example, despite the inexcusable neglect that militias often suffered at the hands of niggardly state legislatures, many units still performed admirably during the War of 1812, most notably during the Battle of New Orleans. See Denning, *supra* note 90 (describing militia successes in the War of 1812).

¹⁰² See JOHN K. MAHON, THE WAR OF 1812, at 51 (1972); see also *infra* Part II.B.

The Dick Act,¹⁰³ passed in 1903, "signified the ... [end] of the old, ... state-controlled, system"¹⁰⁴ by introducing significant federal requirements for the training and equipping of state militias. The National Defense Act of 1908¹⁰⁵ followed the Dick Act and authorized the use of the newly constituted "National Guard" to serve outside the boundaries of the United States.¹⁰⁶

Congress passed another national defense act¹⁰⁷ in 1916 as part of general preparedness in the face of an escalating European war. Among the increased requirements placed upon the states (and upon the United States Army, the administrator of the requirements) was an innovative solution to the constitutional prohibition against the foreign use of militia troops: the President was authorized to draft state Guard members into national service as federal reserve troops.¹⁰⁸ Furthermore, the National Defense Act of 1916, which acted as a condition precedent to the states' receipt of federal funds, forced the states to cede most of whatever control they retained over the militia, including the constitutional prerogative to appoint officers to command the militia.¹⁰⁹ As one commentator has noted, "A recurring fact (pg.201) pattern emerges: the states, faced with ever more demanding standards but unable to pay for upgrading, are forced to accept both federal funding and the resulting loss of control that goes along with that funding."¹¹⁰

This pattern continued into the 1930s with the establishment of a "dual enlistment policy," whereby each member of a state National Guard unit simultaneously became a member of the United States National Guard.¹¹¹ Though militia members retained their status as members of the state National Guard, Congress could order them into actual service for the United States¹¹² whenever it declared a national emergency. During such service, members lost their status as members of the state National Guard.¹¹³

In 1952, Congress removed the national emergency requirement as a prerequisite for federal control of state militias and, instead, authorized federal control for "training" purposes regardless of

¹⁰³ Act of Jan. 21, 1903, ch. 196, 32 Stat. 775 (repealed 1956).

¹⁰⁴ Patrick Todd Mullins, Note, *The Militia Clauses, The National Guard, and Federalism: A Constitutional Tug of War*, 57 GEO. WASH. L. REV. 328, 333 (1988) (detailing the history of the federalization of the militia system and the concomitant erosion of state control over an ostensibly state institution).

¹⁰⁵ Act of May 27, 1908, ch. 204, 35 Stat. 399 (amending Act of Jan. 21, 1903, ch. 196, 32 Stat. 775).

¹⁰⁶ *Id.* at 400. This focus on the military as a means to project the United States' power worldwide is just the sort of vice that results from the maintenance of a standing army. Because the militia clauses of the Constitution seem to limit the militia's role to one of defense, this portion of the act was deemed unconstitutional in a United States Attorney General's opinion which stated that militias could not be sent to a foreign country. *See Authority of President to Send Militia Into a Foreign Country*, 29 Op. Att'y Gen. 322 (1912).

¹⁰⁷ National Defense Act of 1916, ch. 134, 39 Stat. 166 (current version in scattered sections of 10 U.S.C. and 32 U.S.C.).

¹⁰⁸ *See* Mullins, *supra* note 104, at 334. The Supreme Court upheld this constitutional end-run in *Selective Draft Law Cases*, 245 U.S. 366 (1918) (holding that the power to draft members of the National Guard into the U.S. Army and the power to compel civilians to render military service was granted to the President by the Constitution).

¹⁰⁹ Mullins, *supra* note 104, at 335. The right of the states to appoint their own officers was an important concession to Antifederalists during the debates. It was thought that state militia units would be less susceptible to corruption if under federal control than if units remained under the command of "sons of the state." In modern parlance, the states' retention of the power to appoint officers ensured that militias would stay rooted in their community.

¹¹⁰ *Id.* at 334 n.66.

¹¹¹ National Defense Act of 1933, ch. 87, 48 Stat. 153, 160.

¹¹² *Id.* at 161.

¹¹³ *Id.*

the existence of national emergency.¹¹⁴ This power was subject to gubernatorial approval, a requirement removed in the mid-1980s by a Congressional amendment precipitated by some governors' refusal to send forces to train in Central America.¹¹⁵ Thus, in less than a century, state militia systems were dismantled piecemeal; what remains today is, at best, a "select militia" which, because it lacks universal membership, would be viewed by the Framers as little better than a standing army.¹¹⁶ More ominously, the destruction of state militias removed an important civilian check upon federal military power:

By providing for a militia in the Constitution, the Framers sought to strengthen civilian control of the military. They postulated that a militia composed of citizen-soldiers would curb any unseemly ambitions of the small standing army. Today's National Guard is often perceived as the successor (pg.202) to the militia, and observers still tout the Guard's role as the ultimate restraint on the professional military.

