

UNDER FIRE: THE NEW CONSENSUS ON THE SECOND AMENDMENT

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INTRODUCTION: REACTING TO THE NEW SCHOLARLY CONSENSUS

Until the early 1980s the Second Amendment had received little attention or interest from legal scholars.¹ In 1981 Northwestern University law professor Daniel D. Polsby ridiculed the individual rights view of the Amendment as "a lot of horsedung."² But as of 1994, having acquainted himself with the rather substantial literature of the intervening years, Polsby commented:

[A]most all the qualified historians and constitutional-law scholars who have studied the subject [concur]. The overwhelming weight of authority affirms that the Second Amendment establishes an *individual* right to bear arms, which is not dependent upon joining something like the National Guard. It goes without saying that like all constitutional

¹ 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.

² See Mike Royko, *Guns and the Constitution*, CHI. SUN-TIMES, March 20, 1981 (quoting Polsby as "describing this gun lover's belief as 'a lot of horsedung.'").

rights, the right to keep and bear arms is subject to reasonable regulation consistent with its purposes.³

Research conducted through the 1980s has led legal scholars and historians to conclude, sometimes reluctantly, but with virtual unanimity, that there is no tenable textual or historical argument against a broad individual right view of the Second Amendment.⁴(pg.1142)

According to the broad individual right view, the right of the people to keep and bear arms is to be treated the same as the other rights of the people specified in the Constitution—no more and no less. Like the other rights mentioned in the Bill of Rights, it is a right to be asserted by individuals against infringement by government. Like other rights in the Bill of Rights, it is not absolute, but neither is it a hollow shell which legislatures can ignore with impunity. Nor does it merely refer to the right of a state to have a militia, as many, perhaps most, law professors assumed before there was serious scholarship on the Second Amendment.

Despite this scholarship, on May 2, 1994, the broad individual right view was denounced as a gun-lobby "fraud on the American people" by twenty-six law professors in an advertisement sponsored by an anti-gun group which appeared in the *American Lawyer* and other publications.⁵ The only authority they cited supporting their view was a quotation from an article by former Chief Justice Burger in *Parade* magazine.⁶ Though a number of signatories are distinguished scholars, significantly, none had ever delved into the issues sufficiently to publish a scholarly article on the subject.

One of them has repaired that deficiency by writing (the all-too-appropriately named) *Gun Crazy*,⁷ the first article to appear in an important law review in almost thirty years disputing this now-predominant individual right view of the Second Amendment. As *Gun Crazy* presents it, the near-unanimous consensus among historians and legal scholars who have researched the issues is an artifact of a sinister concerted effort by pro-gun professors and fellow travelers. *Gun Crazy* argues that the gullible legal and scholarly communities are falling victim to a gun-lobby-organized conspiracy "to flood the law reviews with friendly scholarship from sympathetic law professors."⁸

Our aim in this Article is two-fold: First, we intend to put the academic discussion of the Second Amendment back on its constructive path by rebutting charges made in *Gun Crazy* against scholars who have contributed to the new consensus that the Second Amendment protects an

³ ATLANTIC MONTHLY, June 1994, at 13. See also GEORGE P. FLETCHER, A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 156 (1988) ("[E]ven though the prevailing interpretation is that the [Second A]mendment merely guarantees a right to the states to maintain a militia, convincing evidence indicates that the framers had an individual right in mind.").

⁴ Whatever value one accords textual or historical evidence for constitutional interpretation, as will be discussed below, those who advocate a militia-centric interpretation of the Second Amendment have relied mainly, if not exclusively, upon textual or historical arguments.

⁵ AM. LAW., June 1994, at 96 (advertisement).

⁶ Warren Burger, *The Right to Bear Arms*, PARADE, Jan. 14, 1990, at 4-6.

⁷ Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995) [hereinafter *Gun Crazy*].

⁸ *Id.* at 138.

individual right. To that end, in Part I, we discuss in detail the false charges of dishonesty and (pg.1143) conspiracy that *Gun Crazy* levels against scholars whose views it finds uncongenial. In Part II, we examine the factual errors in *Gun Crazy*.

Second, we present the textual, structural, historical, and criminological evidence that supports this new consensus; evidence about which most academics, even those who write about other areas of constitutional law, are largely unaware. In Part III, we examine the merits of the interpretation proffered by opponents of an individual right to keep and bear arms: the militia-centric conception of the Second Amendment. We analyze how textual, historical, and structural considerations each argue against such an interpretation and in favor of an individual rights approach. Finally, in Part IV, we consider the issue that is really motivating those who reject an individual rights interpretation in favor of a militia-centric conception of the Second Amendment: the allegedly adverse effect of gun ownership on public safety. Here we present the latest findings of criminologists on the effects of guns and gun ownership on violence.

I. AD HOMINEM ATTACKS ON LEGAL SCHOLARS

Gun Crazy portrays the near-unanimous scholarly literature as "pro-gun lobby" propaganda. One of *Gun Crazy*'s tactics is to reject twenty-five law review articles defending the individual right view as biased per se. These are articles by nonacademics whom *Gun Crazy* identifies as employees of the NRA and other pro-gun groups or whom *Gun Crazy* denigrates as "[g]un-rights litigators and activists,"⁹ "leading gun-rights litigators and lobbyists,"¹⁰ and "warhorses."¹¹ At the same time, *Gun Crazy* derives its substantive arguments on the Second Amendment from the handful of articles on the other side which it cites without ever informing readers that their authors are officers or paid employees of anti-gun groups.¹² (pg.1144)

It is unnecessary to quibble over the matter for, even when the articles by nonacademics are deducted, the consensus among full-time law professors and other academics who have studied the matter still overwhelmingly supports the broad individual right view of the Amendment.¹³ Based on

⁹ *Id.* at 69.

¹⁰ *Id.* at 138.

¹¹ *Id.* at 138 n.356.

¹² Since 1980, five articles have appeared championing the states' rights view of the Second Amendment. They are: Richard M. Aborn, *The Battle over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417 (1995) (article by president of Handgun Control, Inc.); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989); Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. 141 (1982) (article by Coordinator of Legal Affairs for the National Coalition to Ban Handguns); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991) (Dennis A. Henigan was the Director of the Legal Action Project at the Center to Prevent Handgun Violence); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383 (1983) (article by anti-gun state attorney general).

¹³ Counting only post-1980 articles, the most recent publications are Nicholas J. Johnson, *Shots Across No Man's Land: A Response to Handgun Control, Inc.'s Richard Aborn*, 22 FORDHAM URB. L.J. 441 (1995); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995); James E. Ely, Jr., Book Review, 52 WM. & MARY Q. 212 (3d series) (1995); Jeremy Rabkin, *Constitutional Firepower: New Light on the Meaning of the Second Amendment*, 86 J. CRIM. L. & CRIMINOLOGY 231 (1995) (book review).

We annotate pre-1995 publications that appeared before *Gun Crazy* was published with a dagger (†) to indicate the ones

the criteria it (pg.1145) selects, post-1972 law review articles by law professors, *Gun Crazy* and just one other law review article deny the broad individual right view.¹⁴ Several more law professor-authored articles catalog positions taken by each side without themselves supporting either,¹⁵ and there is also student work on both sides.¹⁶ After our manuscript was written, but before its publication, we

Gun Crazy fails to cite, while an asterisk (*) indicates those by historians rather than law professors: FLETCHER, *supra* note 3, at 156†; LEONARD M. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 341 (1988)†*; JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994)†* [hereinafter MALCOLM, ORIGINS]; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992)† [hereinafter Amar, *Fourteenth Amendment*]; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) [hereinafter Amar, *Bill of Rights*]; Robert J. Cottrol, *Second Amendment*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit L. Hall ed., 1992)† [hereinafter Cottrol, OXFORD COMPANION]; Robert J. Cottrol & Raymond T. Diamond, *Public Safety and the Right to Bear Arms*, in AFTER 200 YEARS: THE BILL OF RIGHTS IN MODERN AMERICA (D. Bodenhamer & J. Ely eds., 1993)† [hereinafter Cottrol & Diamond, *Public Safety*]; Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991) [hereinafter Cottrol & Diamond, *Afro-Americanist Reconsideration*]; Edward F. Leddy, *Guns and Gun Control*, in READER'S COMPANION TO AMERICAN HISTORY 477-79 (Eric Foner & John A. Garrity eds., 1991)†*; Stephanie A. Levin, *Grassroots Voices: Local Action and National Military Policy*, 40 BUFF. L. REV. 321 (1992)†; Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HAST. CONST. L.Q. 285 (1983)†* [hereinafter Malcolm, *Common Law*]; William Marina, *Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective*, in FIREARMS AND VIOLENCE (Donald Kates ed., 1984)†*; Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 L. & CONTEMP. PROBS. 125 (1986)†*; William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994)†; David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007 (1994)†; Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1994)† (book review) [hereinafter Cottrol & Diamond, *Fifth Auxiliary Right*]; F. Smith Fussner, Book Review, 3 CONST. COMMENTARY 582 (1986)†*; Joyce Lee Malcolm, Book Review, 54 GEO. WASH. L. REV. 452 (1986)†* [hereinafter Malcolm, *Review*]; David Wootton, *Disarming the English*, LONDON REV. BOOKS, July 21, 1994, at 20-22†*; see also MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986)†; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993)†; James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 328 (1990); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991)†*; John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993)†; 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, (1994) (extensively discussing the Second Amendment in relation to the Tennessee Constitution).

Gun Crazy, *supra* note 7, at 138 n.359, classifies two other articles as being "[o]n the broad individual right side" though they attempt to reconcile this right with gun prohibition: David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) (arguing that the Amendment is an individual right but may not be applicable to a present in which only one half of households are armed, as its purpose was to ensure that the entire populace would be armed) and Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 HAMLINE L. REV. 69 (1986) (conceding that the Amendment does guarantee a right of personal security, but arguing that this can constitutionally be implemented by banning and confiscating all guns).

¹⁴ *Gun Crazy*, *supra* note 7, fails to mention one other law professor's article supporting its position: George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 688-93 (1992).

¹⁵ Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453 (1992); Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53 (1992).

¹⁶ The following student works support the individual right view: T. Markus Funk, Comment, *Gun Control and Economic Discrimination: The Melting-Point Case-In-Point*, 85 J. CRIM. L. & CRIMINOLOGY 764 (1995); Kurt F. Kluin, Note, *Gun Control: Is It a Legal and Effective Means of Controlling Firearms in the United States?*, 21 WASHBURN L.J. 244 (1982); Eric C. Morgan, Note, *Assault Rifle Legislation: Unwise and Unconstitutional*, 17 AM. L. CRIM. L. 143 (1990); Robert A. O'Hare, Jr. & Jorge Pedreira, Note, *An Uncertain Right: The Second Amendment and the Assault Weapon Legislation Controversy*, 66 ST. JOHN'S L. REV. 179 (1992); Kevin D. Szczepanski, Comment, *Searching for the Plain Meaning of the Second Amendment*, 44 BUFF. L. REV. 197 (1996); Jay R. Wagner, Comment, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent Is There an Individual Right to Keep and Bear Arms?*, 37 VILL. L. REV. 1407 (1992).

The following student works support the anti-individual right view: Daniel Abrams, Topic, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488 (1992); Scott Bursor, Note, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEX. L. REV. 1125 (1996); Michael T. O'Donnell, Note, *The Second*

became aware of the existence, or impending publication, of several more law review articles. Though the authors are not associated with the gun lobby, all support the broad individual right position.¹⁷(pg.1146)

Gun Crazy suggests that "one's scholarly views of the Amendment are determined primarily by one's position on gun control."¹⁸ This is demonstrably false, at least with respect to those scholars who support the individual right interpretation. The great majority of historians and law professors who have written on the subject have never owned a gun in their lives and do not desire to own guns or to have any association with the gun lobby. Their motivation is primarily one of simple intellectual integrity, but there is a secondary motivation as well: the need to take rights seriously, even rights with which they may not agree.¹⁹

Many of these professors have long been closely associated with the ACLU and the NAACP Legal Defense and Education Fund, Inc. As former ACLU national board member Alan Dershowitz has said:

Foolish liberals who are trying to read the Second Amendment out of the Constitution by claiming it's not an individual right or that it's too much of a public safety hazard don't see

Amendment: A Study of Recent Trends, 25 U. RICH. L. REV. 501 (1991) (suggesting that, whatever the actual intent of the Amendment the lower federal courts have refused to enforce it to invalidate gun control laws); Mark Udulutch, Note, *The Constitutional Implications of Gun Control and Several Realistic Gun Control Proposals*, 17 AM. J. CRIM. L. 19 (1989).

¹⁷ Thomas McAfee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History or Precedent Stand in the Way?*, 75 N.C. L. REV. (forthcoming 1997); Brannon 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); Nicholas J. Johnson, *Plenary Power and Constitutional Outcasts: Federal Power, Critical Race Theory, and the Second, Ninth, and Tenth Amendments*, 57 OHIO ST. L.J. 1555 (1996); Inge Anna Larrish, *Why Annie Can't Get a Gun: A Feminist Perspective on the Second Amendment*, 1996 U. ILL. L. REV. 467 (1996); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. (forthcoming Fall 1997); Michael J. Quinlan, *Is There a Neutral Justification for Refusing To Implement the Second Amendment or Is the Supreme Court Just "Gun Shy"?*, 22 CAPITAL U. L. REV. 641 (1993); Gregory Lee Shelton, Comment, *In Search of the Lost Amendment: Challenging Federal Firearms Regulation Through Utilization of the "State's Right" Interpretation of the Second Amendment*, 1995 FLA. ST. U. L. REV. 105 (1995); T. Markus Funk, *Is the True Meaning of the Second Amendment Really Such a Riddle?: Tracing the Historical "Origins of an Anglo-American Right,"* 39 HOWARD L.J. 411 (1995) (book review).

¹⁸ *Gun Crazy*, *supra* note 7, at 144.

¹⁹ Van Alstyne, *supra* note 13, at 1254:

The difference between [people who take civil liberties seriously] and others ... is that such serious people begin with a constitutional understanding that declines to trivialize the Second Amendment or the Fourteenth Amendment, just as they likewise decline to trivialize any other right expressly identified elsewhere in the Bill of Rights. It is difficult to see why they are less than entirely right in this unremarkable view. That it has taken the NRA to speak for them, with respect to the Second Amendment, moreover, is merely interesting—perhaps far more as a comment on others, however, than on the NRA.

Cf. Levinson, *supra* note 13, at 657-58:

As Ronald Dworkin has argued, what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so. If protecting freedom of speech, the rights of criminal defendants, or any other part of the Bill of Rights were always (or even most of the time) clearly costless to the society as a whole, it would truly be impossible to understand why they would be as controversial as they are.... "Cost-benefit" analysis, rightly or wrongly, has come to be viewed as a "conservative" weapon to attack liberal rights. Yet one finds that the tables are strikingly turned when the Second Amendment comes into play.

the danger in the big picture. They're courting disaster by encouraging others to use the same means to eliminate portions of the Constitution they don't like.²⁰ (pg.1147)

To discriminate among the constitutional rights that one is willing to defend is ruinous to the credibility of those who exhort or hector public officials to honor rights with which those officials may disagree or which they may wish to disregard.²¹

We recognize, incidentally, the novelty and inappropriateness of discussing such personal matters in a scholarly forum. That only illustrates the unfortunate effect of *Gun Crazy's* descent into falsehood, guilt by association, and character assassination as modalities of legal analysis. Of course, some of the scholars *Gun Crazy* assaults do entertain views on firearms policy that differ from those of *Gun Crazy's* author, but this does not impugn their scholarship on the Second Amendment. Moreover, *Gun Crazy* misrepresents their views by portraying them as "gun lobby" stooges and champions of pro-gun irredentism. In fact, at least two scholars it so assaults argue that the great majority of the public, including most gun owners, recognize the need for sensible gun controls—and that this majority is dissipated because gun owners are driven into the arms of the NRA by the extremist anti-gun goals and vituperative rhetoric that *Gun Crazy* epitomizes.²²

Gun Crazy describes itself as "an Article about ... deceit, misperception, and dereliction of responsibility"²³ As we shall show in this Part and in (pg.1148) Part II, *Gun Crazy* is projecting its own deficiencies onto those who share the individual right view of the Second Amendment. First, *Gun Crazy* repeatedly harps on the need for truth, the virtues of truth, and the "dialogic responsibility"²⁴ of scholars, politicians, and journalists to tell the truth. But the truth is that *Gun*

²⁰ As quoted in Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 TENN. L. REV. 759, 789 (1995).

²¹ This view was also advanced by the Warren Court in defense of its controversial Bill of Rights decisions:

As no constitutional guarantee enjoys preference, so *none should suffer subordination or deletion*. [Consider] ... Senator Albert J. Beveridge[']s warning] ... in 1920, a time when there was also manifested impatience with some of the restrictions of the Constitution in the presumed interest of security. His appeal was to the Constitution—to *the whole Constitution, not to a mutilating selection of those parts only which for the moment find favor*.

Ullmann v. United States, 350 U.S. 422, 428 (1955) (emphasis added) (footnote omitted). In a footnote, the Court quoted the Beveridge speech:

If liberty is worth keeping and free representative government worth saving, we must stand for *all* American fundamentals—not some, but all. All are woven into the great fabric of our national well-being. We cannot hold fast to some only, and abandon others that, for the moment, we find inconvenient. If one American fundamental is prostrated, others in the end will surely fall.

Id. at 428 n.3.

²² See Cottrol & Diamond, *Public Safety*, *supra* note 13, at 85-86; see also Don B. Kates, Jr., *The Battle over Gun Control*, 84 PUB. INTEREST 42 (1986); Don B. Kates, Jr., *Bigotry, Symbolism, and Ideology in the Battle over Gun Control*, 1992 PUB. INTEREST L. REV. 31; Lance K. Stell, *Guns, Politics and Reason*, 9 J. AM. CULTURE 71(1986).

²³ *Gun Crazy*, *supra* note 7, at 57.

²⁴ *Id.* at 62. By our count *Gun Crazy* uses this term 14 times, not including in its subtitle. See generally, *id.* at 117-48.

Crazy presents a pastiche of ignorant and/or careless factual errors, outright lies, half-truths, suppressed facts, tendentious reasoning, *ad homines*, epithets, and assumed premises conveyed in hyper-emotional verbiage. The most charitable view that may be taken of many of *Gun Crazy*'s assertions is that the article is beset by its own slovenly research and by credulous dependence on partisan sources whose partisanship *Gun Crazy* conceals from its readers.

Second, *Gun Crazy* solemnly speculates that the reason so few law professors have been willing to speak out against the gun lobby may be that "real political controversy and ugly cross-talk, may simply be too off-putting for the taste of many in the legal academy."²⁵ The fact is that *Gun Crazy* is a paradigm of irrelevant "ugly cross-talk" and *ad homines* in the law review debate over the Second Amendment. Its apparent purpose is to deter the publication of politically incorrect scholarship by heaping calumny and vituperation on scholars whose research has led them, however reluctantly, to conclusions it finds uncongenial.

Although *Gun Crazy* also advances arguments for its militia-centric view of the Second Amendment (which we examine below),²⁶ these consist in a rehash of the points made in more obscure articles published by paid advocates for anti-gun groups—whom *Gun Crazy* does not so identify, though it takes great pains to so identify articles by NRA employees. Indeed, we hasten to note that, despite the notorious acrimony of the popular gun debates, rival expositions of the Second Amendment by paid employees of anti-gun and pro-gun groups are far more honest and intellectually compelling than is *Gun Crazy*, and they have in the main *not* resorted to the epithets, *ad homines*, and falsehoods that mar *Gun Crazy*. *Gun Crazy* represents a departure from standards of civility and scholarship that heretofore have prevailed in the legal literature on the Amendment.²⁷ (pg.1149)

To discredit the overwhelming consensus of scholarly opinion supporting the politically incorrect view of the Second Amendment, *Gun Crazy* employs techniques most often associated in this country with the late Senator Joseph McCarthy (R-WI). The charge of McCarthyism is often so lightly made that we hesitated before making it. Yet, as we show in this Part, there is no more descriptive a label for the character assassination, guilt by association, and conspiracism with which *Gun Crazy* defames law professors whose views it finds uncongenial. We realize that these, like the accusations leveled by *Gun Crazy* at Second Amendment scholars, are serious charges. To substantiate them will require a detailed analysis of *Gun Crazy*'s claims. For those who find the detail in which we address these accusations tiresome, we suggest skipping ahead after reading only as long as is necessary to satisfy themselves of the falsity of *Gun Crazy*'s charges.