The reality, however, is much different. 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.¹¹⁷

C. *Mandatory Militias?*

Despite some interest in militias in the early twentieth century¹¹⁸ and more recently in a few communities around the country,¹¹⁹ the federal government, and the populace in general, seems uninterested in reestablishing a universal militia.¹²⁰ Nevertheless, a Communitarian approach to the Second Amendment that focuses on the Constitution's militia clauses makes a case that Congress is obligated to provide the states with the ability to maintain a militia that the Framers would recognize, rather than merely providing for the operation of the National Guard.

¹¹⁴ Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481, 489.

¹¹⁵ The "Montgomery Amendment" to the National Defense Authorization Act of 1987 provides that "[t]he consent of a Governor ... may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty." National Defense Authorization Act of 1987, Pub. L. 99-661, sec. 522, § 12301, 100 Stat. 3871 (codified at 10 U.S.C. § 12301(f) (1984)). The Supreme Court found this amendment to be constitutional in *Perpich v. Department of Defense*, 496 U.S. 334, 337 (1990).

¹¹⁶ See JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 148 (1994) ("Because of their long-standing prejudice against a select militia as constituting a form of standing army liable to be skewed politically and dangerous to liberty, every state had created a general militia.").

¹¹⁷ Colonel 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 (1994) (footnotes omitted).

¹¹⁸ See generally JOHN GARRY CLIFFORD, *THE CITIZEN SOLDIERS: THE PLATTSBURG TRAINING CAMP MOVEMENT, 1913-1920* (1972) (describing early twentieth century efforts to institute universal military training in the United States).

¹¹⁹ See, e.g., Larry Rohter, *County Creates Militia To Defend Gun Rights*, N.Y. TIMES, May 29, 1994, at A14 (describing a unanimous vote of the Santa Rosa County, Florida County Commission establishing a militia and making every man, woman, and child in the county eligible for service).

¹²⁰ At most, civic republicans advocate a host of governmental reforms that are supposed to capture the militia spirit. See, e.g., Williams, *supra* note 25, at 603-04 (listing alternative "virtue functions" that could be performed by "militia surrogates").

If one accepts the Communitarian platform's community-oriented approach,¹²¹ it can be argued plausibly that the Second Amendment actually requires the maintenance of a universal militia. After all, the opening clause of the Second Amendment begins, "A well regulated Militia, being necessary to the security of a free State"¹²² Thus the Framers considered a well-regulated militia to be, well, necessary to the security of a free (pg.203) state.¹²³ Add to this straightforward textual language what we know about the historical background, particularly the Framers' Whiggish hostility toward standing armies,¹²⁴ and the idea that the federal government, and perhaps the states as well, possess an absolute obligation to maintain a universal militia seems reasonably well-founded. This intent is evident in light of the 1792 Militia Act,¹²⁵ which is entirely consistent with this understanding.

Of course, such a duty could be meaningless in practice. Similar obligations of the federal government, after all, have largely been interpreted out of existence. The Guaranty Clause of Article IV, Section 4,¹²⁶ for example, was the subject of judicial near-abnegation,¹²⁷ with its goal being achieved, if at all, by such other provisions as the Due Process Clause and the Equal Protection Clause. In general, courts are far more willing to entertain claims based on individual rights than on government obligation.¹²⁸

In this light, the Second Amendment could be understood as an example of very careful drafting indeed: a government obligation (to maintain a militia) coupled with an individual right (to keep and bear arms) that ensures that the key element of a universal militia (an armed citizenry) cannot be extinguished by government neglect.¹²⁹ At the very least, the clear constitutional statement regarding the *necessity* of a well-regulated (universal) militia for the security of a free state should give us pause. The logical consequence of this statement is that a state lacking such a militia is either insecure or unfree.¹³⁰ In light of what is known about the purposes of the

¹²¹ See ETZIONI, *supra* note 1, at 253-54 (noting that the Communitarian platform preamble states that "[n]either human existence nor individual liberty can be sustained for long outside the interdependent and overlapping communities to which we all belong").

¹²² U.S. CONST. amend. II.

¹²³ See Dunlap, *supra* note 117, at 384-85.

¹²⁴ See *supra* notes 82-85 and accompanying text.

¹²⁵ Act of May 8, 1792, ch. 33, 1 Stat. 271 (repealed 1903).