Gun Crazy takes a two-step approach. The first step is to accuse the "gun lobby"—referring to those associated with political activism in defense of the right to own and possess guns—of

²⁵ *Id.* at 139.

²⁶ *See infra* Part III.

²⁷ Compare Ehrman & Henigan, *supra* note 12 (activists defending the militia-centric approach), and Henigan, *supra* note 12 (same), with Thomas M. Moncure, Jr., *The Second Amendment Ain't About Hunting*, 34 HOW. L.J. 589 (1991) (activist defending the individual right theory), and Thomas M. Moncure, *Who Is the Militia—The Virginia Ratification Convention and the Right to Bear Arms*, 19 LINC. L. REV. 1 (1990) (same).

consciously lying about the true meaning of the Second Amendment. *Gun Crazy* is replete with such phrases as:

Dishonesty also dominates the gun lobby's discussion of [case law] on the Second Amendment.²⁸

the gun lobby's dishonest manipulation of constitutional meaning²⁹

Second Amendment deception³⁰

Fabricated Meanings of the Second Amendment³¹

the constitutional fish story told by the gun lobby³²

a monumental myth³³

a constitutional deception³⁴

phantom constitutional barriers³⁵

misinformation campaign³⁶

Second Amendment sleight-of-hand³⁷ (pg.1150)

the gun lobby's constitutional distortion³⁸

the gun lobby's Second Amendment misrepresentation³⁹

The terms "fabrication," "deception," and "deceit" appear repeatedly throughout the article.

The second step is to charge or imply that seemingly neutral scholars have reached the same duplicitous conclusions because of their concealed connections to the gun lobby.

The deception that leading constitutional scholars are accused of perpetrating on the American public is two-fold: First, they are accused of concealing from their readers the supposed fact that courts have uniformly rejected the individual right conception of the Second Amendment. Second, they are accused of deliberately distorting the historical evidence they cite in support of the individual right conception, indeed of borrowing their distorted evidence from gun-rights activists. As we shall see, when separated from the rhetoric, the facts alleged to justify these serious charges—assuming they were true—are remarkably thin. In any event, as we shall show, the facts alleged are false.

In sum, *Gun Crazy* portrays major figures in constitutional law as propagandists masquerading as scholars. Following their fixed agenda of erecting "phantom constitutional

²⁸ *Gun Crazy*, *supra* note 7, at 104.

²⁹ *Id.* at 148.

³⁰ *Id.* at 61.

³¹ *Id.* at 63.

³² *Id.* at 61.

³³ *Id.* at 110.

³⁴ *Id.* at 63, 110.

³⁵ *Id.* at 61.

³⁶ *Id.* at 103.

³⁷ *Id.*

³⁸ *Id.* at 111.

³⁹ *Id.* at 113.

barriers"⁴⁰ to gun control, they participate in duping gullible legal scholars and the general public into accepting "the gun lobby's well-orchestrated propaganda campaign";⁴¹ they know the truth, but deny it in "dereliction of [their] dialogical responsibility"⁴² as scholars to "speak the 'truth'";⁴³ they are in the forefront of the "rabidly vocal minority"⁴⁴ being "effectively mobilized"⁴⁵ by the NRA "to drown out and shout down virtually all other voices in the constitutional conversation."⁴⁶ Even after being informed of the falsity of these charges, *Gun Crazy's* author's unrepentant commitment to this method of discourse is revealed by his subsequent statement (pg.1151) to a reporter that "[t]he majority of these articles could have been spewed out of the N.R.A.'s word processor."⁴⁷

A. Deceitfully Ignoring Case Law

Gun Crazy's principal charge is that Akhil Reed Amar, Sanford Levinson, William Van Alstyne, Robert Cottrol, and others deliberately deceive readers by not acknowledging (or acknowledging "fully"⁴⁸) what *Gun Crazy* repeatedly misdescribes as fifty years of unanimous federal court rejection of the individual right view of the Amendment.⁴⁹ "The failure" to tell the truth, according to *Gun Crazy*, "lies in refusing to mention the scope of the case law that confines the 'right to bear arms' to only the narrowest of circumstances."⁵⁰

Notice the slippery nature of this charge: "refusing to mention" sounds like the sanctionable violation of professional ethics committed by a lawyer who deliberately omits relevant case law when making a legal argument.⁵¹ But when "the scope" is added, an element of judgment has been introduced. The failure now may consist only of a disagreement about the significance or meaning of the case law rather than a concealment of relevant data.

⁴⁰ *Id.* at 61.

⁴¹ *Id.* at 148.

⁴² *Id.* at 139.

⁴³ *Id.* at 135.

⁴⁴ *Id.* at 61.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Gun Crazy's* author as quoted in Scott Heller, *The Right to Bear Arms*, CHRONICLE OF HIGHER EDUC., July 21, 1995, at A8 [hereinafter CHRONICLE] (responding to protests raised against *Gun Crazy's* inaccuracy).

⁴⁸ *Gun Crazy*, *supra* note 7, at 143.

⁴⁹ *Id.* at 82 (referring to "more than fifty years of settled jurisprudence"); *id.* at 139 ("[The scholars] inexplicably ignore, or summarily dismiss, the judicial consensus rejecting the broad individual right position.") By our count *Gun Crazy* refers explicitly to a "judicial consensus" 14 times.

⁵⁰ *Id.* at 139.

⁵¹ FED. R. CIV. P., Rule 11. Analogous, particularly in light of *Gun Crazy's* innumerable references to "fraud" and "deception," is the fraudulent sale of goods or securities. *See, e.g.*, CAL. CIVIL CODE § 1710 (West 1985) (actionable deceit includes "[t]he suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact..."); CAL. CIVIL CODE § 1572 (West 1982) (Actionable fraud includes "[t]he suppression of that which is true, by one having knowledge or belief of the fact"); RESTATEMENT (SECOND) OF TORTS, Chs. 22-23 (1938); RESTATEMENT (SECOND) OF CONTRACTS §§ 160-61(1981).

Moreover, Herz expresses an antiquated, if not completely idiosyncratic, view of what he terms the "dialogic responsibility" of scholars. Even in areas where the case law is far more settled than that which concerns the right to arms, scholars are not limited to addressing issues in terms of "black letter law." Many constitutional theorists understand their task as scholars to be to substantiate their constitutional interpretations with the aim of influencing (pg.1152) *future* judicial decisions. The fact that courts may have decided questions differently than would the theorist is precisely what motivates the research. It is far from clear to us that scholars evaluating, for example, the original understanding of a statute or constitutional provision are ethically bound to emphasize or even mention the fact that courts, which may not have even considered the scholars' approach, have adopted a different understanding.

Whether the charge of "deceit, misperception, and dereliction of responsibility,"⁵² is fair when referring to the omission of case law in a scholarly article, in this case it is wrong on both counts. The cases are not monolithic and Second Amendment scholars have not ignored them.

As we shall now show, *Gun Crazy* only attains its supposedly "broad,"⁵³ "clear"⁵⁴ and "striking judicial consensus"⁵⁵ by misstating opinions, misconstruing dicta as holdings, and failing to disclose contrary opinions. Moreover, none of the opinions cited in *Gun Crazy* discusses the historical research that has led to the prevailing scholarly consensus. In most of the cases no more than a sentence or two is addressed to Second Amendment issues.

1. Supreme Court Discussions of the Amendment

Despite its claims about the definitive effect of judicial construction, *Gun Crazy* eschews anything beyond brief reference to Supreme Court opinions which concern the Amendment. This is necessary because neither the Court's treatment of the Amendment discussed in *Gun Crazy* nor those treatments not mentioned in *Gun Crazy* square with *Gun Crazy*'s characterization of them as monolithic.

a. Supreme Court Opinions Discussed by Gun Crazy

In *United States v. Miller*,⁵⁶ the only Supreme Court case to consider explicitly the nature and scope of the people's right to keep and bear arms, the Court held that an indictment should not have been dismissed on the blanket theory that any law taxing and requiring registration of sawed-off shotguns (pg.1153) violated the Second Amendment *ipso facto*. Neither of the indicted defendants were, or claimed to be, members of the militia, or of any military group. Without suggesting that they needed to allege such a status, the *Miller* Court reversed and remanded the case, stating that:

⁵² *Gun Crazy*, *supra* note 7, at 57.

⁵³ *Id.* at 140.

⁵⁴ *Id.* at 107.

⁵⁵ *Id.* at 104.

⁵⁶ 307 U.S. 174 (1939).

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*. Certainly it is not within judicial notice that *this weapon* is any part of the ordinary military equipment or that its use could contribute to the common defense.⁵⁷

Gun Crazy claims that the Court in *Miller*:

[W]ent only as far as was necessary to dispose of the case before it. The *Miller* holding most plausibly means only that it is a *necessary* condition that a firearm be useful to the militia and an individual's service therein, not that military utility is a *sufficient* condition to grant constitutional protection. The individual using the firearm still must be doing so in the context of service in a government-organized (not independent) militia.⁵⁸

Although we do not claim that the meaning of the opinion in *Miller* is beyond dispute, this passage from *Gun Crazy* is revealing for a number of reasons. First, its claim that the Court "went only as far as was necessary to dispose of the case before it," would be plainly wrong had the Court accepted *Gun Crazy's* "narrow, militia-centric"⁵⁹ theory of the Second Amendment. To the contrary, the Court would not have had to go nearly as far as it did, but could simply have reversed on the ground that the defendants lacked standing to raise a Second Amendment challenge because they were not members of a "government-organized" state militia.⁶⁰ Unless the Court accepted that gun ownership by ordinary citizens *not* involved in a "government-organized" militia is a right protected by the Amendment, the defendants simply were in no position to challenge the law. The only reason the (pg.1154) Court had to remand to consider whether a sawed-off shotgun is the kind of firearm the Amendment protects is that the Justices accepted, at least implicitly, that individuals do have standing to invoke the Second Amendment. Thus, *Gun Crazy's* claim that "[t]he *Miller* holding most plausibly means only that it is a *necessary* condition that a firearm be useful to the militia and an individual's service therein, not that military utility is a *sufficient* condition to grant constitutional protection"⁶¹ is a highly implausible law office distinction.

Second, *Gun Crazy* claims that, "[t]he individual using the firearm still *must* be doing so in the context of service in a government-organized (not independent) militia."⁶² *Gun Crazy* quotes no language to this effect because there simply is nothing in the opinion that says any such thing. Nor has the Supreme Court ever explicitly or implicitly adopted such a theory. Therefore, it is improper to suggest, as we think the passage quoted above⁶³ on the whole does, that this was the *holding* of

⁵⁷ *Id.* at 178 (emphasis added). In support of this position, the Court then cites *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840), a case which flatly held the right to arms to be an individual right, but then held that it excluded nonmilitary arms, i.e., that a bowie knife is not the *type* of military weapon protected by the Tennessee State Constitution.

⁵⁸ *Gun Crazy*, *supra* note 7, at 69.

⁵⁹ *Id.* at 80.

⁶⁰ See *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996).

⁶¹ *Gun Crazy*, *supra* note 7, at 69.

⁶² *Id.* (emphasis added).

⁶³ See *supra* text accompanying note 58.

Miller. It is particularly improper in light of the fact, which is neither acknowledged nor denied in *Gun Crazy*, that *its* narrow militia-centric theory *was* argued to the Court. The brief for the United States, the only brief filed in the case, "argued that the [Second Amendment] right was a collective one that [only] protected the people when carrying arms as members of the state militia."⁶⁴ The Court failed to adopt this militia-centric theory despite the fact that the appellee-defendants filed no brief in the case.

To us, it seems the "most plausible" interpretation of the *Miller* Court's order to remand was that it rejected the view *Gun Crazy* advocates.⁶⁵ Moreover, (pg.1155) in contrast to *Gun Crazy's* use of the term "government-organized militia," the Court described a militia as follows:

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of [the] Colonies and [the] States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time.⁶⁶

Once again, while far from clear, this passage is not inhospitable to the view that it is a private individual right to keep and bear arms which is protected. For only if there existed such a "body of citizens" in possession of "arms supplied by themselves," could they, should the need arise, be "enrolled for military discipline" to act "in concert for the common defense."

We consider the relationship between the Militia Clause and the individual right to keep and bear arms at greater length below;⁶⁷ at this juncture the important issue is this: Is a scholar who disagrees with *Gun Crazy's* interpretation of *Miller*, and says so, engaging in "deception"—a term that *Gun Crazy* uses nine times in the article?⁶⁸ Would scholars who ignore this enigmatic case to present their own view of "the debates in the Convention, the history and legislation of Colonies and

⁶⁴ ROBERT J. COTTRILL, 1 GUN CONTROL AND THE CONSTITUTION xxvii (1993). See Brief for United States at 15-16, *Miller* (No. 696). This fact was known to Herz because *Gun Crazy* cites Cottrol, *supra*. See *Gun Crazy*, *supra* note 7, at 143 n.390. Further, far from, "ignor[ing]" or "summarily dismiss[ing]," *id.* at 139, this case, Robert Cottrol discusses it at greater length (two pages vs. one) than *Gun Crazy*, adds original research (unlike *Gun Crazy*) examining the government's brief, and Cottrol reproduces the entire text of this case (and two others) in his anthology. Nonetheless *Gun Crazy* accuses Cottrol of having "ignored what the courts have said—omitting material in gross measure." *Gun Crazy*, *supra* note 7, at 143.

⁶⁵ *Gun Crazy* also does not inform readers that the *Miller* Court reached its basically individual right result even though the individual right position was not argued to the Court. The matter went up from the trial court on the government's appeal; by the time it was briefed one of the defendants had died, and the other apparently did not engage counsel. The only brief filed was the government's.

⁶⁶ United States v. Miller, 307 U.S. 174, 179 (1939) (emphasis added).

⁶⁷ See *infra* Part III.

⁶⁸ See *Gun Crazy*, *supra* note 7, at 62 (previewing a section of the article that focuses on "deception").

States, and the writings of approved commentators"⁶⁹ be engaging in "dereliction"—a term that *Gun Crazy* uses twelve times—of their responsibility as scholars?"⁷⁰ (pg.1156)

Gun Crazy also discusses two nineteenth century Supreme Court cases, *United States v. Cruikshank*,⁷¹ and *Presser v. Illinois*.⁷² *Gun Crazy* emphasizes that these nineteenth century cases hold, as they do, that the Second Amendment does not apply against the states, either by its own force or by incorporation through the Fourteenth Amendment,⁷³ and that the Supreme Court "has not seen fit to revisit those earlier decisions, refusing to grant certiorari in any of the cases dismissing Second Amendment challenges to state regulations on nonincorporation grounds."⁷⁴ Then *Gun Crazy* criticizes "gun-rights activists" for arguing "that these decisions are meaningless because they came prior to the onset of the modern incorporation doctrine."⁷⁵

Gun Crazy fails to mention, much less address, the general agreement among those scholars who have addressed the issue that the Privileges or Immunities Clause of the Fourteenth Amendment was specifically intended to incorporate the personal right to arms.⁷⁶ By confining its discussion of these two cases to the issue of incorporation, *Gun Crazy* misleadingly fails to note that, in both cases, the Court refused to apply the right to keep and bear arms to the states, not because it was a collective right or because it was a militia-centric right, but because the Fourteenth Amendment did not empower the courts to protect *any* individual rights mentioned in the Bill of Rights. That is, the Court treated the Second Amendment as an individual right fully on par with other parts of the Bill

⁶⁹ *Miller*, 307 U.S. at 179.

⁷⁰ *Gun Crazy* also emphasizes the continued refusal of the Supreme Court to grant certiorari to reverse lower court cases in which the broad individual right theory was supposedly rejected. *Gun Crazy*, *supra* note 7, at 77 ("The Court has denied certiorari in at least nine cases in which the lower courts relied on *Miller* to reject Second Amendment challenges.") (footnote omitted). While this may reflect the Court's "deep disinclination to disturb existing doctrine" as *Gun Crazy* asserts, *id.* at 77, it may also simply represent the Justices' sympathy for gun control provisions and their inability to justify credibly a judicial repeal of the Second Amendment or the fact that, in the main, the regulations under review applied only to convicted felons. Because it is so difficult to interpret a refusal to grant certiorari, such denials are not considered a comment on the merits, as *Gun Crazy* concedes. *See id.* ("orthodox understanding views a denial of certiorari as making no comment on the merits"). Once again, is it a failure of "dialogic responsibility" to disregard the Court's denial of certiorari when writing about the Second Amendment?

⁷¹ 92 U.S. 542 (1875) (right to arms and right to assemble constrain only governmental action not private action).

⁷² 116 U.S. 252, 265 (1885) (right to arms constrains only federal action not private action). Along with *Miller*, the full text of this opinion appears in Robert Cottrol's anthology. *See GUN CONTROL AND THE CONSTITUTION*, *supra* note 64, at 86.

⁷³ *See Presser*, 116 U.S. at 265:

[A] conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States. It was so held by this court in the case of *United States v. Cruikshank*

⁷⁴ *Gun Crazy*, *supra* note 7, at 72.

⁷⁵ *Id.* Notice the inconsistency between this claim and *Gun Crazy*'s primary charge that "gun-rights activists" and scholars have neglected to discuss these cases in their writings.

⁷⁶ CURTIS, *supra* note 13, at 104 ("Among the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States were the right to freedom of speech, the right to due process of law, and the right to bear arms."). *See also id.* at 52, 53, 56, 72, 88, 140-41 and 164 (citing different references to the right to bear arms in the context of the Fourteenth Amendment); Amar, *Fourteenth Amendment*, *supra* note 13, at 1205-11, 1261-62 (same); Aynes, *supra* note 13, at 84, 98 (same); Van Alstyne, *supra* note 13, at 1251-53 (discussing how the right to keep and bear arms figures in the meaning of the Fourteenth Amendment).

of Rights construed in the same cases.⁷⁷ This (pg.1157) fact undermines *Gun Crazy's* assertion that a judicial monolith, whose existence no honest scholar can deny or ignore, has consistently rejected a broad individual right when construing the Second Amendment.

Gun Crazy assigns to a brief and misleading footnote one of the Supreme Court's most important modern mentions of the Second Amendment. In *United States v. Verdugo-Urquidez*⁷⁸ the Court noted that, as the phrase "right of the people" is used throughout the Constitution, it always denotes citizens and their rights against government. In focusing on the Fourth Amendment, the case suggests that the words "the people" are to be interpreted *in pari materia* as they appear in the First, Second, Fourth, Ninth, and Tenth Amendments, and in the body of the Constitution as well.⁷⁹ After suggesting this, the Court proceeded to recognize, as it had to, that "the people" is used in contrast to the "state," and is equated at least to the entire individual citizenry (although it may not include aliens who lack residency or other connection to the country).⁸⁰

Gun Crazy's sketchy description of the case in a footnote fails to explain *Verdugo-Urquidez* sufficiently for readers to understand that the Court is rejecting the textual contradiction inherent in any approach which, like *Gun Crazy's*, requires giving "the people" a wholly different meaning in the Second Amendment than in the rest of the Bill of Rights. Having ducked that issue, *Gun Crazy* is able to get by with the following misleading response:

the Court's comment about "the people" does not even begin to address the central question of the Second Amendment's *scope*: whether the (pg.1158) right to arms applies to "the people" for all purposes, or only in connection with militia service.⁸¹

Of course, no affirmation of any broad individual right retained by the people mentioned in the Constitution "address[es] the central question of [its] *scope*." This is as true of the right to freedom of speech as it is of the right to keep and bear arms.