¹²⁶ U.S. CONST. art. IV, § 4.

¹²⁷ Article IV, Section 4 of the Constitution provides that the "United States shall guarantee to every State in the Union a Republican Form of Government." This provision is regarded as essentially meaningless by most lawyers today, but there is no doubt that the Framers intended it to grant the national government power to act in the event that a state government became tyrannical. It is generally poor lawyering to argue that any part of the Constitution lacks meaning, and there is no basis for such an assertion in the context of the Guaranty Clause. The case generally cited for the proposition that the Guaranty Clause is a nullity is *Luther v. Borden*, 48 U.S. 1 (1849). That case, however, merely stated that the clause is not susceptible to direct judicial enforcement, something made clear later in *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). Such a holding is not at all inconsistent with the notion that the federal government lacks power under the Guaranty Clause. It merely indicates that such power is held in the first instance by Congress or the Executive branch, not by the judiciary.

¹²⁸ See generally SANDEL, *supra* note 5, at 25-54 (noting that the Supreme Court views protecting individual rights as a priority).

¹²⁹ See COOLEY, *supra* note 79, at 729.

¹³⁰ See William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1243-44 (1994). Van Alstyne writes that the Second Amendment adheres to the guarantee of the right of the people to keep and bear arms as the predicate for the other provision to which it speaks, i.e., the provision respecting a militia, as distinct from a standing army

(pg.204) Second Amendment and the Framers' views regarding standing armies and armed citizens, an interpretation of the first clause of the Second Amendment as requiring universal militias seems well-founded. It is certainly better grounded in the Constitution's text, history, and purposes than many other constitutional arguments that have attained general acceptance.¹³¹

Nor is that the only consequence. Accepting, *arguendo*, that a court lacks the power to order the creation of a universal militia, the absence of such a militia could still have legal (and political) consequences. One can imagine the following exchange between a government representative and a member of one of today's neomilitias:

GOVERNMENT: You have no right to operate a private militia. The only militia recognized under the Second Amendment is a state-sponsored militia. Private groups have no standing.¹³²

MILITIAMAN: A state-sponsored militia, eh? Which one is that?

GOVERNMENT: The National Guard, of course.¹³³

MILITIAMAN: Don't be silly. The National Guard is not universal, and it isn't state-controlled. At best, it's a select militia of the sort that the Framers disliked.¹³⁴ (pg.205)

GOVERNMENT: Oh, all right. The truth is, we allowed the real militia to die. It wasn't good for much. We couldn't even use it to invade Mexico or Canada. Furthermore, the professional military didn't like it.¹³⁵

separately subject to congressional regulation and control. Specifically, it looks to an ultimate reliance on the common citizen who has a right to keep and bear arms rather than only to some standing army, or only to some other politically separated, defined, and detached armed cadre, as an essential source of security of a free state.... [The Second Amendment] expressly embraces that right and indeed it erects the very scaffolding of a free state upon that guarantee. It derives its definition of a well-regulated militia in just this way for a "free State": The militia to be well-regulated is a militia to be drawn from just such people (i.e., people with a right to keep and bear arms) rather than from some other source (i.e., from people without rights to keep and bear arms).

Id. (emphasis omitted).

¹³¹ *Id.* at 1255.

¹³² For arguments in support of this position, see Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 488-96 (1995) (describing the "States' Right Model" of the Second Amendment).

¹³³ See, e.g., 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, 36-38 (1989) (discussing the creation of the National Guard as an organized form of the militia).

¹³⁴ See, e.g., Akhil Reed 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 "select militia"—and viewed in many quarters as little better than a standing army. In 1789, when used without any qualifying adjective, "the militia" referred to all Citizens capable of bearing arms.... [Thus,] the "militia" is identical to "the people"

Id. (emphasis and footnotes omitted).

¹³⁵ Or as David Williams opined,

Those who support a states' rights view of the militia seek to identify the Amendment's militia with the National Guard. The Guard, however, is a select body, only a fraction of the population.... The universal militia, by

MILITIAMAN: Fine. Because you admit you've defaulted on a constitutional obligation that is "necessary to the security of a free state," we've resorted to self-help. We'd rather see a universal militia of the sort the Framers envisioned, but only the government can create that. We've done the best we could in light of your default. And you should be estopped from complaining, until you have lived up to your constitutional obligation.¹³⁶

GOVERNMENT: But private militias are dangerous. They don't necessarily represent the whole community; only portions of the community join such groups. They are prone to being infiltrated by malcontents, and they scare people.¹³⁷

MILITIAMAN: All true. That's why we should have a universal militia. Too bad you guys have fallen down on the job.