Verdugo-Urquidez is both inconsistent with the commonly proffered "state's right to form a militia" interpretation of the Second Amendment and consistent with the broad individual right interpretation. In no manner can it fairly be interpreted as part of a consistent judicial consensus that

⁷⁷ The Supreme Court cases holding the Second Amendment inapplicable to the states are: *Miller v. Texas*, 153 U.S. 535 (1894) (also holding the Fourth Amendment inapplicable to the states); and *Presser v. Illinois*, 116 U.S. 252, 265-67 (1886) (First and Second Amendments inapplicable to the states). The statement to the same effect in *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) is actually dictum because the case's holding is that neither the right to arms nor the right of assembly is protected against private conduct but rather only against federal deprivation.

⁷⁸ 494 U.S. 259, 265 (1990). See also *id.* (referring, inter alia, to Art. I, § 2, cl. 1) (providing that the House of Representatives is to be chosen "by the People of the several states"). It is noteworthy that the dissent sought to define "the people" more broadly, not more restrictively.

⁷⁹ *Id.* at 265. See also *Patton v. United States*, 281 U.S. 276, 298 (1930) ("The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia*"), *overruled on other grounds* by *Williams v. Florida*, 399 U.S. 78 (1970). Cf. *Freytag v. Commissioner*, 501 U.S. 868, 889 (1991) ("[T]he Constitution's terms are illuminated by their cognate provisions.").

⁸⁰ *Verdugo-Urquidez*, 494 U.S. at 265. See also *id.* at 266 (describing the purpose of the Fourth Amendment as being "to protect the people of the United States against arbitrary action by their own Government").

⁸¹ *Gun Crazy*, *supra* note 7, at 73 n.56.

rejects the broad individual right approach and that all honest legal scholars must acknowledge when offering their own interpretation.

b. Supreme Court Opinions Omitted by Gun Crazy

In addition to distorting the cases it cites to make it appear that "the courts have consistently found that the Second Amendment guarantees a right to bear arms only for those individuals who are part of the 'well regulated Militia,'" *Gun Crazy* omits some cases as well.

Gun Crazy contains no discussion of the earliest mention by the Supreme Court of the right to keep and bear arms in Chief Justice Taney's justly infamous opinion in *Dred Scott*.⁸² As an *argumentum ad horribilis*, Chief Justice Taney emphasized that to hold that blacks could be citizens would involve accepting that they enjoyed all the rights of citizens: "the full liberty of speech... and to keep and carry arms wherever they went."⁸³ Like the Founders and the nineteenth century commentators we discuss below,⁸⁴ Taney mentioned the right to arms without differentiating it from other constitutional rights he mentions in the same passage, including freedom of speech and assembly, jury trial, and against self-incrimination.⁸⁵ And contrary to the militia-centric thesis advocated in *Gun Crazy*, Taney's opinion (pg.1159) assumed that all white citizens then enjoyed the guarantee of an individual right "to keep and carry arms wherever they went"⁸⁶ without making any connection of this right to militia service. As discussed below, Taney's comments represent a *universal* understanding in his generation—the generation which followed that of the Founders—of the Amendment as an individual right not necessarily connected to the militia. Though abolitionist legal theorists disagreed with Taney on virtually everything else, they agreed with him on this.⁸⁷

In addition, *Gun Crazy* omits any reference to two other nineteenth century Supreme Court cases that assume the right referred to in the Second Amendment is of an equal status to other constitutional rights.⁸⁸ Of greater significance is that the latest Supreme Court opinion mentioning the Amendment does the same thing. In their landmark joint opinion in *Planned Parenthood v.*

⁸² *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

⁸³ *Id.* at 417.

⁸⁴ *See infra* at Part III.B.2.

⁸⁵ *Dred Scott*, 60 U.S. (19 How.) at 417. *See also id.* at 450 ("Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.").

⁸⁶ *Id.* at 417.

⁸⁷ Two prominent lawyers of the day, Lysander Spooner and Joel Tiffany, argued that slavery was unconstitutional using exactly the same reasoning as Taney, albeit in the converse. Slavery was unconstitutional, in part, they argued, because the laws enforcing it deprived slaves of a host of constitutionally guaranteed personal rights including the right to arms, free speech, religion, and assembly. Far from seeing the Amendment as confined to the militia (of which slaves were not members), they viewed it as founded on the "natural right of all men 'to keep and bear arms' for their personal defence; and prohibit[ed] both Congress and the State governments from infringing the right of 'the people'—that is, of *any* of the people—to do so.... This right of a man 'to keep and bear arms,' is a right palpably inconsistent with the idea of his being a slave." LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 98 (rev. ed. 1860) in *THE COLLECTED WORKS OF LYSANDER SPOONER* (Charles Shively ed., 1971). *See also* Joel Tiffany, *TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY* 99 (1849) *quoted in* CURTIS, *supra* note 13, at 43 (listing the right to keep and bear arms among all those "guarantys, for personal security and liberty" secured by the Constitution, without any militia qualification).

⁸⁸ *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) (equating the Second and First Amendments); *Miller v. Texas*, 153 U.S. 535, 538 (1894) (equating the Second and Fourth Amendments).

*Casey*⁸⁹ Justices Kennedy, O'Connor, and Souter quoted with approval Justice Harlan's statement that the "full scope of ... liberty" is not limited to "the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures."⁹⁰ *Casey* reaffirmed the right of privacy, a right it viewed as belonging to an individual and that can be asserted by the individual against the federal government or a state. The Justices used this quote from Justice Harlan to convey the view that such an unenumerated right had the same constitutional status as all the enumerated rights in this list. All these rights retained by the people are considered by (pg.1160) the Court to be on a par. No mention of a militia-centric qualification is made.

None of these discussions receives any mention in *Gun Crazy*. Though all are no more than very short dicta whose meaning or significance are open to question, they should have merited particular attention in *Gun Crazy*, which purports to show the existence of a clear, broad, and striking judicial consensus that legal scholars are fraudulently ignoring.

2. Lower Federal Court Decisions

When criticizing Second Amendment scholars who *have* discussed Supreme Court opinions, often at length though not to *Gun Crazy's* satisfaction, *Gun Crazy* upbraids them for ignoring lower court decisions. "It requires an advanced case of Supreme Court-only tunnel vision" Herz says,

to ignore more than five decades of consistent interpretation from the federal courts.... Every other federal court to consider the Second Amendment subsequent to the *Miller* decision has adopted a narrow militia-centric view of the right to bear arms. When scholars ignore that consistent case law, they perpetuate the ignorant state of our gun control discourse.⁹¹

According to *Gun Crazy*, there is a unanimous and unbroken consensus in the lower federal courts:

Every federal appellate decision since *Miller* has rejected the broad-individual-rights position and focused instead on whether use of a weapon was related to maintenance of a well-regulated militia. Every such court faced with the gun lobby's claim that *Miller* extends constitutional protection to all weapons with military utility has squarely rejected that assertion.⁹²

An examination of the cases *Gun Crazy* discusses—and those it does not—fails to support this claim. Although most of its case citations are generally accurate, some of what *Gun Crazy* characterizes as holdings are actually dicta; and it suppresses facts that crucially undercut its claims about how dispositive this lower federal court case law is.(pg.1161)

⁸⁹ 505 U.S. 833 (1992).

⁹⁰ *Id.* at 848 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

⁹¹ *Gun Crazy*, *supra* note 7, at 143-44.

⁹² *Id.* at 74.

Consider the dissonance between two things *Gun Crazy* asserts (though at different points in the article and without noting their connection): (a) that "firearms are virtually unregulated"⁹³ in the U.S., especially by the federal government; and (b) that "more than fifty years of settled jurisprudence" proves "no gun control law restricting or regulating any aspect of private purchase, use, or possession of firearms should see invalidation on Second Amendment grounds."⁹⁴ Now if firearms are "virtually unregulated," how likely is it that the cases are numerous and definitive enough to dispositively exclude the possibility of constitutional invalidation?

This question is not merely a rhetorical one. For it turns out that almost all the cases on which *Gun Crazy* relies involved firearms that were illegally possessed by persons previously convicted of a felony.⁹⁵ The proposition that laws designed to disarm felons do not violate state or federal right to arms guarantees is one that has been championed by the NRA since the 1910s—about 50 years prior to the existence of a national anti-gun movement.⁹⁶ Although some of the cases *Gun Crazy* cites do ground their result on the collective rights theory, many others simply affirm that the Second Amendment does not bar laws against felons possessing arms. That is a position fully acceptable to the NRA's leadership⁹⁷ and to those who, in *Gun Crazy's* view, "share the extreme views of the NRA."⁹⁸

Gun Crazy does address this interpretation of the cases, but terms it "disingenuous" because "it fails to take account of the handgun and machine gun (pg.1162) bans upheld in *Quilici* and *Farmer*, respectively."⁹⁹ *Farmer v. Higgins*,¹⁰⁰ however, does not uphold a machine gun ban against constitutional challenge. Indeed *Farmer* says literally *nothing* about the Second Amendment. The issue to which it expressly limits itself is statutory interpretation and the harmonizing of federal machine gun laws.¹⁰¹ Nonetheless, *Gun Crazy* thrice parenthetically characterizes this case as

⁹³ *Id.* at 150 n.424. See also *id.* at 61 n.10 (quoting with approval Sugarman & Rand to this effect); *id.* at 113 (describing the U.S. legal system, as one "that permits virtually unrestrained access to unlimited quantities of the most dangerous means of destruction").

⁹⁴ *Id.* at 82.

⁹⁵ See, e.g., *Marchese v. California*, 545 F.2d 645, 646 (9th Cir. 1976); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971); see also *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (illegal alien); *United States v. Day*, 476 F.2d 562 (6th Cir. 1973) (person who was dishonorably discharged).

⁹⁶ For discussion of the NRA's promotion of the 1910s-20s Uniform Revolver Act and subsequent gun control proposals see LEE KENNET & JAMES LAVERNE ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA* ch. 8 (1975); EDWARD F. LEDDY, *MAGNUM FORCE LOBBY: THE NATIONAL RIFLE ASSOCIATION FIGHTS GUN CONTROL* ch. VI (1987). See generally, Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 209-10 (1983).

⁹⁷ See the recent comment by the NRA's Executive Vice President: "Neither felons nor children under eighteen, of course, have the right to own arms—any more than they have the right to vote. This restriction is based on solid historical reasons ... [and the NRA] has for over seventy years supported laws to prohibit gun ownership by those who have been convicted of violent crime." WAYNE R. LA PIERRE, *GUNS, CRIME AND FREEDOM* 17 (1994).

⁹⁸ *Gun Crazy*, *supra* note 7, at 57 n.2.

⁹⁹ *Id.* at 76 n.70.

¹⁰⁰ 907 F.2d 1041 (11th Cir. 1990).

¹⁰¹ *Id.* at 1045 ("[I]n light of the plain language of section 922(o), as well as its legislative history, we hold that Section 922(o) prohibits the private possession of machine guns not lawfully possessed prior to May 19, 1986."). One of us has argued that machine gun ownership does not fall within the individual right position and has so maintained since 1983. See Kates, *supra* note 96, at 261.

follows: "dismissing as without merit appellee's claims that the Second Amendment provides a right to possess machine-guns."¹⁰²

In *Quilici v. Village of Morton Grove*,¹⁰³ involving a municipal ordinance, not a federal law, the court held, not that the Amendment permits such laws (though its authors believed this to be case¹⁰⁴), but only that it does not invalidate local legislation because of the nineteenth century Supreme Court holdings that the Amendment is not incorporated against the states.¹⁰⁵ Nonetheless, *Gun Crazy* parenthetically characterizes *Quilici* as follows: "finding that a right to possess handguns is not guaranteed by the Second Amendment."¹⁰⁶

In short, although *some* of the cases *Gun Crazy* cites do endorse its position, almost all of these cases concern statutes that arguably are constitutional even under the "broad-individual-right" view *Gun Crazy* denounces. In many of these cases that *Gun Crazy* claims support its view, the opinions discuss the Second Amendment so summarily that it is impossible to say that they are adopting any position beyond their bare holding that the Amendment does not give felons a right to own firearms. None rejects the evidence and arguments presented by Second Amendment scholars in the recent law review literature. Indeed, most were decided before that literature appeared.^(pg.1163)

In the few cases where judges have displayed an awareness of the recent literature, their treatment of the individual right view has tended to depart widely from the pattern *Gun Crazy* represents to be universal and settled. For instance, *Gun Crazy* cites a Ninth Circuit case which rejected the individual right view in an opinion preceding the recent literature.¹⁰⁷ However, in the 1992 case of *Fresno Rifle & Pistol Club v. Van de Kamp*,¹⁰⁸ the court did not reaffirm the militia-centric theory. Instead, after being presented with articles by both Sanford Levinson and David Williams, it rejected the plaintiff's Second Amendment claim on the ground that the Amendment applied only against the federal government (citing the preincorporation doctrine cases of *Cruikshank* and *Presser*) and not, as it had previously held, because the Second Amendment protects only a collective right.¹⁰⁹ Nevertheless, in a later opinion in which it was not presented with the law review literature, the Ninth Circuit rejected the individual right view.¹¹⁰

¹⁰² *Gun Crazy*, *supra* note 7, at 73 n.57, 74 n.59, & 79 n.85.

¹⁰³ 695 F.2d 261 (7th Cir. 1982).

¹⁰⁴ In dictum, the opinion goes on to state what its authors "believe to be the scope of the second amendment." *Id.* at 270.

¹⁰⁵ See *supra* text accompanying notes 71-76, 88.

¹⁰⁶ *Gun Crazy*, *supra* note 7, at 73 n.57.

¹⁰⁷ *Marchese v. California*, 545 F.2d 645, 646 (9th Cir. 1976).

¹⁰⁸ 965 F.2d 723 (9th Cir. 1992).

¹⁰⁹ *Id.* at 729 ("The Supreme Court, however, has held that the Second Amendment constrains only the actions of Congress, not the states.... We are therefore foreclosed from considering these arguments."). Although *Gun Crazy* cites this case, it fails to mention that the court cites and quotes from articles by both Levinson and Williams. Levinson, *supra* note 13, and Williams, *supra* note 13, cited in *Fresno Rifle and Pistol Club*, 965 F.2d at 730 n.8 (Levinson), 729 n.7 (Williams). Indeed the opinion quotes at length from the latter article's description of both the militia-centric and the individual right view of the Amendment, without commenting on the merits of the dispute. *Id.* at 729 n.7.

¹¹⁰ See *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996).

Gun Crazy also overlooks the concurring opinion in one Eighth Circuit case it cites, which accepts the individual right view and explicitly rejects five of the earlier opinions *Gun Crazy* cites.¹¹¹ *Gun Crazy* cites no Fifth Circuit case supporting its view and, once again, fails to disclose that a recent Fifth Circuit opinion, citing Sanford Levinson's article, suggests in dictum that the Fifth Circuit would reject *Gun Crazy's* "narrow" militia-centric position.¹¹² (pg.1164)

Most importantly, the principal problem with the lower federal court decisions that *Gun Crazy* correctly cites as refusing to enforce the Second Amendment is that they all derive from a questionable interpretation of *Miller* and only *Miller*. Thus, "the vast caselaw"¹¹³ that *Gun Crazy* touts so hyperbolically has greatly reduced, if any, weight if it turns out that it misconstrues or departs from *Miller*. As to whether the case law does so, we quote one law review treatment by an author whom *Gun Crazy* appears to hold in high esteem.¹¹⁴

At a minimum, then, *Miller* limits the scope of the Amendment to arms suitable for use by militia.

Lower courts have suggested that *Miller* limits the right even further. If the Amendment's purpose is only to assure the continuation and render possible the "effectiveness" of the militia, then it may protect state governments against federal tampering with their militia, but it does not guarantee individuals any rights at all. Some of *Miller's* language, however, is in tension with such a reading. In the eighteenth century, the Court explained, the militia comprised all males physically capable of acting in concert for the common defense, and "when called for service these men were expected to appear bearing arms supplied by themselves." In other words, *the Court strongly suggested that the Amendment guarantees a private right to own guns*, at least by all males of arms-bearing age, so as to be ready for militia service.¹¹⁵

Can this group of sketchy opinions be considered a judicial consensus so dispositive of the issue that no scholar can honestly address the Amendment without both mentioning this consensus and conceding that it is dispositive? Does the refusal of such scholars as William Van Alstyne, Akhil

¹¹¹ United States v. Hale, 978 F.2d 1016, 1021 (8th Cir. 1992) (Beam, J., concurring):

I disagree ... that Cases v. United States, ... United States v. Warin, ... United States v. Oakes, ... and United States v. Nelson, ... properly interpret the Constitution or the Supreme Court's holding in United States v. Miller ... insofar as they say that Congress has the power to prohibit an individual from possessing any type of firearm, even when kept for lawful purposes.

¹¹² United States v. Lopez, 2 F.3d 1342, 1364 n.46 (5th Cir. 1993), *aff'd on other grounds*, 115 S. Ct. 1624 (1995):

It is also conceivable that some applications of section 922(q) might raise Second Amendment concerns. Lopez does not raise the Second Amendment and thus we do not now consider it. Nevertheless, this orphan of the Bill of Rights may be something of a brooding omnipresence here. For an argument that the Second Amendment should be taken seriously, see Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

¹¹³ *Gun Crazy*, *supra* note 7, at 139.

¹¹⁴ *See id.* at 57 n.* (thanking David C. Williams for his "invaluable comments on earlier drafts"). Moreover, while *Gun Crazy* does not in any way disparage Professor Williams as it does other scholars, its analysis of the Second Amendment, such as it is, is wholly at variance with Williams's analysis.

¹¹⁵ Williams, *supra* note 13, at 557-58 (emphasis added) (footnote citing many of the cases *Gun Crazy* relies on omitted).

Amar, Charles Cantrell, Robert Cottrol, Sanford Levinson, Nelson Lund, Nicholas Johnson, and James Whisker,¹¹⁶ to genuflect before these cases make them part of "the gun lobby's well-orchestrated propaganda campaign to drown out the judiciary's voice."¹¹⁷ (pg.1165)

3. *Second Amendment Scholars Have Not Ignored Judicial Opinions*

Even were this judicial record considered to be a consensus that no responsible scholar could ignore, it is important to note that some of the professors *Gun Crazy* assaults have *not* ignored the case law addressing the Second Amendment. Professors Cottrol and Diamond, Lund, and Van Alstyne each discuss it, though they concur in dismissing the case law as "scanty and utterly undeveloped,"¹¹⁸ an "arrested jurisprudence,"¹¹⁹ "intellectually untenable,"¹²⁰ "no useful body of law,"¹²¹ and no "meaningful case law or jurisprudence."¹²² As for Professor Johnson, although *Gun Crazy* taxes him with not having cited relevant Second Amendment case law, his article instead posits a right to gun ownership under the Ninth Amendment rather than the Second,¹²³ as *Gun Crazy* acknowledges.¹²⁴

Nor are those whom *Gun Crazy* traduces as exhibiting "pro-gun lobby bias" alone in making such judgments. David C. Williams, whose academic integrity is not questioned by *Gun Crazy*,¹²⁵ treats these vaunted lower federal cases in the same perfunctory way for which *Gun Crazy* excoriates Cottrol and Van Alstyne.¹²⁶ Observing that the case law provides a "dearth of judicial instruction,"¹²⁷ Professor Williams cites a couple of the lower federal cases as representative of the whole, and dismisses them as dubious (pg.1166) and in conflict with the Supreme Court precedent they purported to be following.¹²⁸

¹¹⁶ These are the persons identified by *Gun Crazy* as "fail[ing] to acknowledge the contrary judicial consensus." *Gun Crazy*, *supra* note 7, at 143.

¹¹⁷ *Id.* at 148.

¹¹⁸ Van Alstyne, *supra* note 13, at 1239.

¹¹⁹ *Id.* at 1240.

¹²⁰ Lund, *supra* note 13, at 110.

¹²¹ Van Alstyne, *supra* note 13, at 1239.

¹²² Cottrol & Diamond, *Fifth Auxiliary Right*, *supra* note 13, at 1000 n.18. *See also id.* at 999 ("The Second Amendment also continues to be an arena of jurisprudence from which the nation's highest court has largely been absent.").

¹²³ *See* Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992).

¹²⁴ *See Gun Crazy*, *supra* note 7, at 143 n.391 where it parenthetically dismisses Johnson for "reviewing standard originalist sources—and ignoring contrary judicial interpretation—to locate a right to bear arms in Ninth, rather than Second, Amendment." *Gun Crazy* cites no case law relevant to a Ninth Amendment right to own guns—"contrary" or otherwise—nor are we aware of any. In what respect, then, are Judicial interpretations of the *Second* Amendment "contrary" to Johnson's analysis of the Ninth?

¹²⁵ *Gun Crazy*, *supra* note 7, at 57 n.* (thanking David C. Williams for his "invaluable comments on earlier drafts").

¹²⁶ *Gun Crazy*'s author has continued to characterize Amar, Levinson, Van Alstyne, Cottrol, etc., as "totally irresponsible to ignore this judicial consensus." CHRONICLE, *supra* note 47 (quoting Andrew Herz).

¹²⁷ Williams, *supra* note 13, at 558.

¹²⁸ *See id.* at 557-58.

Nevertheless, when Van Alstyne and Cottrol offer the same view of this case law, *Gun Crazy* responds with a new contortion of its charge of deceit. Whereas Amar, Levinson, and others who ignore the case law (deeming it not worth discussing) are guilty of deceit for not discussing it, Van Alstyne and Cottrol who expressly dismiss the case law are deceitful in failing to acknowledge (what *Gun Crazy* deems) its full importance:

Van Alstyne discusses *only* the scant Supreme Court case law, ignoring the many state and lower federal court decisions of the last fifty-five years.¹²⁹

All of [Cottrol's writings on the Second Amendment] display a similar disinclination to acknowledge *fully* judicial or scholarly views contrary to the gun lobby's party line.¹³⁰

It is on the basis of this type of hair-splitting that *Gun Crazy* disparages the integrity of these prominent constitutional theorists. The *leitmotif* running throughout *Gun Crazy* is that no scholar can honestly disagree with its view of the right to arms. From that premise it follows that Akhil Amar, Sanford Levinson, William Van Alstyne and others who disagree with *Gun Crazy* must be stooges parroting "the gun lobby's Second Amendment misrepresentation."¹³¹ We submit that reading these scholars' analyses will leave quite a different impression. Indeed, University of Chicago law professor Cass Sunstein, an observer whom no person could suspect of association with the gun lobby, comments that Amar, Levinson et al. have made the argument for a broad individual right view of the Amendment intellectually respectable.¹³² We must concede, however, that anyone who thinks Akhil Amar and Sanford Levinson minions of the gun lobby will probably think the same of Cass Sunstein.¹³³ (pg.1167)

4. *A Bizarre Theory of Constitutional Meaning*

In vilifying Second Amendment Scholars for failing to acknowledge or accord adequate weight to the opinions of courts, *Gun Crazy* advances, in several places, a highly idiosyncratic theory of constitutional meaning:

Dishonesty also dominates the gun lobby's discussion of the judiciary's read on the Second Amendment. Gun-rights advocates argue not only that the Second Amendment *should* provide a broad, nearly absolute individual right to bear firearms, but that the Amendment *does in fact* guarantee all individuals a personal "right to bear arms" for all legal, private purposes.¹³⁴

....

The gun-rights advocates' portrayal of the Second Amendment as conferring a broad individual right is a monumental myth. It is a libertarian pipe dream. It is a constitutional

¹²⁹ *Gun Crazy*, *supra* note 7, at 141.

¹³⁰ *Id.* at 143 (emphasis added). *See also id.* at 142 ("Cottrol and Diamond's citation to only one of dozens of like-minded decisions *seriously downplays* the broad judicial dismissal of any broad individual right." (emphasis added)).

¹³¹ *Gun Crazy*, *supra* note 7, at 112.

¹³² As quoted in CHRONICLE, *supra* note 47, at A8. Professor Sunstein does not go so far as to endorse the argument or take any position himself on the Amendment.

¹³³ In fact, however, Professor Sunstein has never owned a gun in his life, never wishes to do so, and has no association with any gun rights organization. Personal communication (Aug. 22, 1995).

¹³⁴ *Gun Crazy*, *supra* note 7, at 104.

deception designed to further a political agenda. It is an argument about what the Second Amendment *should* guarantee—not a reflection of what it *does* guarantee in any legally meaningful sense.¹³⁵

....

Although it is perfectly natural and acceptable for pro-gun-rights elected officials, media commentators, and scholars to argue that the Second Amendment *should* be read to protect all private firearms ownership, a dereliction of dialogic responsibility occurs when they claim that the Second Amendment *does* provide broad constitutional cover for gun owners.¹³⁶

Indeed, this claim lies at the very heart of *Gun Crazy*'s charge that Second Amendment scholars have acted deceptively. But what does this claim mean?

The legal positivist view of law that distinguishes between describing what a law *is* and what it *should* be is commonplace, and perhaps that is what *Gun Crazy* thinks it is adopting. But this distinction does not apply, at least not easily, to a claim about what the Constitution *means*. A claim of constitutional meaning is normally spoken of the way we speak of facts: as either true or false, correct or incorrect, probable or improbable, etc. Whether the positive law agrees with that claim is another matter, but the fact that, at a particular moment, positive law may disagree with a claimed constitutional meaning does not in any way serve to refute or undermine that meaning.¹³⁷ (pg.1168)

Anyone who reads the Constitution is entitled to render an opinion on what it truly, correctly, or probably means—what it really *does* mean, not "should" mean—and to support that claim with arguments and evidence. Second Amendment scholars have done exactly that. They have not, or at least not always, claimed that their interpretation has been accepted by courts and is therefore "positive law." True, *some* treatments of judicial opinions by Second Amendment scholars have attempted to show that judicial precedent is not clearly in conflict with their interpretation, or is generally supportive of it, and in this sense have claimed that their individual right interpretation is supported by positive law. But whether those Second Amendment scholars who make *this* argument are correct, they are clearly not guilty of ignoring the case law.

Gun Crazy appears to be adopting as its interpretive methodology the legal-realist-era aphorism that "the Constitution *means* what the Supreme Court (and lower federal courts) says it means." But this aphorism was never meant to be taken literally as a claim about meaning; it was simply a poetic statement of the proposition that the Supreme Court has the last word as a matter of positive law.

Let us put the matter another way: A lawyer representing a client might be acting unethically if she represents to a court that the positive law concerning the meaning of the Second Amendment is X when it really is Y. And a lawyer might be acting irresponsibly if she recommends that a client

¹³⁵ *Id.* at 110.

¹³⁶ *Id.* at 118.

¹³⁷ Except insofar as any consensus of thoughtful people tends to establish the plausibility of a particular claim. For example, if a consensus of legal scholars who have studied the matter agree that the Second Amendment protects a broad individual right, this may enhance the chances that this interpretation is correct. It surely does not *establish* its correctness, however, because the consensus could nevertheless be wrong.

bring a lawsuit on the basis of what she thinks the Second Amendment really means without telling the client that this interpretation had consistently been rejected by the courts.

A lawyer is doing *nothing* unethical, however, by urging a court to adopt what she believes in good faith to be a correct interpretation of the Second Amendment, even though it is a meaning that courts had in the past consistently rejected. When a lawyer makes such an argument she is not arguing what the Second Amendment *should* mean (whatever that means), but what the Second Amendment *does* mean.¹³⁸ Indeed, *that* is the reason she is giving (pg.1169) for why the court should change its mind: because it has been *wrong* about what the Constitution *does* mean. Note that this is precisely the distinction on which Rule 11 of the Federal Rules of Civil Procedure turns, in providing that a lawyer cannot be sanctioned for arguing for law reform or change.

This is all Second Amendment scholars have ever argued with respect to the meaning of the Second Amendment: that courts, law teachers, and others are wrong about what the Constitution *does* mean, not what it *should* mean. And, when making such a claim, there is no ethical imperative to discuss the fact that some or even all courts have disagreed. In charging others with scholarly deception for arguing what the Second Amendment does mean in the face of disagreement by the courts—and this is its principal charge—*Gun Crazy* manifests a serious intellectual confusion.

B. Other Supposed Scholarly Deceptions

Gun Crazy's accusations of willful duplicity by Second Amendment scholars are not limited to the charge of concealing an alleged judicial consensus. In perhaps the most scurrilous section of the article, *Gun Crazy* singles out three authors for special attention as examples of legal scholars who fail to speak the truth: William Van Alstyne, Sanford Levinson, and Robert Cottrol.¹³⁹ We consider the charges against each in turn.

1. William Van Alstyne

Gun Crazy discusses Duke University Professor William Van Alstyne in a section entitled "Legal Scholars' Dereliction of Responsibility—Failure to Speak the Truth."¹⁴⁰ According to *Gun Crazy*, Van Alstyne "trots out a misleadingly edited version" of a quote from *The Federalist*. *Gun Crazy* charges that these quotes represent "standard NRA editing."¹⁴¹

Here is Van Alstyne's reference to *The Federalist, No. 46*:

¹³⁸ And this is so, regardless of one's theory of constitutional meaning, as long as one does not adopt the view that the Constitution can actually mean *whatever* the court says it means. While this may indeed be Herz's view, he should elaborate this novel theory of constitutional meaning before indicting other scholars for being unfamiliar with it.

¹³⁹ See *Gun Crazy*, *supra* note 7, at 139-45.

¹⁴⁰ *Id.* at 139.

¹⁴¹ *Id.* at 141 n.380.

Madison contrasted the "advantage ... the American people possess" (under the proposed Constitution) with the circumstances in "several (pg.1170) kingdoms of Europe ... [where] the governments are afraid to trust the people with arms."¹⁴²

Here is the passage in full (with the passages excerpted by Van Alstyne emphasized):

Besides the *advantage* of being armed, which *the American people possess* over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit. Notwithstanding the military establishments of the *several kingdoms of Europe*, which are carried as far as the public resources will bear, *the governments are afraid to trust the people with arms.*¹⁴³

Now here is the problem with this editing according to *Gun Crazy*:

This passage discusses *two* different barriers against tyranny: a militia and an armed populace. The Second Amendment, by its introductory clause, is designed to preserve the militia. Indeed, Madison's words strongly suggest that the first barrier, the "advantage" of an armed populace, is one *already possessed* at the time of the Constitution, as a consequence of the frontier nature of American society, and as compared against the more established nations of Europe. In any event, Van Alstyne's editing, which is standard NRA editing, conveniently combines two sentences into one, making the passage far stronger support than it is objectively.¹⁴⁴

To the extent that this criticism is intelligible, *Gun Crazy* appears to be saying that (1) Madison sees two differences, not one, between America and Europe: an armed population and the existence of a militia;¹⁴⁵ (2) the Second Amendment applies only to the militia; and therefore (3) it is misleading to edit this quote to suggest that the advantage of an armed population, an advantage possessed at the time the original Constitution was ratified and before the Second Amendment was even proposed, is protected by the Second Amendment.^(pg.1171)

This is a pure *non sequitur* which assumes in step (2) what it purports to show: that the Second Amendment does not protect the barrier against tyranny provided by "the advantage of being armed" because it was intended only to protect the militia. But apart from being illogical, it is "a bit silly."¹⁴⁶ Madison is claiming that *all three* of the barriers he listed would be protected, not by the Second Amendment, which had yet to be formulated, but by the proposed Constitution (which is exactly what Van Alstyne quotes him as saying). Moreover, *all three* barriers already existed at the

¹⁴² Van Alstyne, *supra* note 13, at 1245.

¹⁴³ THE FEDERALIST No. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

¹⁴⁴ *Gun Crazy*, *supra* note 7, at 141 n.380.

¹⁴⁵ The full quotation identifies *three* differences, an armed population, subordinate government, and militias, but as we show below, Herz has a difficult time counting even his own lists. See *infra* at notes 240-47 and accompanying text.

¹⁴⁶ This is the phrase *Gun Crazy* uses to describe Sanford Levinson's statement that the NRA position on the Second Amendment should be included in *academic* discourse. See *Gun Crazy*, *supra* note 7, at 141 ("To describe the nearly inescapable drone of the NRA position on gun control as 'excluded' is a bit silly.").

time of the Constitution, which merely preserves them, though each in a different way. The right to keep and bear arms is protected—just as all the rights retained by the people are protected by the unamended Constitution—by the fact that the Constitution gives the federal government no power to dispossess the people of their preexisting natural rights. Thus, when the Constitution was criticized for being inadequate because it lacked a Bill of Rights to protect, among other rights, the freedom of the press, Hamilton gave his famous reply: "[W]hy declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restriction may be imposed?"¹⁴⁷

According to this argument, the right to keep and bear arms could not be restrained by the federal government at the time of the Constitution's ratification because "no power is given by which restriction may be imposed." Those provisions in the Bill of Rights which expressly protected natural rights retained by the people¹⁴⁸ were included, in Madison's words, "for greater caution."¹⁴⁹ They added nothing new to the original Constitution.¹⁵⁰ Thus (pg.1172) the fact that the American people "already possessed" the "advantage of being armed" at the time of the Constitution is *support* for the proposition that the Second Amendment was intended to protect their right to continued possession of arms.

Herz is apparently unaware of the elementary proposition¹⁵¹ that "the Framers of the Bill of Rights did not purport to 'create' rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be *pre-existing*."¹⁵² One of the other

¹⁴⁷ THE FEDERALIST No. 64 at 559 (Alexander Hamilton) (Mod. Lib. ed. 1937).

¹⁴⁸ As distinct from those which strengthened procedural rights provided by the Constitution.

¹⁴⁹ 1 ANNALS OF CONGRESS 452 (J. Gales ed., 1789) [hereinafter ANNALS OF CONGRESS] (speech of Rep. J. Madison) [hereinafter Madison's House Speech]. Madison's speech is reprinted in full in 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 55 (Randy E. Barnett ed., 1989).

¹⁵⁰ Gary Lawson and Patricia Granger have argued that, prior to the ratification of the Bill of Rights, background natural rights, including the right to keep and bear arms, were protected by the Necessary and Proper Clause. *See* Gary Lawson & Patricia B. Granger, *The Proper Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993). *See also* Randy E. Barnett, *Necessary and Proper*, 44 U.C.L.A. L. REV. 745 (1997). Lawson and Granger endorse the view of St. George Tucker that "an executory law that infringed on the right to keep and bear arms would not be 'necessary and proper' within the meaning of the Sweeping clause" because "laws that violate individual rights are not 'proper,' regardless of whether they are 'necessary.'" *Id.* at 302-03. We discuss Tucker's views of the Second Amendment *infra* notes 373-79.

¹⁵¹ *See* Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152-53 (1928) and citations there given; Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 908, 915 (1993); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1166, 1177 (1987).

¹⁵² *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan and Marshall, JJ., dissenting) (emphasis added). *See generally* *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 34 (1991) (Scalia, J., concurring) ("The law is perfectly well settled that the ... Bill of Rights, [was] not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors") (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)) (Second and Fourth Amendment case); *Logan v. United States*, 12 S. Ct. 617, 624 (1892) (distinguishing rights created by federal law from preexisting constitutional rights, expressly including Second Amendment); *United States v. Cruikshank*, 92 U.S. 542, 551, 553 (1875) (dealing with the right to assemble and the right to arms and declaring them preexisting rights guaranteed by the Constitution, not rights created thereby).

rights included in the Bill of Rights which Madison thought was one of the "preexistent rights of nature"¹⁵³ was freedom of speech.¹⁵⁴

The fact that Madison and his colleagues believed individuals had a natural right both to freedom of speech and to possess arms for self-defense is crucial evidence that they meant exactly what they said in guaranteeing "the right of the people to keep and bear arms." Thus, insofar as *Gun Crazy's* interpretation of the meaning of the quotation has any force, it is to support the individual right interpretation of the Amendment, the interpretation that Van Alstyne was supposedly bowdlerizing the quotation to buttress.

In any event, Van Alstyne's edited quote *accurately* depicts the *relevant* part of what Madison thought differentiated America from Europe, while excluding the irrelevant parts. It is both characteristic and disturbing that *Gun (pg.1173) Crazy* charges Van Alstyne with adopting "standard NRA editing"¹⁵⁵ without providing any example of NRA materials using the same editing. But even had Herz provided such an example, this would only bolster the credibility of NRA editing.

2. Robert Cottrol and Raymond Diamond

Professor Robert Cottrol of George Washington University has edited a three-volume text on the Second Amendment and has authored or co-authored articles on it which appear, inter alia, in the *Oxford Companion to the Supreme Court*,¹⁵⁶ and the *Yale*¹⁵⁷ and *Georgetown Law Journals*.¹⁵⁸ *Gun Crazy* charges that, like the others, he and his frequent co-author, Tulane University law professor Raymond Diamond, "display a ... disinclination to acknowledge fully judicial or scholarly views contrary to the gun lobby's party line."¹⁵⁹

We have responded to the supposed omission of judicial opinions above.¹⁶⁰ As for their alleged failure to "acknowledge fully" contrary scholarship, anyone reviewing Cottrol's three-volume documentary history of the Second Amendment will find that he reprints seven law review or other articles opposing the individual right view—including *all the articles on which Gun Crazy itself principally relies*.¹⁶¹

Gun Crazy does not inform readers of Cottrol's three-volume work, referring instead only to the highly compressed one-volume paperback. It complains that this edition includes "only three

¹⁵³ Madison's House Speech, *supra* note 149, at 454.

¹⁵⁴ Madison's notes for his speech are reprinted in 1 RIGHTS RETAINED BY THE PEOPLE, *supra* note 149, at 64-65 [hereinafter Madison's Notes]. In the section discussing "Contents of Bill of Rhts," the following appears: "3. natural rights retained as speach [sic]." *Id.* at 64.

¹⁵⁵ *Gun Crazy*, *supra* note 7, at 141 n.380.

¹⁵⁶ COTTR0L, OXFORD COMPANION, *supra* note 13.

¹⁵⁷ Cottrol & Diamond, *Fifth Auxiliary Right*, *supra* note 13.

¹⁵⁸ Cottrol & Diamond, *Afro-Americanist Reconsideration*, *supra* note 13.

¹⁵⁹ *Gun Crazy*, *supra* note 7, at 143.

¹⁶⁰ See *supra* Part I.A.

¹⁶¹ See COTTR0L, *supra* note 64, at 270-95; 2 *id.* at 1-44, 69-78, 253-58, 283-360.

essays out of ten offering positions contrary to the broad-individual-right view."¹⁶² To a less jaundiced observer, including three out of ten articles is not even remotely to be characterized as hiding from the reader the existence of contrary views, in derogation of one's scholarly responsibilities.^(pg.1174)

Gun Crazy asserts that Professors Cottrol and Diamond "rely on standard gun-lobby materials."¹⁶³ As with Van Alstyne, no examples of this alleged reliance are provided, and, insofar as this criticism is intelligible, it is false. Cottrol and Diamond's historical exegeses have depended entirely on standard historical evidence,¹⁶⁴ not "standard gun-lobby materials"—an imprecation *Gun Crazy* fails to reference in any way that would explain or define it.

To these charges, *Gun Crazy* adds an accusation that is particularly noxious. It invokes the specter of racial paranoia (not to mention obsequiousness), when it asserts that "they elaborate the long-standing NRA theme that 'gun control is a white plot to disarm a feared minority population.'"¹⁶⁵ *Gun Crazy* is quoting here, not anything said or written by Cottrol and Diamond, but a characterization borrowed with approval from Josh Sugarmann, whom *Gun Crazy* fails to identify as former Communications Director of the National Coalition to Ban Handguns, and the founder and present Executive Director of an anti-gun organization called the Violence Policy Center. No textual support for this demeaning characterization is provided.¹⁶⁶

The racial implications and intent of many gun control proposals are, however, no myth invented by the NRA. On the contrary, they were recognized by historians and policy analysts, including at least one strong gun control advocate, long before Cottrol and Diamond's admittedly much deeper exploration of the issue.¹⁶⁷ And Herz himself concedes that "there is indeed some historical merit to this argument."¹⁶⁸ What then is his complaint about ^(pg.1175) Cottrol and Diamond's scholarly thesis? That "the position makes little sense today in light of the tremendous and

¹⁶² *Gun Crazy*, *supra* note 7, at 143 n.390 (referring to ROBERT J. COTTRIL, GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT (1994)).