Despite its half-whimsical treatment here, the argument is a serious one. (pg.206) If a well-regulated militia of the sort the Framers envisioned is as important as a Communitarian interpretation of the Second Amendment suggests, then there is a constitutional argument for self-help in the event of a government default. Such an argument would likely fail in court, but that does not necessarily diminish its political, or even its constitutional, force. The easy solution is to take seriously the Second Amendment's first clause. Doing so, however, is likely to pose problems for the Communitarians' stated goal of domestic disarmament.

D. *The Communitarian Militia*

Critics will no doubt label militias as quaint anachronisms, unsuited for either modern military service¹³⁸ or local law enforcement,¹³⁹ activities viewed as best left to "professionals," though the recent record of some law enforcement professionals should give one pause.¹⁴⁰ Despite what critics say, states continue to take their militias semi-seriously: almost every state in the nation has a statute that designates the citizenry of a specified age as the "unorganized militia" of the

contrast, was the people under another name; it could not turn against the people because it was the people. As the National Guard is not universal, it cannot serve as a substitute.

Williams, *supra* note 25, at 589 (footnotes omitted); *see also* William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 2 (1992) (suggesting that the National Guard should be considered "troops" raised with the consent of Congress under Article I, Section 10, rather than a "militia").

¹³⁶ *See* Denning, *supra* note 90.

¹³⁷ *See* Williams, *supra* note 25, at 553-54 (describing civilian militias and their relationship to the Second Amendment as "terrifying").

¹³⁸ This argument was made in the 1940s. *See* Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 189-93 (1940).

¹³⁹ *See* MALCOLM, *supra* note 116, at 2-3 (describing the duties of medieval English citizens to patrol their towns and villages and to pursue criminals).

¹⁴⁰ *See, e.g.*, Jeremy Pearce, *Drugs and Big Money Tempt Cops Across the Country*, DET. NEWS, May 3, 1996, at A7, available in 1996 WL 2917542; Graham Rayman, *More Allegations of Bad Cops*, NEWSDAY (New York), Aug. 15, 1996, at A24, available in 1996 WL 2533174.

state.¹⁴¹ Many states even have updated their unorganized militia statutes in recent years to include women.¹⁴² Although geopolitical realities probably preclude reliance on the militia as the keystone of our military strategy, this is not a flaw of militias; rather, it speaks to the role the United States has assumed in world affairs, a role the Framers had not likely intended. Using a militia to service the security needs of states and communities, on the other hand, makes good sense¹⁴³ (pg.207) and can be done in a way that constitutes a perfect fit with Communitarian principles.

In the eighteenth century, universality was viewed as the great virtue of militias.¹⁴⁴ The militia was seen as incorruptible and thus incapable of tyranny because the diversity of membership was thought to be a powerful guard against any one element in a community gaining sway over the whole.¹⁴⁵ Militia service brought together community members from varied backgrounds.¹⁴⁶ (Communitarian reticence about acknowledging the virtues of militias is especially puzzling given the strong, community-centered and self-reliant elements in the Communitarian platform.¹⁴⁷) Further, if cultivated, the militia could reinforce the idea of duty to the polity in the deepest sense by obligating members to take up arms for the community's defense and by accepting responsibility

¹⁴¹ See, e.g., ALASKA CONST. art. I, § 19; IOWA CONST. art. VI, § 1; MISS. CONST. art. IX, § 214; N.M. CONST. art. XVIII, § 1; N.D. CONST. art. XI, § 16; OHIO CONST. art. IX, § 1; S.C. CONST. art. XIII, § 1; S.D. CONST. art. XV, § 1; UTAH CONST. art. XV, § 1; WYO. CONST. art. XVII, § 1; ALA. CODE § 31-2-2 (1994); ARK. CODE ANN. § 12-61-10 1(b) (Michie 1994); CAL. MIL. & VET. CODE § 122 (West 1994); CONN. GEN. STAT. § 27-1 (1992); GA. CODE ANN. § 38-2-3(d) (1994); IDAHO CODE § 46-102 (1994); IND. CODE ANN. § 10-2-3-1 (Michie 1994); KAN. STAT. ANN. § 48-904(e) (1993); KY. CONST. § 219 (1993); MINN. STAT. § 190.06 (1993); N.M. STAT. ANN. § 20-2-2(B) (Michie 1994); N.Y. MIL. LAW § 2(2) (McKinney 1993); S.D. CODIFIED LAWS § 33-2-2 (Michie 1994); TENN. CODE ANN. § 58-1-104(d) (Michie 1994); WYO. STAT. § 19-2-102(a) (1994).

¹⁴² See, e.g., IDAHO CODE § 46-105 (1995); KAN. STAT. ANN. § 48-904(e) (1994); R.I. GEN. LAWS § 30-1-3 (1994).

¹⁴³ This is particularly true in light of the rather appalling string of pronouncements from state courts which conclude that because local police departments have a duty to protect everyone generally, they are responsible for protecting no one in particular. See, e.g., *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. 1981) ("[A] fundamental principle [of American law is] that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen."). Any attempted restoration of "collective responsibility" or a community's "moral voice" is likely doomed to failure if the community members will not come to one another's aid even when there is little risk of harm to the rescuer.

¹⁴⁴ See Williams, *supra* note 25, at 577-79.

¹⁴⁵ *Id.*

¹⁴⁶ See *id.* at 580. Williams writes,

[Militia m]embership was service to the state that always disrupted one's chosen round of activities and often involved hunger, cold, disease, and danger. The militia member was expected to bear these burdens with the knowledge that he was keeping the republic safe. The experience of working together with fellow citizens could cement this perspective of self-sacrifice to the common good. Militia service required cooperation among citizens and subordination to orders, [and] stimulated a commitment to comrades that would become a devotion to the public that they represented

Id. (footnotes omitted). Similarly, the late novelist Andrew Lytle described a typical militia muster in his novel, *The Long Night*. Lytle emphasized that such an assembly brought together those from all socio-economic classes. ANDREW LYTLE, *THE LONG NIGHT* 23 (1936); see *infra* note 159 and accompanying text. Cf. ETZIONI, *supra* note 1, at 114. Etzioni describes a mandatory year of national service for high school graduates as

an important community builder because it would act as a grand sociological mixer.... A year of national service, especially if it was designed to enable people from different geographical and sociological backgrounds to work and live together, could be an effective way for boys and girls, whites and nonwhites, people from parochial and public schools, north and south, the city and the country, to come together constructively while working together at a common task.

Id.

¹⁴⁷ See *supra* notes 49-63 and accompanying text.

for the safety of residents and visitors.¹⁴⁸ A (pg.208) reconstituted militia serving individual communities under the aegis of the state also would accomplish the Communitarian goal of resolving problems by use of the smallest possible societal unit.¹⁴⁹

More importantly, the existence of a citizen militia responsible in some way for the security of a given community also might reintroduce responsibility into the administration of law enforcement. Although law enforcement officials formerly were liable, for example, in trespass for improperly serving a search warrant or for breaking into the wrong house to make an arrest, legal fictions such as sovereign immunity and qualified immunity now present almost insuperable barriers for citizens wishing to hold law enforcement officers accountable for mistakes or abuses.¹⁵⁰ Further, the recent phenomenon of the "militarization" of law enforcement at all levels of government evokes sinister analogies to authoritarian regimes and the much feared "midnight knock at the door."¹⁵¹ Professional law enforcement officers clad in Nomex coveralls and face shields, after all, hardly seem to represent the community even in their own minds, much less in the minds of many onlookers. Encouraging communities to take responsibility for their security might also have the effect of making those charged with law enforcement duties *morally* responsible to their friends and neighbors, and thus help them exercise greater care and restraint in carrying out their law enforcement duties. Though many might raise the specter of vigilantism and argue for respecting the domain of law enforcement professionals,¹⁵² the recent behavior of some law enforcement agencies implies that a "professional" record is not always something to which communities should aspire.¹⁵³ Likewise, charging members of a community with its security will sensitize them to the link between rights and responsibilities. Moreover, requiring that community members police the "rights-responsibilities" boundary will highlight the social cost that accompanies the exercise of rights in a diverse and plural community.¹⁵⁴ (pg.209)

A universal militia also would take advantage of some important characteristics of human psychology.¹⁵⁵ At the risk of sounding too flip, if militias are outlawed, only outlaws will join militias. Conversely, the establishment of a government-sponsored universal militia would produce a very different dynamic. Rather than a way to rebel against the status quo, militia service would be a means of community service, similar to jury duty. As with jury duty, those lacking community spirit would probably devote their energies to finding ways of avoiding service. A universal militia of a very different character than the private groups extant today possess—a character far closer to what the Framers envisioned would result.

¹⁴⁸ See *supra* note 143 and accompanying text; see also MALCOLM, *supra* note 116, at 2-3 (noting that from the early Middle Ages in England, "the law made residents of a parish liable for compensating a victim of a robbery or riot committed in their parish for half of his loss").

¹⁴⁹ See *supra* notes 52-53 and accompanying text.

¹⁵⁰ See generally Matthew V. Hess, Comment, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 158 (discussing the qualified immunity defense).