¹⁶³ *Id.* at 142 (quoting Josh Sugarmann, a gun control activist). It is noteworthy that the only reference usually provided when *Gun Crazy* ascribes actions and positions to pro-gun-rights groups is not some publication of theirs but an anti-gun publication attacking them.

¹⁶⁴ See generally Cottrol & Diamond, *Afro-Americanist Reconsideration*, *supra* note 13; Robert J. Cottrol & Raymond T. Diamond, "Never Intended to Be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence? 70 CHI.-KENT L. REV. 1307 (1995).

¹⁶⁵ *Gun Crazy*, *supra* note 7, at 142.

¹⁶⁶ Both Cottrol and Diamond are African-Americans.

¹⁶⁷ Over 20 years ago, journalist and gun control advocate Robert Sherrill put the matter with characteristic bluntness: "The Gun Control Act of 1968 was passed not to control guns, but to control blacks..." ROBERT SHERRILL, THE SATURDAY NIGHT SPECIAL AND OTHER GUNS WITH WHICH AMERICANS WON THE WEST, PROTECTED BOOTLEG FRANCHISES, SLEW WILDLIFE, ROBBED COUNTLESS BANKS, SHOT HUSBANDS PURPOSELY AND BY MISTAKE AND KILLED PRESIDENTS—TOGETHER WITH THE DEBATE OVER CONTINUING SAME 280, 289 ff. (1975). See generally B. Bruce-Briggs, *The Great American Gun War*, PUB. INTEREST, Fall 1976, at 50; Don B. Kates, *Toward a History of Handgun Prohibition in the United States*, in RESTRICTING HANDGUNS (Don B. Kates ed., 1979); KENNETT & ANDERSON, *supra* note 96; Raymond G. Kessler, *Gun Control and Political Power*, 5 LAW & POL'Y Q. 381, 391 ff. (1983).

¹⁶⁸ *Gun Crazy*, *supra* note 7, at 142.

disproportionate toll that gun violence takes on the African-American community."¹⁶⁹ In Part IV, we take up the dubious criminological claims made by Herz, but suffice it to say that this claim in no way supports his charge that Cottrol and Diamond subscribe to some white conspiracy theory, nor that they are appropriately treated in a section entitled, "Legal Scholars' Dereliction of Responsibility—Failure to Speak the Truth."¹⁷⁰

3. Sanford Levinson

Gun Crazy reserves much of its vituperation for University of Texas law professor Sanford Levinson. It charges him with "relying on the usual secondary materials that the NRA finds so appealing"¹⁷¹ and describes him as an "ostensibly nonpartisan legal scholar[]"¹⁷² implying that he is not. *Gun Crazy* asserts that:

Levinson provides a cursory overview of the Second Amendment text and surrounding history, relying on the usual secondary materials that the NRA finds so appealing, including *The Federalist No. 46* and nineteenth-century constitutional commentary from Justice Joseph Story and Thomas Cooley. Like the gun lobby, Levinson strips these materials of important context, advancing the ball "by manipulating his supporting material so as to exclude that which would cast doubt on the existence of a broad individual right."¹⁷³

It will be unnecessary to tediously discuss the details of the quotations from *The Federalist*, Story, Cooley, and others that Levinson is accused of bowdlerizing because *Gun Crazy* provide no details for its charge whatever. Instead, like its reliance on Sugarmann's characterization of Diamond and Cottrol's work, *Gun Crazy* once again incorporates by reference the claims of an employee of an anti-gun group—this time an article by Dennis Henigan (whom Herz once again fails to identify as the Chief Staff Lawyer for the Legal Action Project of the Center to Prevent Handgun Violence).¹⁷⁴ (pg.1176)

What the charges boil down to is that *Gun Crazy* and Henigan disagree with Levinson (and Van Alstyne) as to the meaning of some quotations from Joseph Story's *Commentaries*, James Madison in *The Federalist*, and other Founders. Levinson and Van Alstyne interpret these quotes as showing belief in an individually armed citizenry, while Henigan claims that, in context, they prove only belief in the militia as an antidote to a standing army.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 139.

¹⁷¹ *Id.* at 140.

¹⁷² *Id.* at 145 n.402.

¹⁷³ *Id.* at 140 (citation to Levinson's article omitted). *Gun Crazy* is quoting here from Henigan, *supra* note 12. Earlier in the article *Gun Crazy* makes the following charge, basing it also on Henigan: "Gun-rights advocates *manufacture* many of the apparent endorsements of an expansive Second Amendment interpretation by stripping critical context from the original quotations." *Id.* at 65 (emphasis added).

¹⁷⁴ We continue to point out instances where Herz has violated the canon of scholarly ethics he seeks to impose on those with whom he disagrees, because it demonstrates that he is projecting onto Second Amendment scholars his own sins. We do not necessarily share his view that one need make explicit the employment status of every author whose writings one cites. If any disclosure is appropriate, however, it would surely be disclosure that an author is a full-time employee of a lobbying group.

It would perhaps suffice to point out that *Gun Crazy* and Henigan stand alone in their interpretation of the quotations they claim have been "strip[ped] of their important context" and "manipulated."¹⁷⁵ We believe all the other scholars who address these quotations have interpreted them as supporting the individual right view.¹⁷⁶ Nevertheless, because the matter is important to establish that *Gun Crazy* has done Levinson a grave injustice by repeating Henigan's accusations, we feel compelled to summarize the evidence that one of us has elaborated elsewhere. This evidence shows it is Henigan and Herz who take these quotes out of their context in the Founders' general thought and philosophical background. It is clear that the quotations were available to Herz because he criticizes the article in which they are related,¹⁷⁷ yet he ignores them.

(1) James Madison, James Monroe, Fisher Ames, Albert Gallatin, and others mentioned the right to arms in the same breath with freedom of religion and press, and described them all and interchangeably as "human rights," "private rights," "essential and sacred rights" which "each individual reserves to himself."¹⁷⁸

(2) A Federalist commentary endorsed by James Madison, that was before Congress when it enacted the Bill of Rights and that described the Amendment as confirming citizens "in their right to keep and bear *their private arms*."¹⁷⁹ (pg.1177)

(3) Anti-Federalist editorials which hailed the Amendment as assuring that "the said constitution be never construed" to infringe rights of free expression or "to prevent the people of the United States who are peaceable citizens, from keeping their own arms."¹⁸⁰

(4) Thomas Jefferson's proposal in a model state constitution for a guarantee that "No free man shall be debarred the use of arms within his own lands or tenements."¹⁸¹

(5) Joseph Story's explanation of the Second Amendment in terms of what was in his day regarded as a truism, an axiom of republican liberalism: "One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offense to keep arms"¹⁸²

These specific quotations lead us to the broader context in which Levinson and Van Alstyne (and many other historians and scholars) understand the quotations that Henigan and *Gun Crazy*

¹⁷⁵ *Gun Crazy*, *supra* note 7, at 140.

¹⁷⁶ See, e.g., Reynolds, *supra* note 13, at 461, 468, 469, 470; Shalhope, *supra* note 13, at 125, 131; Cottrol & Diamond, *Fifth Auxiliary Right*, *supra* note 13, at 1001 n.24, 1005-06.

¹⁷⁷ See Kates, *supra* note 96.

¹⁷⁸ *Id.* at 223-24, 228; Shalhope, *supra* note 13, at 135.

¹⁷⁹ Kates, *supra* note 96, at 224 (emphasis added).

¹⁸⁰ *Id.*

¹⁸¹ See Shalhope, *supra* note 13, at 135 (emphasizing that, in contrast, Jefferson's draft had no mention of a militia at all).

¹⁸² JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (republished 1893) (1840).

question. That broader context is the general attitude of the Founders toward the role of arms in society—an attitude so reverential that one intellectual historian has described it as "almost religious."¹⁸³

Neither Herz, Henigan, nor any other exponent of their position deals with that attitude because it is so repugnant to their own. Nevertheless, the Amendment can only be understood in light of that attitude, which involved a set of related propositions that were deemed axiomatic truths in the allied systems of natural rights and civic republicanism the Founders embraced:

(1) The right of personal self-defense is inalienable, being the cardinal natural right;¹⁸⁴ (pg.1178)

(2) A concomitantly inalienable element of the right of self-defense is the right to possess personal arms for defense of self, home, and family;¹⁸⁵

(3) Derivative of the individual right of self-defense is the right of individuals to join together for collective defense;¹⁸⁶

(4) The right of self-defense exists against murder, rape, robbery, and other crimes, whether perpetrated by apolitical criminals or for political purposes by a tyrant or his thugs ("a wicked Magistrate" and his crew of "lewd Villains");¹⁸⁷

¹⁸³ C. Asbury, *The Right to Keep and Bear Arms in America: The Origins and Application of the Second Amendment to the Constitution* (1974) (unpublished Ph.D. dissertation, University of Michigan) (on file with the University of Michigan Graduate Library).

¹⁸⁴ For example, Sam Adams listed among the "Natural Rights of the Colonists as Men," the rights to life, liberty and property, "together with the right to support and defend these in the best manner they can." (quoted in MALCOLM, *ORIGINS*, *supra* note 13, at 149). *See also*, 3 WILLIAM BLACKSTONE, *COMMENTARIES* *4 ("Self-defense therefore, as it is justly called the primary law of nature, so it is not, *neither can it be in fact*, taken away by the law of society.") (emphasis added); THOMAS HOBBS, *LEVIATHAN* 105, 110 (Collier ed., 1962) (1651) (describing the right to self-defense as inalienable: "a covenant not to defend myself from force, by force, is always void"); 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 1 (1827) (same); ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAW OF THE FEDERAL GOVERNMENT* 300 (1803) ("The right of self-defense is the first law of nature.").

¹⁸⁵ *See, e.g.*, STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984), at 58 (quoting colonial newspapers justifying Sam Adams's recommendation that individuals should arm themselves in response to British enforcement of the Stamp Tax on the ground that "[i]t is a natural right [of the people] ... to keep arms for their own defence"); *id.* at 102-04 (quoting nineteenth century American legal treatises to the same effect). Quotation of such sentiments from eighteenth and nineteenth century Americans, and the philosophers they revered, may be multiplied almost endlessly. *See id.* at 17 n.76, 54 (noting the same view in William Eden's 1772 *PRINCIPLES OF PENAL LAW* and the effect of Eden on Jefferson's views); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 596 (1986) (quoting from a Nov. 5, 1776 editorial in the *Pennsylvania Evening Post*, describing the right to arms as "a natural right"); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87, 90-104 (1992) (quoting Montesquieu, Blackstone, Algernon Sydney, Cesare Beccaria, and Thomas Paine).

¹⁸⁶ *See* Kates, *supra* note 185, at 92-93 (quoting John Locke and Algernon Sydney, among others).

¹⁸⁷ *Id.* at 92-93, 103 (quoting Algernon Sydney). Rape, robbery, and murder by individual soldiers (who were, in fact, largely criminals recruited by gaol-sweepings), particularly when billeted upon the king's enemies, were an aspect of English and French history of which the Founders were all too well aware. And it was an aspect of their own history as well. Because the Crown had attempted to enforce the Stamp Tax and other exactions by soldiers, whose invasions of homes and businesses the Founders deemed criminal and believed had been accompanied by robbery, assault, and rape, Sam Adams called upon the populace to arm themselves individually for their own defense. *Id.* at 99-101.

(5) The individual right of self-defense gives rise, in the ultimate extreme, to the right to overthrow tyrants and return government to its proper course;¹⁸⁸ (pg.1179)

(6) The existence of an armed populace will generally avert the necessity of actual resistance, much less revolution, by deterring government and rulers from their inherent tendency to tyrannize and oppress;¹⁸⁹

(7) Finally, the Founders believed "that the perpetuation of a republican spirit and character within [a free] society depended upon the freeman's possession of arms as well as his ability and willingness to defend both himself and his society."¹⁹⁰

C. Impugning the Integrity of Second Amendment Scholars

Gun Crazy has only one explanation for its charge that the scholarly consensus that the Second Amendment protects a broad individual right is a product of deception and a failure to speak the truth: Second Amendment scholars who have ignored judicial opinions and distorted historical facts are biased either because they are institutionally connected to pro-gun rights lobbying organizations or they are personally enamored with guns. In this section, we examine the evidence that *Gun Crazy* advances for this most serious accusation.

1. Are You Now, or Have You Ever Been, a Member of Academics for the Second Amendment?

Earlier in this Article we described *Gun Crazy's* method as McCarthyite.¹⁹¹ We now substantiate this characterization. *Gun Crazy* explicitly charges that Second Amendment scholars reach the conclusions they do as a result of a nefarious conspiracy by the "gun lobby":

This Article contends that the prevailing Second Amendment deception represents an especially severe threat to rational policymaking in a representative democracy. An economically self-interested, single-issue pressure group has effectively mobilized a rabidly

¹⁸⁸ *Id.* at 90 (citing Locke and Sydney). Compare Blackstone's equation of the "natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression" to "the right of having and using arms for self-preservation and defense." 1 BLACKSTONE, *supra* note 184, at *144. Note that Blackstone classified this right to arms as one of three rights which were necessary to preserve liberty and free institutions, the other two being due process and petition. *Id.*

¹⁸⁹ See Kates, *supra* note 185, at 96-97 (quoting Thomas Paine, James Madison, John Trenchard and Walter Moyle, Timothy Dwight, and Joel Barlow).

¹⁹⁰ Shalhope, *supra* note 13, at 138. In the philosophy of civic republicanism to which the Founders were heir, "the bearing of arms is the essential medium through which the individual asserts both his social power and his participation in politics as a responsible moral being...." J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 386 (1975). See also the discussion of the "moral fibre" implications of citizens being armed and dedicated to the defense of their families, homes, liberties, and polity in Kates, *supra* note 96, at 231-34; and Kates, *supra* note 185, at 94-97.

¹⁹¹ See *supra* INTRODUCTION.

vocal minority to drown (pg.1180) out and shout down virtually all other voices in the constitutional conversation.¹⁹²

....

Not content to rely solely on its own lawyers and activists, the gun lobby is also working hard to flood the law reviews with friendly scholarship from sympathetic law professors [footnote 357] and promising law students.¹⁹³

Footnote 357 states: "In 1993 the gun lobby organized a sympathetic scholars' group, known as Academics for the Second Amendment."¹⁹⁴ Later *Gun Crazy* adds: "AFSA is headed by NRA Executive Board member Joseph Olson, a professor at Hamline University School of Law. The group was lauded in the December 1993 issue of the NRA's *American Rifleman*."¹⁹⁵ It then connects this group with Second Amendment scholars: "Of the nine full-time law professors who have offered endorsements of the broad-individual-right position via law review articles, seven are members of the anti-gun-control group Academics for the Second Amendment (AFSA)."¹⁹⁶ The seven professors identified as "members of the anti-gun-control group" are law professors Ahkil Amar, Charles Cantrell, Robert Cottrol, Raymond Diamond, Nicholas Johnson, Sanford Levinson, Nelson Lund, and political scientist James B. Whisker.

Gun Crazy's one, and only one, piece of evidence in support of this accusation is the fact that these professors signed a single advertisement published by Academics for the Second Amendment:

As of March 13, 1993, Professors Amar, Cantrell, Cottrol, Diamond, Johnson, Levinson, and Lund were all AFSA members, as was political science Professor Whisker. Academics for the Second Amendment, *An Open Letter on the Second Amendment*, NAT'L REV., Mar. 15, 1993, at 23, 23. The group also published the Open Letter on the same date in the *New Republic* and the *National Law Journal*.¹⁹⁷

This is one of the bases on which Herz accuses Sanford Levinson of lying when he claims in his article to have previously supported bans on gun possession.¹⁹⁸ "But Levinson's claim in this essay, that he supports 'prohibitory (pg.1181) [firearms] regulation' is hard to swallow. He is a member of the anti-gun-control group, Academics for the Second Amendment"¹⁹⁹

¹⁹² *Gun Crazy*, *supra* note 7, at 61.

¹⁹³ *Id.* at 138.

¹⁹⁴ *Id.* at 138 n.357.

¹⁹⁵ *Id.* at 144.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 144 n.396.

¹⁹⁸ See Levinson, *supra* note 13, at 642 (footnote omitted) (emphasis added):

I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even "winning," interpretations of the Second Amendment would present real hurdles to *those of us supporting prohibitory regulation*.

¹⁹⁹ *Gun Crazy*, *supra* note 7, at 140-41. In light of this accusation the following statements also reek of insinuation:

Their alleged "gun-lobby group" membership also enables *Gun Crazy* to ignore the articles by professors Amar, Cantrell, Johnson, Lund, and Whisker, dismissing them all with one sentence parentheticals in a single footnote. For example, *Gun Crazy* dispatches Yale Law School professor Akhil Amar's two articles²⁰⁰ touching on the Amendment in the following parenthetical: "rejecting the 'states' rights' view of Second Amendment on originalist grounds, with no discussion of contrary case law."²⁰¹

The group membership charge is entirely false. It rests solely on the fact that professors Amar, Cantrell, Johnson, Levinson, Lund, and Whisker let their names be included in an advertisement endorsed by seventy political philosophers, political scientists, law professors, and historians that was sponsored by Academics for the Second Amendment (A2A). Moreover, *Gun Crazy* offers no evidence to show that any of the articles it traduces was written at the behest of the A2A group. Indeed, it is clear from the facts *Gun Crazy* itself offers that its author must have been aware of the falsity of his charges. All but one article he cites appeared *before 1993*, when *Gun Crazy* alleges (pg.1182) A2A came into existence.²⁰² The articles *Gun Crazy* seeks to portray as A2A-sponsored or promoted date back to 1975. *Gun Crazy* does not offer any evidence or reference for its suggestion that Academics for the Second Amendment has sponsored or promoted any post-1993 law review article.

Gun Crazy's charges against distinguished scholars would be comic but for its publication in a respectable law review. Akhil Amar and Sanford Levinson are major figures in constitutional law whose character and opinions are wildly at variance with claims that they are members of "the gun lobby" or consciously deceitful propagandists for it or any other organization.²⁰³ The nature of these charges, their inconsistency with the known character and opinion of the victims, and the emphasis *Gun Crazy* places on them, required its author to have taken steps to positively verify them. Even a slight attempt to do so would instead have discredited these charges.

Had Professors Levinson and Amar been contacted before *Gun Crazy* was published, Herz would have been informed that both dislike guns, have never owned one and have no desire to do

The NRA has enthusiastically quoted Sanford Levinson's similar defense of the Second Amendment: "[T]o take rights seriously ... [means] that one will honor them even when there is significant social cost in doing so." *Id.* at 110 n.233 (alterations in original).

Sanford Levinson utterly ignores the vast case law arrayed against his favorable nod to the gun lobby's reading of the "right to bear arms." *Id.* at 139.

Levinson provides a cursory overview of the Second Amendment text and surrounding history, relying on the usual secondary materials that the NRA finds so appealing. *Id.* at 140.

Like the gun lobby, Levinson strips these materials of important context, advancing the ball "by manipulating his supporting material so as to exclude that which would cast doubt on the existence of a broad individual right." *Id.*

²⁰⁰ Amar addresses the Second Amendment in two articles, *Bill of Rights*, *supra* note 13, at 1164; and *Fourteenth Amendment*, *supra* note 13, at 1205-11, 1261-62. *Gun Crazy* cites only *Bill of Rights*. *Gun Crazy*, *supra* note 7, at 62 n.12.