¹⁵¹ See *Military Police*, TULSA WORLD, Nov. 3, 1995, at N12, available in 1995 WL 10049369; Jim Nesbitt, *Under Fire: If Police Departments View Themselves as an Army, Who Is the Enemy?*, SUNDAY PATRIOT-NEWS (Harrisburg, Pa.), May 28, 1995, at G1, available in 1995 WL 5064837.

¹⁵² See *Crossing the Line: Patriots and the Militias*, ARIZONA REPUBLIC, July 4, 1996, at B6, available in 1996 WL 7719447.

¹⁵³ See Pearce, *supra* note 140, at A7; Rayman, *supra* note 140, at A24.

¹⁵⁴ See GLENDON, *supra* note 5, at 1-17.

¹⁵⁵ See Williams, *supra* note 25, at 563.

Similarly, mandatory training in the use of arms in connection with militia service similarly would further important Communitarian goals. It could teach forbearance, illustrating that the right to keep and bear arms does not give one the right to be a "gunslinger." At the same time, arms education also would address one of the "clear and present dangers" to the public health cited in the Communitarian platform: deaths caused by accidental gunshot wounds.¹⁵⁶ A return to the Framers' universal militia, then, would obviate the need for "domestic disarmament" by eliminating the platform's reason for it. In addition, it would provide a meaningful Communitarian interpretation of the Second Amendment, just as the Communitarian platform commands.¹⁵⁷

One thing should be obvious from this discussion: in principle, it is possible to have "community militias" composed of all law-abiding citizens or to have domestic disarmament, but not both, as the Communitarian platform demands. If all law-abiding citizens belong to the universal militia, then they will be armed; that is what belonging to a militia means, as the Supreme Court made clear in *United States v. Miller*.¹⁵⁸ The platform does not address this contradiction, and the other Communitarian discussion of guns is so unrelentingly hostile to gun ownership by individuals that it is difficult to believe Communitarians take seriously their own beliefs in this context. As the following discussion demonstrates, that is unfortunate.

III. TAKING COMMUNITARIANISM SERIOUSLY

Nothing captures the spirit of community present in militias quite like the following passage from the late novelist Andrew Lytle's *The Long Night*:

You're too young to remember militia musters, but in my (pg.210) boyhood they were mighty fine gatherings. It was one of those days, I remember, when a man didn't care what happened so long as he could feel his strength or try his skill.

....

It wasn't long until riders from every section of the county came in, some of the younger and more spirited men shouting and taking on. But you'd see sober gentlemen of middle years, sitting straight in their saddles, ride by in a running walk as if they rode to musters every day. Those too poor to own stock, although there were not many of this condition, straggled in on foot.... Kin would meet that hadn't seen one another for a year or more; and the women would hardly run through the ailments of children and servants, with just a running start on the marriages and baptizing, when the musters came to an end. Such jollification you never saw. There were dinners on the ground, and red-mouth barbecue pits. The groceries knocked out the tops of their liquor barrels, and red whisky ran down gullets like rain after a dry spell.¹⁵⁹

¹⁵⁶ See ETZIONI, *supra* note 1, at 265.

¹⁵⁷ See *supra* notes 71-73 and accompanying text.

¹⁵⁸ 307 U.S. 174, 179 (1939); see *supra* note 80 (discussing *Miller*).

¹⁵⁹ LYTLE, *supra* note 146, at 23. Lytle's narrative continues with descriptions of speech making, wrestling, and other games of strength, followed by a fight, though as Lytle's narrator puts it: "One or two men were cut up right smart, but nobody got involved in a killing. Men settled their disputes in those days with their fists." *Id.* at 24.

Today we hear a great deal of yearning for the sort of community spirit that Lytle describes. At one time, militia service instilled the virtues of self-sacrifice and self-control, taught the safe use of arms, deterred both tyranny and invasion, and brought members of various social groups together for socialization,¹⁶⁰ all while providing a socially constructive outlet for citizens' martial impulses. One would expect Communitarians to endorse wholeheartedly such an institution, but such an endorsement is conspicuously absent.

Although there is probably little more enthusiasm outside Communitarian ranks for the reconstitution of a universal militia, the unwillingness of Communitarians to entertain the idea makes one a bit suspicious of their whole enterprise. Why does community begin and end only with (disarmed) community service, responsibility, and forbearance? If irresponsible use of weapons in our communities is a great problem (as it no doubt is), why rush to disarm everyone instead of creating an outlet through which responsible right-to-keep-and-bear-arms values might be transmitted? After all, in response to the problem of fatalities caused by drunk drivers, (pg.211) Etzioni merely argues that sobriety checkpoints are reasonable¹⁶¹—he does not advocate the criminalization of alcohol or the banning of automobiles. When it comes to a community's responsibility for defending home or property, possibly through violence, one notes a deafening silence; although the platform advocates a "Communitarian" interpretation of the Second Amendment, there is no hint of how that should be effected, and the platform itself includes an obvious contradiction on the subject. One would expect that a Communitarian ideal would demand community-related virtues such as intellectual honesty and a self-critical stance toward one's own predilections. As our analysis indicates, the Communitarians' treatment of this issue lacks at least one of those virtues.

This omission in Communitarian analysis underscores a key flaw. It is impossible to read the Communitarian literature without suspecting that the "community" envisioned by most Communitarians looks much like Ann Arbor, Michigan; Charlottesville, Virginia; or Cambridge, Massachusetts: communities with a disproportionate number of Volvos and Montessori schools. There is nothing wrong with such communities; they are nice places to live. It is a mistake, however, to think that the community values of Ann Arbor, for example, are the only ones that matter, or should matter. America possesses many communities where pickup trucks are more common than Volvos and where community members believe in values that Communitarians find unimportant, such as independence and the responsible use of arms.¹⁶² Some of these communities have responded to the Etziosis of the world, who they believe do not appreciate their values, by organizing their own militias ("neomilitias"). The rise of such groups indicates the way in which elite constitutional opinion has failed to mesh with, or even acknowledge, the deeply felt sentiments of many Americans.¹⁶³ As we have seen, the dismissive attitudes that many elite commentators display toward such sentiments mask what should be, cultural differences aside, a surprising degree of common ground.¹⁶⁴

Indeed, the common ground goes even farther. The rise of private "militias" can be seen as the dark side of community and Communitarianism. Already there are signs that in a few areas in

¹⁶⁰ See Williams, *supra* note 25, at 577-80.

¹⁶¹ See ETZIONI, *supra* note 1, at 170-73.

¹⁶² See, e.g., Skinner, *supra* note 16, at 18.

¹⁶³ See LASCH, *supra* note 33, at 25-49.

¹⁶⁴ See ETZIONI, *supra* note 1, at 134-47 (discussing Communitarian principles of strengthening institutions, personal responsibility, self-help, and social justice).

which militia groups are active, some have attempted to constitute a law unto themselves,¹⁶⁵ recognizing no authority but their own and cloaking their usurpation (pg.212) in high-sounding rhetoric about illegitimacy and tyranny.¹⁶⁶ History is rife with private community groups which, with the tacit support of government, seek to impose their will on disfavored members of a community.¹⁶⁷ These "intermediate organizations" are often even more sinister when they are armed. Although many Communitarians have failed to address this issue, "Neorepublican" theorists in legal academia have acknowledged that the power of these intermediate organizations that Communitarianism or republicanism is supposed to encourage must be subject to some regulation. Professor Cass Sunstein, for example, notes the importance of government not completely surrendering important responsibilities to private organizations.¹⁶⁸ At the same time, however, Sunstein believes that despite the potential for abuse that exists with the emergence of intermediate institutions, the answer is not simply for the government to attempt to eliminate them. To the contrary, Sunstein writes that "[g]overnment must therefore play a role in limiting the power of such organizations without denying the importance of their continued existence."¹⁶⁹ The classical universal militia, of course, was designed to play just such a role, yet it receives no credit in Communitarian writings.

That is unfortunate. The more that Communitarians and other members of the elite stigmatize gun-ownership and call for vigorous prosecution of gun owners and neomilitia members, the more extremists will be attracted to both. Moreover, given that seventy-five percent of Americans believe the Constitution protects the right to keep and bear arms,¹⁷⁰ attempts to demonize gun ownership and calls for "domestic disarmament" in the name of "community," or some equally amorphous collective ideal, could result in (pg.213) a loss of legitimacy that would pose a much greater threat to communities in the long run. Similarly, considering the prominence given the militia in the Constitution and in its underlying ideology, and the failure to maintain the institution as the country has developed, it is not surprising that intermediate institutions have arisen to fill the vacuum left by the demise of the traditional militia. Here too, it seems that should a government adhering to Communitarian principles wish to control the power of the neomilitias, it has the concomitant responsibility to establish an alternative structure into which might be channeled the militia-like impulses of its citizens.

¹⁶⁵ See Corn, *supra* note 13, at 5 (noting that "many militiamen have turned their energies toward setting up so-called common law courts ... over whom the federal government has no authority").

¹⁶⁶ See Williams, *supra* note 25, at 582.