²⁰¹ *Gun Crazy*, *supra* note 7, at 143 n.391.

²⁰² *Id.* at 138 n.357.

²⁰³ A law professor (who will remain nameless) commented to us facetiously that all one need do is look at pictures of Levinson and Amar to know that neither is a closet gun lover or, indeed, would know one end of a gun from the other.

so; neither has ever been even a member of the NRA or A2A, much less a leader or paid employee thereof; neither has ever litigated a gun case (for pay or pro bono), much less been "gun rights litigators and activists." On the contrary, they are supporters of gun control, although they were more supportive before they began researching the Second Amendment than they are now.²⁰⁴

Had Herz contacted Professor Amar, he would have been told that Amar began work on his bicentennial article on the Bill of Rights with a preconception of the Second Amendment as states' right rather than individual right.²⁰⁵ It is only because he found that the text and legislative history admit of no other view that Professor Amar was driven to conclude:

The ultimate right to keep and bear arms belongs to "the people," not the "states." As the language of the Tenth Amendment shows, these two are of course not identical and when the Constitution means "states," it says so. Thus, ... "the people" at the core of the Second Amendment are the same "people" at the heart of the Preamble and the First Amendment, (pg.1183) namely Citizens.... Nowadays, it is quite common to speak loosely of the National Guard as "the state militia," but ... [i]n 1789, when used without any qualifying adjective, "the militia" referred to all Citizens capable of bearing arms.... [T]he "militia" is identical to "the people" in the core sense described above.²⁰⁶

Assuming Herz felt some reticence about checking his claims with Amar and Levinson, the fact that they are not A2A members could have been ascertained by asking A2A's president (correctly identified in *Gun Crazy* as Hamline University law professor Joseph Olson) whether they were. It is noteworthy that Herz *did* call Olson for information. But Herz failed to ask him whether the professors who *Gun Crazy* falsely claims are A2A members really do have that status.²⁰⁷ Instead of asking them or Professor Olson, *Gun Crazy* charged the law professors with A2A membership based solely on the fact that they endorsed a statement summarizing their views on the Second Amendment, which A2A published in 1993.

Then there is *Gun Crazy's* treatment of Professor Van Alstyne. *Gun Crazy* discusses Van Alstyne in the same section that discusses Sanford Levinson, Akhil Amar, et al., a section that is expressly devoted to law professors who allegedly champion the Amendment mendaciously and in bad faith because they are members of A2A. Unless readers attend to the footnotes with particular care, they will not catch the fact that *Gun Crazy* never actually claims Van Alstyne is a member "of

²⁰⁴ Personal communication with Professor Levinson (June 21, 1995).

²⁰⁵ Personal communication with Professor Amar (June 21, 1995).

²⁰⁶ Amar, *Bill of Rights*, *supra* note 13, at 1166 (footnotes omitted).

²⁰⁷ Personal communication with Professor Olson (June 19, 1995). In a letter dated July 23, 1993, and sent to Don Kates (on file with Don Kates), Professor Olson further informed us:

Mr. Herz spoke to me once prior to writing his article, probably in late 1994. He had left me a message that he was writing an article on the Second Amendment. We played telephone tag for a while, then spoke for about *two* minutes. I told him that if he were serious about writing on the right to keep and bear arms, he had to talk with you and Bob Cottrol and gave him both [your] phone numbers and I said I would send him a copy of [William] Van Alstyne's article and the Open Letter. I did so, including an information packet on A2A. He asked *no* questions and said *nothing* beyond stating that he wanted to write a Second Amendment piece. I was led to the erroneous impression that he was a serious scholar.... He *never* mentioned nor asked anything about A2A. He *never* again called before publishing his article.

the anti-gun control group" as it does of Levinson and Amar. It could not make such a claim because Van Alstyne's name was not included in the A2A advertisement.

Creating this misimpression enables *Gun Crazy* to finesse the urgent need to offer some plausible motive for someone of Van Alstyne's stature to falsify (pg.1184) quotations. To charge one of the major figures in constitutional law with cribbing from NRA materials and trying to hoodwink other scholars into accepting a pro-gun interpretation of the Second Amendment that he knows to be deficient surely requires some plausible motive. It also avoids the need to provide any evidence to support *Gun Crazy's* characterization of Van Alstyne as a "pro-gun scholar"²⁰⁸ who "endors[es] ... the gun lobby's Second Amendment gospel."²⁰⁹

If Herz means by this only that *any* scholar who comes to the individual right conclusion is by definition "pro-gun," the characterization is completely misleading, particularly in a section in which others are accused (falsely) of organizational ties to the gun-rights lobby. Contrast this with its accusation that Levinson has bowdlerized quotations, which *Gun Crazy* bolsters by accusing Levinson of being an A2A member. *Gun Crazy's* charge that Van Alstyne also falsifies quotations is similarly bolstered by leaving readers under the misimpression that Van Alstyne is an A2A member—though without actually saying so.

Nevertheless, in Robert Cottrol, *Gun Crazy* can congratulate itself on having at last actually identified a member, indeed a board member, of A2A: the lone accurate charge of the eight it makes against scholars who have authored law review articles endorsing a broad individual right interpretation of the Amendment.²¹⁰ Once again, A2A did not even exist when the Cottrol-Diamond article *Gun Crazy* criticizes was published. So it is hard to see how it could be part of a conspiracy by "the gun lobby ... to flood the law reviews with friendly scholarship from sympathetic law professors."²¹¹

But *Gun Crazy's* attack on Cottrol goes beyond its unelaborated innuendo that his being an A2A member somehow discredits his (and Diamond's) pre-A2A writings. *Gun Crazy* alleges that the whole body of Cottrol's work slavishly (pg.1185) adheres to the "gun lobby gospel"²¹² and deceitfully omits "judicial or scholarly views contrary to the gun lobby party line."²¹³ Far from being the gun lobby stooge *Gun Crazy* depicts, however, Cottrol advocates the enactment of gun control laws that

²⁰⁸ On page 112 of *Gun Crazy* appears the following sentence: "[R]epealing the Second Amendment is a red herring that pro-gun scholars have adopted." This is followed by a footnote which cites only Van Alstyne. See *Gun Crazy*, *supra* note 7, at 112 & n.242.

²⁰⁹ *Id.* at 142 n.384.

²¹⁰ *Gun Crazy* charges A2A membership accurately as to Cottrol and inaccurately as to Professors Amar, Cantrell, Diamond, Johnson, Levinson, Lund, and Whisker. See *id.* at 144 n.396.

²¹¹ *Id.* at 138. This passage is immediately followed by footnote 357 which reads: "In 1993 the gun lobby organized a sympathetic scholars' group, known as Academics for the Second Amendment." *Id.* at 138 n.357. So the explicit claim being made is that A2A, *formed years after Cottrol and Diamond published their research*, is the vehicle by which the gun lobby is attempting to "flood the law reviews" with "friendly scholarship."

²¹² *Id.* at 144.

²¹³ *Id.* at 143.

pro-gun groups denounce as unconstitutional, including the Brady Bill, plus more extensive controls that pro-gun groups oppose even more bitterly.²¹⁴

Perhaps *Gun Crazy* misrepresents Cottrol's position as one of pro-gun irredentism to avoid dealing with Cottrol's criticism of the anti-gun irredentism *Gun Crazy* represents. Cottrol and Diamond stress that the great majority of the public, *including most gun owners*, accept the need for reasonable gun controls. They argue that the NRA is only able to defeat such legislation because gun owners are driven into its arms by the anti-gun extremism *Gun Crazy* epitomizes.

Contrast *Gun Crazy's* misportrayal with what Cottrol and Diamond actually write:

[Polls show o]verwhelming majorities of the American population support the right of individuals to own firearms [but they also want] ... measures that would keep guns out of the hands of criminals, the mentally unbalanced, and others likely to abuse the right. And it is this public consensus that should be the starting point of a new, more productive debate over the Second Amendment....

... The debate should thus focus on ways of developing fair and effective procedures for screening out those who should be prevented from purchasing firearms and how to do so in ways that would not seriously impair the rights the Second Amendment was designed to protect. Whether such procedures should involve waiting periods, registration, background checks, licensing procedures, or combinations of these possibilities should be part of the debate....

Ironically, an acceptance of the individual rights component of the Second Amendment may be necessary for effective gun control measures. The political difficulty in securing effective national screening measures is directly related to the fear on the part of many who value the right to keep and bear arms that such measures are merely way stations on the road to firearms prohibition. *That fear has been fed by those who have (pg.1186) sought to read the Second Amendment's guarantee out of the Bill of Rights. The recognition that the Constitution does indeed protect the right to keep and bear arms may be the first step in the needed process of fashioning laws that both contribute to public safety and preserve a right long valued in this society.*²¹⁵

Given the techniques used by *Gun Crazy* to discredit the scholars it discusses, it is interesting to note those Second Amendment scholars that *Gun Crazy* chose *not* to discuss. In the previous section we quoted a passage from intellectual historian Robert Shalhope that gives the quotations that Van Alstyne and Levinson supposedly bowdlerized the same meaning they do. Shalhope's seminal article on the Second Amendment and the place of an armed citizenry in that philosophy appeared in the faculty-refereed *Journal of American History*.²¹⁶ This piece and a subsequent law

²¹⁴ Robert J. Cottrol, ... *Here's a Better Idea*, RICHMOND TIMES-DISPATCH, April 9, 1989, at F-1. The Brady Bill imposes a national background check only on handgun purchases. Cottrol's proposal, which was made at the height of pro-gun groups' vociferous fight against Brady, favors a national background check for purchasers of any kind of firearm.

²¹⁵ Cottrol & Diamond, *Public Safety*, *supra* note 13, at 85-86 (emphasis added). While Herz may have been unaware of this particular article, in denouncing Cottrol he cites a much shorter Cottrol article which is devoted to the same point. *Gun Crazy*, *supra* note 7, at 143 n.389 (citing Robert J. Cottrol, *Want Gun Control? Enforce the Second Amendment!*, AM. RIFLEMAN, Mar. 1990, at 21).

²¹⁶ Robert Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982).

review article should have been prime targets for a scathing reply in *Gun Crazy* because Shalhope too accepts the view *Gun Crazy* excoriates as a "Second Amendment deception." Shalhope writes:

When James Madison and his colleagues drafted the Bill of Rights, they ... firmly believed in two distinct principles: (1) Individuals had the right to possess arms to defend themselves and their property; and (2) states retained the right to maintain militias *composed of these individually-armed citizens....* [In enacting the Bill of Rights] ... congressmen firmly believed in the right of individual citizens to possess arms....²¹⁷

So it is surprising to find that *Gun Crazy* provides no discussion whatever of Shalhope's body of uncongenial scholarship. One might dismiss this as an oversight, except that *Gun Crazy* does cite Shalhope's *Journal of American History* article at the end of a list of articles given in footnote 12.²¹⁸ Moreover, although his article is reprinted in its entirety in the one-volume anthology by Robert Cottrol that Herz claims to have examined, *Gun Crazy* reveals nothing of Professor Shalhope's substantive analysis. Could this be because (pg.1187) he is a non-gunowning intellectual historian who did not sign the A2A letter? Indeed, Shalhope has evinced no interest in the modern gun control debate at all. The subject of his research is the philosophy of the founding generation and its relationship to the philosophy of civic republicanism.²¹⁹

Another historian whose work should have attracted *Gun Crazy's* attention is Joyce Lee Malcolm, whose specialty is the political and legal history of early modern England, colonial America, and the early Republic. Professor Malcolm's recent book should have been well known to *Gun Crazy's* author,²²⁰ especially because it received extensive publicity²²¹ and has been hailed by scholarly reviewers as the definitive historical treatise on the right to arms.²²² Furthermore, she had previously published articles in law reviews and historical journals to the same effect.²²³ Her findings should certainly have presented an important target for *Gun Crazy*, given her book's pre-eminence and the support it lends to what *Gun Crazy* derides as "a constitutional deception."

²¹⁷ Shalhope, *supra* note 13, at 133, 137. We have added emphasis to highlight the Amendment's *dual effect*: by guaranteeing individuals the right to arms it *both* preserved their right *and* precluded any attempt to disarm a militia composed of its individually armed members.

²¹⁸ *Gun Crazy*, *supra* note 7, at 62 n.12.

²¹⁹ Personal communication with Professor Shalhope (1983).

²²⁰ It is difficult to attribute *Gun Crazy's* failure to deal with Professor Malcolm's book, *ORIGINS*, *supra* note 13, to ignorance of its existence. It was cited twice by William Van Alstyne, whose article *Gun Crazy* reviews in as much detail as it gives any article that contradicts its views. See Van Alstyne, *supra* note 13, at 1247 n.39 & 1249 n.45.

²²¹ Its publication by Harvard University Press in early 1994 was widely heralded, resulting in a lengthy interview with Professor Malcolm in the *National Law Journal*. Interview with Professor Joyce Lee Malcolm, *NAT'L L.J.*, Oct. 3, 1994, at B14-16. Moreover, in addition to the reviews discussed *infra* note 222, the book was reviewed in the *Washington Times*. Richard Maxwell Brown, *Analyzing the True Aim of the Right to Bear Arms*, *WASH. TIMES*, May 8, 1994, at B8.

²²² The book has been reviewed by Vanderbilt Law School professor James Ely, Ely, *supra* note 13; Canadian sociologist Allen D. Olmsted, 24 *CONTEMP. SOC.* 58-59 (1995); Cornell University political scientist Jeremy Rabkin, 86 *J. CRIM. L. & CRIMINOLOGY* 231 (1995) (book review); University of Tennessee Law School professor Glenn Reynolds, *A.B.A. J.*, Aug. 1994, at 94-95; English historian Frederic Paul Smoler, *OBSERVER*, Aug. 7, 1994, at 21 (book review); and English political scientist David Wootton, Wootton, *supra* note 13.

²²³ See Malcolm, *Common Law*, *supra* note 13; Joyce Lee Malcolm, *Charles II and the Reconstruction of Royal Power*, 35 *HIST. J.* (of Gr. Brit.) 307 (1992); Joyce Lee Malcolm, *The Creation of a "True Ancient and Indubitable" Right: The English Bill of Rights and the Right to Be Armed*, 32 *J. BRIT. STUD.* 226 (1993); Malcolm, *Review*, *supra* note 13.

Summarizing those findings, Professor Malcolm writes:

The Second Amendment was meant to accomplish two distinct goals.... First, it was meant to guarantee the individual's right to have arms for self-defence and self-preservation.... These privately owned arms were meant to serve a larger purpose as well ... and it is the coupling of these two objectives that has caused the most confusion. The customary (pg.1188) American militia necessitated an armed public ... the militia [being] ... the body of the people.... The argument that today's National Guardsmen, members of a select militia, would constitute the *only* persons entitled to keep and bear arms has no historical foundation.²²⁴

However desirable it might have been to respond to this, doing so presented a grave problem for *Gun Crazy*: Joyce Lee Malcolm was not an endorser of the A2A statement; she has never belonged to a pro-gun group; and the research underlying her book was sponsored not by any gun group but by the American Bar Foundation, Harvard Law School, and the National Endowment for the Humanities.²²⁵ Moreover, she had been very critical of Stephen Halbrook's book, which is the single most important influence and scholarly source for pro-gun advocates (although she concurs in Halbrook's view of the Amendment's purpose and meaning).²²⁶

Bereft, therefore, of any *ad homines* to hurl at Professor Malcolm, *Gun Crazy* simply ignores her. Malcolm's is yet another body of uncongenial scholarship with which it fails to acquaint its readers.

2. Falsifying the Scholars' Actual Views

It is not true that the advertisement sponsored by Academics for the Second Amendment and endorsed by over seventy scholars has "spread the gun lobby's gospel" or has "provide[d] much-appreciated scholarly seals of approval for the NRA."²²⁷ We think that it is highly revealing, indeed deceptive, that *Gun Crazy* fails to reprint the text of the A2A-sponsored statement. (pg.1189) For,

²²⁴ MALCOLM, ORIGINS, *supra* note 13, at 162-63 (first emphasis added).

²²⁵ Personal communication with Professor Malcolm (June 22, 1995).

²²⁶ See, e.g., Malcolm, *Review*, *supra* note 13 (negatively reviewing HALBROOK'S, THAT EVERY MAN BE ARMED, *supra* note 185). Compare *Gun Crazy*, *supra* note 7, at 138 & n.356, describing Halbrook as among the "leading gun-rights litigators," a "warhorse" who has written nine articles on the Amendment.

²²⁷ According to *Gun Crazy* the A2A group

proclaims that it seeks to "foster intellectually honest discourse" on the Second Amendment, and that its "primary goal is to give the 'right to keep and bear arms' enshrined in the Bill of Rights its proper, prominent place in Constitutional discourse and analysis." But in the group's paid political announcement and in the writings of its members, "intellectually honest discourse" includes steering a course far away from the judiciary's interpretation of the Second Amendment. The group's members have spread the gun lobby's gospel effectively. Their academic endorsements provide much-appreciated scholarly seals of approval for the NRA, and perpetuate the popular false consciousness regarding the operative meaning, as rendered by the courts, of the Second Amendment.

Gun Crazy, *supra* note 7, at 144-45 (footnotes omitted).

had *Gun Crazy* provided readers with its text, they would have found that *Gun Crazy* wildly misrepresents the views of those who endorsed this letter.

Contrast *Gun Crazy's* characterization with the actual words of the A2A statement, particularly those we emphasize in its final paragraph:

The view that the Second Amendment to the Constitution of the United States guarantees only the states' right to maintain formal militias has attained a surprising respectability. That may be more explicable as an expression of the hostility many academicians feel towards guns and their owners than as an unbiased constitutional interpretation. The Second Amendment does not guarantee merely a "right of the states," but rather a "right of the people," a term which, as used throughout the Bill of Rights (e.g. the First and Fourth Amendments), is widely understood to encompass a personal right of citizens.

Moreover, the Amendment refers to the "militia," a term which in the 18th Century meant not a formal military unit like the National Guard, but a system under which every household and every man of military age was required to own a gun in order to defend the community against tyranny, foreign invasion, and crime. The leading interpretations before Congress when it enacted the Bill of Rights affirmed that by the Second Amendment "the people are confirmed in their right to keep and bear their private arms"—"their own arms."

Furthermore, the "individual right" component of Second Amendment thought became even more prominent in constitutional theory due to the transformation wrought by and through the debates in the [Post-Civil War] Congress concerning the privileges and immunities of national citizenship. Many Congressmen pointed out that blacks in the South needed to be constitutionally protected in the citizen's individual, personal right to bear arms in self-defense.

Of course, *the right to bear arms is no more "absolute" than is the right to speak, to publish, or to assemble.* Hence, there is room for disagreement over the scope of Second Amendment rights, just as there currently exists legitimate disagreement over the scope of First Amendment rights of assembly and free speech. Nothing in this statement, therefore, is intended to deny *either the constitutionality of, or the need for, sensible gun laws.*²²⁸

Nothing in this statement validates *Gun Crazy's* insinuation that the signatories are promoters of gun lobby extremism.^(pg.1190)

In fact, *Gun Crazy's* misportrayal of the scholars it assaults is based on systematic nondisclosure of the fact that some of them have actually condemned the NRA position.

Even if one accepts [the individual right view of the Second Amendment], the overriding temptation is to say that times and circumstances have changed and that there is simply no reason to continue enforcing an outmoded, and indeed dangerous, understanding of private rights against public order....