¹⁶⁷ See Joelle E. Polesky, *The Rise of Private Militia: A First and Second Amendment Analysis of the Right to Organize and the Right to Train*, 144 U. PA. L. REV. 1593, 1604 (1996).

¹⁶⁸ See Sunstein, *supra* note 9, at 1574. Sunstein writes that intermediate organizations serve a variety of important functions, but recognition of that point does not eliminate the need to describe the appropriate role of the state and national governments.

....

An approach that sees the locus of republican virtues exclusively in private institutions undervalues the distinctive capacities of the state. In view of those capacities, political deliberation and citizenship must occur within public institutions as well.

Id.

¹⁶⁹ *Id.*

¹⁷⁰ According to a poll taken in the spring of 1995, most Americans believe citizens possess such a right. In that poll, respondents were asked, "Do you agree that the Constitution guarantees you the right to own a gun?" Seventy-five percent of those polled agreed; only 18% disagreed. See *The Fight to Bear Arms*, U.S. NEWS & WORLD REPORT, May 22, 1995, at 29.

It is possible that community might somehow be achieved through Habitat-for-Humanity style group projects, extensive discourse, and the creation of conditions necessary for "social justice."¹⁷¹ As the community gets larger, however, and as the powers the "community" exercises are granted to bodies increasingly remote from those for whose benefit the powers are supposed to be exercised, our antennae ought to be set aquiver. The twentieth century surely has taught that more long term destruction has been committed in the name of the "community" than by "radical individualists." According to Assistant Secretary of State for Human Rights John Shattuck, in this century, "the number of people killed by their own governments under authoritarian regimes is four times the number killed in all this century's wars combined."¹⁷² As writer Hannah Arendt reminds us, "It was not out of a desire for freedom that people eventually demanded their share in government or admission to the political realm, but out of mistrust in those who held the power over their life and goods."¹⁷³ Advocates of Communitarianism, whose numbers (judging from the number of new books) seem to be growing, would do well to consider the logical implications of their newfound "third way" and consider whether their position on the Second Amendment dictates that the cartridge box be restored, along with the ballot box and the jury box, as a hallmark of civic responsibility and a vehicle for the transmission of civic virtue. If they are not willing to consider this implication of their thinking, perhaps we should not take them very seriously in the future.

Alas, however, the failure to consider seriously the implications of their own positions is hardly a monopoly of the Communitarians. For example, Judge Robert Bork and other right-wing constitutional scholars have famously failed to consider that the very constitutional theories they champion (pg.214) must sometimes lead to results they abhor.¹⁷⁴ Nor are the Communitarians the only ones to practice such one-eyed constitutional interpretation with regard to the Second Amendment.¹⁷⁵ Although a certain amount of excess enthusiasm for one's own arguments is only human, academics should rise above such sentiments to the extent possible. As a movement started by academics, and as one that celebrates forbearance and the subordination of self-gratification for the good of the community, Communitarianism should be relatively free from such sins. The fact that it is not free suggests that honest, self-critical constitutional scholarship must be a very difficult thing indeed.

That is unfortunate, because constitutional scholarship is important, and honest constitutional scholarship plays, or should play, an important role in our society as a check on the actions of judges and politicians. Faithful interpretation of the Constitution is difficult, and, if done honestly and consistently, it is certain to generate at least some answers that the interpreter does not like. Thus, we should be suspicious of those whose constitutional theories generate only answers they find

¹⁷¹ The backlash to Communitarianism and neorepublicanism is building. See James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421 (1996); Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989 (1994).

¹⁷² Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1025-26 n.141 (1995) (quoting Shattuck).

¹⁷³ HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 150 (Penguin Books 1993) (1961).

¹⁷⁴ See, e.g., Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333 (1992) (criticizing right-wing attacks on *Griswold v. Connecticut* as inconsistent with original understanding); Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold, and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045 (1990) (same).

¹⁷⁵ See 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 courts for misinterpreting *Miller* because of the disapproval of the Second Amendment in general); Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995) (discussing how a states' rights interpretation of the Second Amendment leads to a result that supporters of such an interpretation dislike).

congenial, regardless of their ideological stripe. Unfortunately, constitutional scholarship that passes this test appears to be in short supply.

We have no solution to this problem beyond that offered by the Communitarians: suasion. We hope that as a result of our criticisms, and, no doubt, those of others, the Communitarians will revisit their views on this issue and at least consider that their own approach, if taken seriously, may produce answers other than the "domestic disarmament" they so clearly desire. In this much, at least, we agree with the Communitarians: dialogue is important. We hope that our contribution to the debate will promote more thinking about both Communitarianism and the Second Amendment.