I am not unsympathetic to such arguments. It is no purpose of this essay to solicit membership for the National Rifle Association or to express any sympathy for what even Don Kates, a strong critic of the conventional dismissal of the Second Amendment,

²²⁸ Printed as *An Open Letter on the Second Amendment*, NEW REPUBLIC, Mar. 15, 1993, at 15 (emphasis added) (advertisement).

describes as "the gun lobby's obnoxious habit of assailing all forms of regulation on 2nd Amendment grounds."²²⁹

Anyone who diligently compares *Gun Crazy* to the articles it assails will discover an odd coincidence. Criticisms *Gun Crazy* offers of the pro-gun-rights position often coincide identically to such criticisms previously made by Levinson, Van Alstyne, and others whom *Gun Crazy* depicts as minions or fellow travelers of the gun lobby. Compare, for instance, the language italicized in the quotation from Levinson just given to *Gun Crazy's* criticism: "The gun lobby insists that the Second Amendment is an all-purpose barrier to virtually all gun control proposals."²³⁰ Or compare the analogy *Gun Crazy* draws: "Viewing the Second Amendment as an absolute barrier to firearms regulation is like the assertion that the First Amendment's Free Speech Clause absolutely prohibits any speech regulations"²³¹ to the following passage from the article by Van Alstyne that *Gun Crazy* severely criticizes: "The freedoms of speech and of the press, it has been correctly said, are not absolute. Neither is one's right to keep and bear arms absolute."²³² (pg.1191)

3. The Relevance of Guilt by Association

Gun Crazy's charges against Amar, Levinson, and other scholars raise issues which *Gun Crazy* itself never directly addresses. Once again, all these scholars actually did was sign a statement that summarized their previously expressed views on the Amendment, a statement which Academics for the Second Amendment then publicized in 1993. *Gun Crazy* uses this only as a smear, an unelaborated innuendo. There is not even an attempt to explain how conclusions Levinson and Amar reached in their respective 1989 and 1991 *Yale Law Journal* articles²³³ are impugned by the fact that years later they endorsed a statement summarizing those same conclusions. Even assuming that *Gun Crazy* were correct in charging Amar and Levinson with membership in A2A, a group that did not exist until late 1992²³⁴ (not 1993 as alleged by *Gun Crazy*),²³⁵ *Gun Crazy* does not attempt to explain how that would impugn conclusions they independently reached years before.

This leads to some broader reflections on guilt by association as legal reasoning. Suppose that, when Levinson and Amar began their research, they had both been members of the NRA (which

²²⁹ Levinson, *supra* note 13, at 655-56. In the passage we have emphasized, Professor Levinson is quoting from a then-unpublished manuscript that was subsequently published as Don B. Kates, *Minimalist Interpretation of the Second Amendment*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 130 (E. Hickok, ed., 1991). Kates is, of course, one of the authors of this Article. Compare the italicized passage with *Gun Crazy's* thrice-repeated description of Kates as "a gun rights litigator," *Gun Crazy*, *supra* note 7, at 63, 69 & n.40, 109, a term which *Gun Crazy* defines as one who "share[s] the extreme views of the NRA." *Id.* at 57 n.2.

²³⁰ *Id.* at 104. *See also id.* at 57 (In this article "[m]y focus is on the claim that every proposed regulation of firearms necessarily implicates the Second Amendment.") It is particularly incongruous that *Gun Crazy* dispenses so much of its venom in falsifying the views of those whose scholarship has actually discredited that claim.

²³¹ *Gun Crazy*, *supra* note 7, at 105.

²³² Van Alstyne, *supra* note 13, at 1254. The same analogy was made almost a decade earlier by one of the authors of this article. *See* Don B. Kates, *The Second Amendment: A Dialogue*, 49 L. & CONTEMP. PROBS. 143, 145-46 (1986) ("[R]easonable gun controls are no more foreclosed by the second amendment than is reasonable regulation of speech by the first amendment.").

²³³ *See* Amar, *Bill of Rights*, *supra* note 13; Levinson, *supra* note 13.

²³⁴ Personal communication with Joseph Olson, A2A's President (June 19, 1995).

²³⁵ *Gun Crazy*, *supra* note 7, at 138 n.357.

did exist at that time). Is that a basis for discounting their scholarship as *Gun Crazy* does? It is surprising—or is it?—that *Gun Crazy* fails to make a charge that is logically indistinguishable and that has the added advantage of actually being true of Levinson and Van Alstyne. They are both members of the ACLU, on whose national board Van Alstyne served for many years. If their supposed A2A membership would discredit their view of the Second Amendment, surely their ACLU membership must equally do so (not to mention discrediting their views of the rest of the Bill of Rights). Similarly, Professors Cottrol and Diamond are members of the NAACP and other national groups opposing the death penalty.²³⁶ Does this association discredit Cottrol's adverse law review articles on (pg.1192) the death penalty?²³⁷ Are Cottrol and Diamond now to be precluded from writing on the death penalty or on legal issues involving race?²³⁸

Presumably Herz would answer these questions in the negative. Yet what is the likely effect of an attack like *Gun Crazy's*? Will it not be to deter additional scholars from publishing their agreement with the broad individual right view of the Second Amendment? Will not others now think long and hard before lending their name to an advertisement on an important legal question with which they are in entire agreement, indeed an ad which endorses and communicates the conclusions they reached during the course of their scholarship? In sum, will not *Gun Crazy* contribute to the "ugly cross-talk, [that] may simply be too off-putting for the taste of many in the legal academy, quite a few of whom have intentionally eschewed the often confrontational stance of the practicing lawyer"?²³⁹ That certainly appears to be its intended effect.

II. FACTUAL ERRORS AND SLOPPINESS

In addition to the *ad homines* intended to malign both Second Amendment scholarship and the scholars described in Part I, *Gun Crazy* is replete with factual errors. Some of these errors concern its analysis of legal scholarship. Others concern facts about the National Rifle Association and firearms. When considered together, these errors suggest that *Gun Crazy* is more a polemic than a serious contribution to legal scholarship.

A. Fudging the Count in Order to Minimize the Scholarly Consensus

Gun Crazy seeks energetically to dispel the overwhelmingly contrary scholarship by statistical legerdemain, but is hampered by its own slovenly research and by the disability that doomed so many of us to law school: inability to count. For reasons addressed below, *Gun Crazy* purports to limit the scope of its count to full-time law professors listed in the 1993-94 AALS

²³⁶ In addition to the NAACP, Professor Cottrol is a member of Amnesty International and the National Coalition to Abolish the Death Penalty. Personal communication with Professor Cottrol (July 27, 1995).

²³⁷ See, e.g., Robert J. Cottrol, *Static History and Brittle Jurisprudence: Raoul Berger and the Problem of Constitutional Methodology*, 20 B.C. L. REV. 353 (1985).

²³⁸ See, e.g., Cottrol's argument for the constitutionality of and need for affirmative action, Robert J. Cottrol, *A Tale of Two Cultures: Or Making the Proper Connections Between Law, Social History and the Political Economy of Despair*, 25 SANDIEGO L. REV. 989 (1988); Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255 (1983).

²³⁹ *Gun Crazy*, *supra* note 7, at 139.

(pg.1193) *Directory of Law Teachers*²⁴⁰ as teaching constitutional law, who have published articles focusing on the Second Amendment.²⁴¹ *Gun Crazy* proceeds to assert that "only nine [of these professors] have ever written a law review article focusing on the Second Amendment,"²⁴² to which it appends a footnote listing *ten* authors, not nine.²⁴³ Inexplicably, five of those listed do not meet the specified criteria²⁴⁴ while four others who do meet the criteria are omitted from the footnote.²⁴⁵ The criteria chosen exclude three other constitutional law professors whose indicated support for the broad individual right view appears very briefly in articles devoted to other topics.²⁴⁶

Later in the same paragraph *Gun Crazy* asserts that "[f]ull-time law professors [have] penned only ten articles focusing on the Second Amendment," of which it counts seven "on the broad individual right side" and three on the (pg.1194) other.²⁴⁷ But Herz misanalyzes the law professors' articles he cites and thus overcounts the number of articles supporting his militia-centric view.

Far from supporting *Gun Crazy's* position, Professor Stephanie Levin takes the position held by those whom *Gun Crazy* denounces. Indeed, she favorably cites in support of her position a scholar *Gun Crazy* dismisses as a gun lobby "warhorse" because he holds, as does Professor Levin, that the Second Amendment embodies *both* collective and individual purposes. By guaranteeing

²⁴⁰ AMERICAN ASSOCIATION OF LAW SCHOOLS (AALS), *DIRECTORY OF LAW TEACHERS*, 1993-1994.

²⁴¹ *Gun Crazy*, *supra* note 7, at 137 ("At the beginning of the 1993-94 academic year, the AALS-member law schools employed 1368 self-described constitutional law professors.").

²⁴² *Id.*

²⁴³ Following is the text of footnote 353:

Bogus, *supra* note 11; Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 *YALE L.J.* 661 (1989); Cottrol & Diamond, *supra* note 12; Stephanie A. Levin, *Grassroots Voices: Local Action and National Military Policy*, 40 *BUFF. L. REV.* 321 (1992); Levinson, *supra* note 12; McClurg, *supra* note 108; Van Alstyne, *supra* note 12; David E. Vandercoy, *The History of the Second Amendment*, 28 *VAL. U. L. REV.* 1007; Williams, *supra* note 48.

Id. at 137 n.353.

²⁴⁴ *Gun Crazy* cites an article by Wendy Brown (a California professor of Women's studies). *Id.* at 137 n.353. Reading Professor Brown's self-description at the bottom of the first page of her article would have established that she is not a law professor. Reading the 1993-94 AALS *DIRECTORY OF LAW TEACHERS* that *Gun Crazy* cites would have established that it does not list her. Neither does it list two others, Stephanie Levin and Carl Bogus. The AALS Directory does list Andrew Jay McClurg and David Vandercoy as law professors, but not as teachers of constitutional law.

²⁴⁵ It is particularly inexplicable that *Gun Crazy* omits from footnote 353 two such professors whom it mentions elsewhere, Akhil Amar and Donald Beschle, not to mention George Anastaplo, whom it seems not to have discovered, despite his having written one of the few articles by a law professor supportive of *Gun Crazy's* position. *See* Anastaplo, *supra* note 14. Law professor Charles Cantrell (who is mentioned in footnotes 391 and 396 of *Gun Crazy*) may have been omitted because his article appeared in a bar publication rather than a regular law review.

²⁴⁶ We do not suggest that it was in any way improper for *Gun Crazy* to exclude law professors who have not devoted substantial space to addressing the Amendment. But because they are relevant to *Gun Crazy's* claim about the silence of the academic community on this issue, we do note the affirmative references to the individual right view by Gerard V. Bradley, James Gray Pope, and John Choon Yoo. *See* Gerard V. Bradley, *The Bill of Rights and Originalism*, 1992 *U. ILL. L. REV.* 417, 434 (describing the militia clause as "mere exhortatory or precatory language"); James Gray Pope, *supra* note 13; John Choon Yoo, *supra* note 13.

²⁴⁷ *Gun Crazy*, *supra* note 7, at 138 & n.359.

individuals the right to have arms for self-defense it also protects the collective arms of the militia, which consists of the military-age male citizenry bearing their own arms.²⁴⁸

Although it is true that Carl Bogus (who *Gun Crazy* neglects to mention was a member of the Board of Directors of the Center to Prevent Handgun Violence) feels a strong affinity for the narrowest possible view of the Second Amendment, it is difficult to classify the article by Bogus that *Gun Crazy* cites as squarely supporting its view of the Second Amendment.²⁴⁹ Insofar as Bogus discusses the matter, his article offers multiple conclusory denials that the Amendment protects individual gun ownership. But the argument made by Bogus in support of these denials undermines *Gun Crazy's* militia-centric view of the Second Amendment. Bogus's thesis is that the Amendment's real purpose was to guarantee the ability of white slaveholders to keep control over their black slaves. Assuming that was one of the purposes, it would seem to support, not contradict, the idea of the Amendment as a broad-based right of individuals (that would now extend to blacks as well as whites).

It is important to note two unannounced effects of *Gun Crazy's* exclusion of all but "[f]ull-time law professors": First, that exclusion relieves Herz of the need to mention, count, and respond to law review articles by professional historians, all of them adverse to his position.²⁵⁰ A second advantage *Gun Crazy* obtains from concentrating only on law professors is that it allows (pg.1195) Herz to dismiss twenty-five law review articles whose authors *Gun Crazy* categorizes as "leading gun-rights litigators and lobbyists";²⁵¹ "[f]ive warhorses [who] have pulled virtually all of the load";²⁵² "a band that essentially knows just one tune";²⁵³ "gun-rights advocates ... [who] share the extreme views of the NRA."²⁵⁴ This is highly misleading. One of the supposed one-tune band members, Don Kates (one of the authors of the present Article) devotes much of his scholarship to striking discordant notes: arguing for the constitutionality of licensing, registration, and other controls that are anathema to the gun lobby;²⁵⁵ endorsing several such controls;²⁵⁶ and severely

²⁴⁸ Levin, *supra* note 13, at 346-47 n.105 (favorably citing David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1 (1987)). Compare *Gun Crazy*, *supra* note 7, at 138 & n.356 (listing Hardy among the "leading gun-rights litigators and lobbyists," a "band that essentially knows just one tune").

²⁴⁹ Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993).

²⁵⁰ See Fussner, *supra* note 13 (book review); Malcolm, *Common Law*, *supra* note 13; Malcolm, *Review*, *supra* note 13; Shalhope, *supra* note 13; Shalhope, *supra* note 216.

²⁵¹ *Gun Crazy*, *supra* note 7, at 138.

²⁵² *Id.* at 138 n.356.

²⁵³ *Id.*

²⁵⁴ *Id.* at 57 n.2.

²⁵⁵ Of the five articles by Don Kates that *Gun Crazy* mentions, the earliest devotes 11 pages to validating gun registration, licensing, and other controls, see Kates, *supra* note 96, at 257-67. The second is devoted entirely to defending the validity of various gun controls, see Kates, *supra* note 229, as is a portion of a third, see Don B. Kates, *Gun Control: Separating Reality from Symbolism*, 20 J. CONTEMP. L. 353, 365 (1994) [hereinafter *Gun Control*].

²⁵⁶ See, e.g., DON B. KATES, GUNS, MURDER AND THE CONSTITUTION: A REALISTIC ASSESSMENT OF GUN CONTROL 57-61 (1990) [hereinafter KATES, GUNS, MURDER]; Don B. Kates, *The Battle over Gun Control*, 84 PUB. INTEREST 42, 42-43, 45-46 (1986); Don B. Kates, *Conclusion*, in FIREARMS AND VIOLENCE 527-35 (Don B. Kates ed., 1984) [hereinafter KATES, FIREARMS AND VIOLENCE]; Don B. Kates, *Firearms and Violence: Old Premises and Current Evidence in VIOLENCE IN AMERICA* 198, 207 (T. Gurr ed., 1989) [hereinafter Kates, *Current Evidence*].

rebuking the gun lobby for myopic and constitutionally unwarranted opposition to them.²⁵⁷ Contrary to *Gun Crazy's* innuendos, this old warhorse has neither been urged nor paid by the gun lobby to write articles. In fact, his articles have been denounced in the pages of the *American Rifleman* as "Orwellian Newspeak"²⁵⁸ by Stephen Halbrook, whom *Gun Crazy* also classifies as a warhorse who, like Kates, supposedly belongs to a "band that essentially knows just one tune."²⁵⁹ Kates and Halbrook have publicly debated each other as to the permissible scope of gun control under the Second Amendment.²⁶⁰ (pg.1196)

B. Defaming the "Necromerchants"

Because our primary purpose here is to respond to the serious charges that *Gun Crazy* makes about Second Amendment scholarship and scholars, we do not address the pages of dubious allegations and invective *Gun Crazy* directs against the NRA and the gun industry. Yet some of its claims are so patently false, even absurd, that they evidence *Gun Crazy's* slipshod treatment of facts.

One cannot always tell whether *Gun Crazy's* factual errors are deliberate or merely the result of sloppiness or credulity. Sometimes they are offered to buttress its arguments, but other times they are not. As an example of the latter, *Gun Crazy* asserts, "[t]here are two types of handguns—revolvers and pistols."²⁶¹ It then offers the following definition of "pistols": "[P]istols, actually semiautomatic handguns, hold between 14 and 17 cartridges"²⁶² Slight research would have informed Herz that there are other types of handguns than revolvers and semiautomatics, and there is no significance whatever to the figure of fourteen to seventeen rounds.²⁶³ Defining the category semiautomatic pistol as holding "between fourteen and seventeen cartridges" is comparable to defining the category "flower" as ranging in color from red to pink.

Other false claims offered in support of its polemic against guns, gun manufacturers, gun-rights activist groups, and Second Amendment scholars are more disturbing. They are not only false, but so serious and demonstrably false that they reveal *Gun Crazy* to be a work of propaganda.^(pg.1197)

1. Marketing Candy-Colored Guns for Kids

²⁵⁷ Kates, *supra* note 229, at 130-31 ("the gun lobby's obnoxious habit of assailing all forms of regulation on Second Amendment grounds"); Kates, *supra* note 185, at 88 ("the gun lobby's obnoxious pretension that the amendment bars any gun control it happens to oppose, however moderate or rational"); Kates, *Gun Control*, *supra* note 255, at 365 ("the gun lobby position may be briefly dispatched by noting that the Amendment does *not* read: 'Congress shall make no law of which the gun lobby disapproves'").

²⁵⁸ Stephen P. Halbrook, *To Bear Arms for Self-Defense: Our Second Amendment Heritage*, AM. RIFLEMAN, Nov. 1984, at 28 (criticizing Kates's arguments for the constitutionality of a wide variety of gun controls under the Second Amendment).

²⁵⁹ *Gun Crazy*, *supra* note 7, at 138 & n.356.

²⁶⁰ See, e.g., Kates, *supra* note 232, at 143; Stephen P. Halbrook, *What the Framers Intended: A Linguistic Interpretation of the Second Amendment*, 49 L. & CONTEMP. PROBS., Winter 1986, at 153.

²⁶¹ *Gun Crazy*, *supra* note 7, at 59 n.5.

²⁶² *Id.*

²⁶³ In fact, most semiautomatic pistols hold no more than nine rounds, but there are semiautomatic pistols holding 20, 30, 50, or even 100 round magazines. That some pistols hold 14-17 rounds is a happenstance that does not differentiate them in any meaningful way from those holding 5-13 and those holding 18-20 rounds.

Dubbing gun manufacturers "necromerchants,"²⁶⁴ *Gun Crazy* claims that they "often target their products for use by children and criminals."²⁶⁵ To support its claim with respect to children, *Gun Crazy* asserts that gun manufacturers "are turning out weapons in 'bright Crayola-crayon colors....'"²⁶⁶ Having never heard of such a thing, we checked with Eugene J. Wolberg, the firearms examiner and Senior Criminalist for the San Diego, California, Police Department.²⁶⁷ After he finished laughing, Wolberg explained the matter: Only one of the "necromerchants," Eagle Arms, has ever produced firearms in such colors. It did so as a gimmick on *not-for-sale advertising models of target match rifles it displays at industry shows*. A child who attends gun industry shows and can afford the \$2,000 price of an Eagle target match rifle can buy such a rifle (in black steel only, not in the Crayola-crayon colors).²⁶⁸ Of course, s/he must be willing to wait for the rifle to be delivered after s/he reaches the age of majority. In addition, the Smith & Wesson Company produces its "Ladysmith" pistols and revolvers in colored versions; but these are subdued pastels and are marketed to women, not children.²⁶⁹

2. Marketing Fingerproof Guns to Criminals

Then there is *Gun Crazy's* claim that the "necromerchants" design guns for sale to criminals. This is one of multiple falsehoods for which *Gun Crazy* relies on citations to Josh Sugarmann.²⁷⁰ Quoting Sugarmann, *Gun Crazy* (pg.1198) asserts that one manufacturer advertises "a TEC-KOTE [finish that] provides a natural lubricity ... [that offers] ... excellent resistance to fingerprints...."²⁷¹ Wolberg comments that this is "taken completely out of context" in order to mislead people who have no knowledge of firearms.²⁷²

What the advertisement is actually concerned with is not the issue of police fingerprint detection, but the fact that fingers carry a natural acid that can corrode and mar a firearm's finish unless it is carefully relubricated after each time it is handled. What the advertisement conveys to

²⁶⁴ *Gun Crazy*, *supra* note 7, at 92. In a footnote, *Gun Crazy* offers the following definition:

ne•cro•mer•chant (nek' rĀmŭr' chant) *n.* [NLat. < Gk. Nekros, corpse ME < Or. *marcheant* < VLat. *mercantans < Lat. mercari. to trade] One whose occupation is the buying and selling of the implements of death for personal profit.

Id. at 92 n.140. Presumably, Herz would continue to permit "necromerchants" to manufacture "implements of death" so they might sell them to the police and armed forces "for personal profit."

²⁶⁵ *Id.* at 92.

²⁶⁶ *Id.* at 92 n.141. *Gun Crazy* obtains this misinformation from a magazine article. Diane Weathers, *Stop the Guns*, ESSENCE, Dec. 1993, at 67, 134.

²⁶⁷ Personal communication with Senior Criminalist Eugene J. Wolberg (July 20, 1995).

²⁶⁸ The base price of the rifle is about \$1,400, but that is without any kind of sighting mechanism. With the normal target-quality telescopic sight, the price is about \$2,000.

²⁶⁹ The only guns that remotely fit *Gun Crazy's* description are those with smaller proportions, which are marketed to parents as "youth" models. Wolberg, *supra* note 267.

²⁷⁰ Once again, Herz fails to identify Sugarmann as the former Communications Director of the National Coalition to Ban Handguns, and the founder and present Executive Director of an anti-gun organization called the Violence Policy Center.

²⁷¹ *Gun Crazy*, *supra* note 7, at 92 n.142 (alterations in original).

²⁷² Wolberg, *supra* note 267.

those who are familiar with firearms is that TEC-KOTEd firearms resist such corrosion. The TEC-KOTE finish is irrelevant to police fingerprint detection techniques; police laboratories have no more difficulty lifting prints from this firearm than from any other.²⁷³

3. *The NRA Helped Assassinate President Kennedy*

Gun Crazy claims, referring to the rifle with which John F. Kennedy was slain, that the NRA aided the assassination by "help[ing] develop the high-powered ammunition that made this 'notoriously inaccurate' rifle more effective."²⁷⁴ Despite the absurdity of this, we checked with three experts.²⁷⁵ Each said that this claim is false in every particular.

First, the Mannlicher-Carcano Italian army surplus rifle is not at all inaccurate. Its bad reputation among American shooters is an artifact of their lack of familiarity with Mannlicher-type actions (as opposed to the familiar (pg.1199) Mauser-type action). The Mannlicher-Carcano is a military-quality rifle chosen as such for its accuracy against human targets. Indeed, the Italian Army still uses the rifle for its precision shooting team.²⁷⁶

Second, the ammunition Oswald used is "just normal [military surplus] ammunition," commercially manufactured for sale based on the specifications provided by the Italian Army. As to the NRA's having participated in the assassination, the expert comments ranged from "absurd," "fantastic," and "nonsense," to "preposterous."²⁷⁷

4. *The "Assault Weapon" Hoax*²⁷⁸

Gun Crazy's ignorance of firearms and factual sloppiness are evident in its treatment of the "assault weapon" issue. Assault rifles are *fully* automatic rifles developed for military service, for

²⁷³ *Id.*

²⁷⁴ *Id.* at 114 n.250 (citing JOSH SUGARMANN, *NRA: MONEY, FIREPOWER AND FEAR* 35 (1992)). It is not entirely clear to us whether *Gun Crazy* means to imply that the NRA deliberately aided in the assassination of Kennedy (who was an NRA life member and a supporter of the gun industry, which is generally centered in his native New England). But there would seem to be no point in mentioning the matter if it was believed that all the NRA had done was develop more effective ammunition for a rifle without any foreknowledge or intent to help in its later use by Oswald. In that circumstance the NRA would be no more blameworthy than the Texas School Book Depository, which without foreknowledge hired an assassin who later misused its facility as a sniper's nest.

²⁷⁵ Martin Fackler, M.D. (Col., U.S. Army, retired), founder and former director of the U.S. Army Wound Ballistics Laboratory; William Wooton of Wooton Laboratory, the premier American authority on the history of rifle ammunition; and Columbia Medical School Professor John K. Lattimer, author of innumerable medical studies of aspects of the JFK case. See JOHN K. LATTIMER, *KENNEDY & LINCOLN: MEDICAL AND BALLISTIC ASPECTS OF THEIR ASSASSINATIONS* (1980).

²⁷⁶ Fackler, *supra* note 275.

²⁷⁷ On reading *Gun Crazy's* source, SUGARMANN, *supra* note 274, it appears that Herz alone is responsible for this innuendo. The facts which the source gives, but Herz omits, are that at the end of WWII the NRA responded to a request for technical advice from the U.S. Army, which had captured large quantities of the rifle during WWII. At that time Lee Harvey Oswald was not even ten years old and John F. Kennedy was still serving his first term in the House of Representatives.

²⁷⁸ In addition to the other sources cited herein, this section of the Article has been read and its accuracy confirmed by Eugene J. Wolberg, Senior Criminalist, City of San Diego and Chairman of the California Attorney General's Assault Weapon Identification Committee. Personal communication (Aug. 25, 1995).

example, the Russian AK-47 and the American M-16.²⁷⁹ From the 1930s on, civilian possession of fully automatic weapons has been outlawed by many states and highly restricted by federal law. The 1986 Voelkmer-McClure Act flatly prohibited civilian ownership or purchase of any fully automatic weapon manufactured after May 1986.²⁸⁰

The term "assault weapon" (as opposed to "assault *rifle*") has no military or other recognized or official meaning.²⁸¹ It is a term colloquially applied, (pg.1200) largely as a scare tactic, to *semi*-automatic firearms that cosmetically resemble real assault rifles, but fire no faster than a revolver or a pump-action shotgun and that function mechanically no differently from many of the more innocuous-looking rifles used for hunting.²⁸²

Contrary to the treatment in *Gun Crazy*, these weapons are far *less* deadly than many conventional hunting weapons.²⁸³ Like the military assault rifles they imitate, the semi-automatic "assault weapons" are designed to use *down-powered* ammunition, reflecting the fact that incapacitating an enemy soldier requires far less power than killing a bear or moose with hunting weapons.²⁸⁴ As David Kopel points out,

The great irony of the claim that the rifles labeled ... "assault weapons" are uniquely destructive is that they are the only rifles that have ever been designed *not* to kill [human beings].... [This accords both with the Hague Convention and with military theory which

²⁷⁹ See GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 70 (1991) (citing U.S. Department of Defense (DOD) definitions). A fully automatic weapon continues to fire when the user continues to press the trigger; a semi-automatic weapon fires once each time the user pulls the trigger. The DOD definition is actually more restrictive than the one given in the text because it includes only those fully automatic weapons that *also* have a semi-automatic mode of fire, that is "selective fire" weapons that allow the user to select between semi- and fully automatic. The distinction is irrelevant to the issues we discuss because, since the 1930s, laws regulating fully automatic arms have applied to any weapon capable of firing full-auto.

²⁸⁰ See 18 U.S.C. § 922(o) (1988) (limiting civilian purchase of fully automatic weapons to those manufactured prior to May 19, 1986, subject to registration requirements under 26 U.S.C. § 5812 (1988), and to a \$200 transaction fee under 26 U.S.C. § 5811 (1988)).

²⁸¹ Wolberg, *supra* note 278, comments that the experience of the California Attorney General's Assault Weapon Identification Committee is that the term "assault weapon" does not mean anything. It has proven impossible for the Committee to identify an "assault weapon" by type after years of attempting to do so. The only definition which has proven workable is circular: an "assault weapon" is one that is specifically so identified by name and model on the California ban list. CAL. PENAL CODE § 12276 (West Supp. 1997). Accordingly, when we use the term "assault weapon" it appears in quotes.

²⁸² Wolberg, *supra* note 278.

²⁸³ An assailant armed with an AR-15 (the civilian version of the M-16) would have to pull the trigger 27 times to fire as many similar-size projectiles as an ordinary 12-gauge hunting shotgun loaded with #4 buck dispenses with only one pull of the trigger. To equal the 162 projectiles dispersed by simply emptying a 12-gauge shotgun of its six shots, an AR-15-armed assailant would have to empty and replace five and one-half 30-shot detachable magazines. The AR-15's .223 bullets would travel at a substantially higher velocity than the shotgun's .24 caliber pellets, but would also be substantially smaller. Wolberg, *supra* note 268; VINCENT DI MAIO, M.D., GUNSHOT WOUNDS: PRACTICAL ASPECTS OF FIREARMS, BALLISTICS AND FORENSIC TECHNIQUES 146 (1985).

²⁸⁴ See Edgar A. Suter, M.D., "Assault Weapons" Revisited, 83 J. MED. ASS'N GA. 281 (1994):

Typically assault weapons fire low or intermediate power cartridges (e.g., 9 mm Parabellum, 5.56 x 45 mm, 7.62 x 39 mm) with non-expanding bullets that have been designed to wound rather than kill. Such cartridges are considerably less deadly than most high-power hunting cartridges (e.g. .243 Winchester, 30-06, .300 Winchester Magnum) which, by definition, are designed to kill, particularly when loaded with expanding bullets.

is that] wounding an enemy soldier uses up more of his side's resources (to haul him off the battlefield and then care for him) than does killing an enemy.²⁸⁵

According to the founder of the U.S. Army's Wound Ballistics Laboratory, who is an experienced battle surgeon as well as a forensic analyst: "If [semiautomatic 'assault weapon' makers] had advertised their effects as depicted by the media, they would be liable to [civil] prosecution under truth-in-advertising laws."²⁸⁶ (pg.1201)

Gun Crazy dwells emotionally on massacres like the Stockton, California tragedy in which six of the thirty-five people Patrick Purdy shot with an "assault weapon" died.²⁸⁷ Although it is grisly to make comparisons, *Gun Crazy's* use of this example requires us to note that during a massacre at a McDonald's in San Ysidro, California in 1984, James Huberty killed twenty-one of the thirty-one people he shot (mostly children). He used several weapons but primarily an ordinary hunting shotgun.²⁸⁸ We realize, of course, that Herz would ban all these weapons—indeed all firearms—so he would be indifferent to the fact that "assault weapons" (and handguns) are less lethal than common hunting weapons. But then gun-rights proponents are not wrong when they claim that many gun regulations, including the ban on so-called "assault weapons," are merely stepping stones along the route to complete prohibition.²⁸⁹

Also false is *Gun Crazy's* claim that "assault weapons" are frequently used in crimes.²⁹⁰ Contrast such a claim with the conclusion of the report to Congress by the Congressional Research Service of the Library of Congress: "The only national statistics available on the makes and models of firearms that are or might have been used by criminals ... indicate that criminals use the semiautomatic firearms in question *much less often* than other makes or models of firearms."²⁹¹ The

²⁸⁵ DAVID B. KOPEL, GUNS: WHO SHOULD HAVE THEM? 169 (1995) (emphasis added).

²⁸⁶ *Id.* at 170 (emphasis added). Kopel is here quoting Col. Martin L. Fackler, M.D.:

Military bullets are designed to limit tissue disruption—to *wound rather than kill* [Tactically, this] ... is actually more effective for most warfare; it removes [both the enemy soldier] hit and those needed to care for him.... If [semi-automatic "assault weapon" makers] had advertised their effects as depicted by the media, they would be liable to prosecution under truth-in-advertising laws.

Medical Examiner Vincent Di Maio notes that the lethality of the modern military .223 caliber rifle is high only as compared to even less powerful modern military arms. Compared to even low-powered hunting rifles, .223 wounds "are, in fact, less severe than those produced by hunting ammunition such as the 30-30." DI MAIO, *supra* note 283, at 146. Dr. Di Maio also notes the 30-30's relative weakness when compared to standard hunting rifles. *Id.* at 161.

²⁸⁷ *Gun Crazy* does not mention incidents, such as occurred at a Shoney's Restaurant in Anniston, Alabama, in which armed citizens prevented a massacre by successfully defending themselves against armed assailants. Such incidents are not as well publicized as those in which defenseless, unarmed citizens are slain by armed attackers. J. Neil Schulman, *A Massacre We Didn't Hear About*, L.A. TIMES, Jan. 1, 1992, at B5. We discuss the efficacy of citizen self-defense *infra* Part IV.B.2.

²⁸⁸ Personal communication (Aug. 25, 1995) from Eugene J. Wolberg, who was the senior criminalist on the scene.

²⁸⁹ See our discussion of *Gun Crazy's* claim that gun rights proponents are paranoid, *infra* Part IV.C.

²⁹⁰ *Gun Crazy*, *supra* note 7, at 91-92 n.13 (assault weapons "make up 10% of all guns traced to crime").

²⁹¹ CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, "ASSAULT WEAPONS": MILITARY-STYLE SEMIAUTOMATIC FIREARMS FACTS AND ISSUES 5 (1992) [hereinafter FIREARMS FACTS] (emphasis added). Eugene Wolberg comments that, of approximately 70 people murdered each year in San Diego with a firearm, in no more than one or two cases has the weapon ever been a firearm listed as an "assault weapon" under the California "assault weapons" ban. This includes the years before the ban as well

U.S. Department of Justice *Survey of State Prison (pg.1202) Inmates, 1991* suggests that less than one percent of inmates had been armed with, although had not necessarily used, a "military-type weapon" (undefined) while committing the offense for which they were incarcerated.²⁹²

In their more candid moments, the advocates of banning such firearms repudiate this falsehood. A Handgun Control, Inc., representative stated in Congressional testimony: "[w]e agree with the National Rifle Association that assault weapons right now play a small role in overall violent crime."²⁹³ As to the supposed use of such weapons in attacking police, in 1992 more New York City police officers were attacked "with roach spray, wood chisels, fire extinguishers, radio amplifiers, or any other of a readily available array of household objects than were attacked with assault weapons."²⁹⁴ Describing a decade of murders of California officers the *California Journal of Law Enforcement* commented, "[i]t is interesting to note, in the current hysteria over semi-automatic and military look-alike weapons, that the most common weapon used to murder peace officers [in the 1980s] was the .38 Special and the .357 Magnum revolver."²⁹⁵ Nationally, of 1,534 police officers murdered in the years 1975 to 1992, sixteen were killed with an "assault weapon."²⁹⁶

5. Race, Racism, Falsehood, and the NRA

Recall *Gun Crazy's* description of the idea "that 'gun control is a white plot to disarm a feared minority population'" as a "long-standing (pg.1203) NRA theme."²⁹⁷ On its face this is difficult to square with other elements of *Gun Crazy's* portrayal of the NRA. *Gun Crazy* also denounces the NRA's "not-so-subtle devaluation of the lives of poor persons of color"²⁹⁸ and depicts it as an organization of white males (often associated with "white-supremacist movements"²⁹⁹ for whom "[t]he pleasure

as those following it. Personal communication (Aug. 25, 1995).

²⁹² BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE PRISON INMATES, 1991, at 19 (1993) [hereinafter SURVEY].

²⁹³ Quoted in FIREARMS FACTS, *supra* note 291, at 6. To the same effect see Karl P. Adler et al., *Firearms Violence and Public Health: Limiting the Availability of Guns*, 271 JAMA 1281 (1994) ("Although these weapons account for only a small percentage of firearms deaths...."); Judith Cohen Dolins & Katherine K. Christoffel, *Reducing Violent Injuries*, 94 PEDIATRICS 638, 646 ("These dangerous guns, which fire a large number of bullets in seconds, still account for only a small percentage of all injuries and deaths due to firearms....").

²⁹⁴ Suter, *supra* note 284, at 285 (citing NEW YORK CITY POLICE DEP'T, 1992 FIREARMS DISCHARGE ASSAULT REP. 7 (1993)).

²⁹⁵ George T. Williams & Charles B. Moorman, *A Decade of Peace Officers Murdered in California: The 1980s*, 46 J. CAL. L. ENFORCEMENT 1, 6 (1991).

²⁹⁶ ALAN S. KRUG, THE "ASSAULT WEAPON" ISSUE 16-17 (1993) (using FBI, state, and local police data). Although this is an NRA publication, generally confirming data are readily available from FIREARMS FACTS, *supra* note 291 and from the Williams & Moorman study, *supra* note 294.

²⁹⁷ *Gun Crazy*, *supra* note 7, at 142 (citing and quoting SUGARMANN, *supra* note 275).

²⁹⁸ *Id.* at 116 n.256.

²⁹⁹ *Id.* at 84 n.110. *Gun Crazy* fails to mention, however, that Professor Robert Cottrol, who by virtue of his membership in Academics for the Second Amendment is labeled by *Gun Crazy* as a member of an anti-gun control group organized by the NRA, and his coauthor, Professor Raymond Diamond, are both African-Americans. So is Professor Nicholas Johnson, who *Gun Crazy* falsely claims is an A2A member. See *supra* note 196-97 and accompanying text.

of more efficient or pleasurable hunting and target competition weapons ... outweigh[s] the hundreds of lives (mostly of persons of color in the inner city)."³⁰⁰

As discussed below,³⁰¹ however, vast increases in gun (especially handgun) ownership over the last two decades have been accompanied by a slight *decline* in homicide. Since the early 1970s homicide has declined or remained stable for every segment of American society except young inner city males. Gun-rights proponents are forced to point this out to correct their opponents' hyperbole about rising homicide. Yet *Gun Crazy* uses their response to mount another accusation of racism. By correcting such criminological falsehoods "the gun lobby" only proves its indifference to "non-white children and teenagers who die"³⁰² and its "morally reprehensible"³⁰³ and "racist assumptions"³⁰⁴ that "we should discount [their deaths] because the lives of these children of color are apparently worthless, or, at best, worth less [than the lives of white children]."³⁰⁵

The works Herz cites contain nothing to justify these insinuations and he has to suppress the fact that they expressly repudiate it. Compare, for example, *Gun Crazy's* claims of an "insidious ... lingering scent of racism in the gun lobby's ranks,"³⁰⁶ its leadership's "indifference to the death and suffering of 'others' of color,"³⁰⁷ with the following passage by one of the two (pg.1204) "gun activists" *Gun Crazy* claims advocates the "devaluation of the lives of poor persons of color."³⁰⁸

One of the central strategies of the gun prohibition advocates has been to tell Americans that they are all in immediate peril of gun violence. [Citing claims] that the recent rise in youth homicide puts all Americans at imminent risk, for "this onslaught of childhood violence knows no boundaries of race, geography, or class...."

To the contrary, the problem of youth homicide is very heavily concentrated in Black males aged fifteen-nineteen *That fact, of course, is no reason to be less concerned about the youth homicide problem. Since many problems, including violence, suffered by the urban Black community are the long-term result of governmental and societal racism, the moral obligation for all Americans to respond to the crisis is all the greater.*³⁰⁹

III. THE MILITIA-CENTRIC THEORY OF THE SECOND AMENDMENT

³⁰⁰ *Id.* at 115.

³⁰¹ *See infra* Part IV.B.4.

³⁰² *Gun Crazy, supra* note 7, at 116.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 115.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 116 n.256 (citing Paul Blackman and David Kopel).

³⁰⁹ DAVID B. KOPEL, CHILDREN & GUNS: SENSIBLE SOLUTIONS 37 (1993) (emphasis added). *Compare Gun Crazy, supra* note 7, at 116 n.256 (citing only a different, much shorter, work by Kopel). Kopel is, incidentally, a Democrat, a member of Amnesty International and the ACLU, and the son of the Colorado legislator who authored the state's fair housing act and other anti-discrimination measures. Personal communication from David B. Kopel (Aug. 24, 1995). Once again, we acknowledge that such facts should not be appropriate for discussion in a scholarly article. Once again, we plead that, however inappropriate, they have been made necessary by the argumentative techniques used by *Gun Crazy*.

We now turn to the substantive argument made by *Gun Crazy* about the appropriate interpretation of the Second Amendment. Such as it is, the argument is largely if not entirely semantic.

A. A Makeweight Conception of the Second Amendment

Gun Crazy dubs its perspective the "narrow individual right"³¹⁰ view of the Amendment, "a narrow focus on the militia in defining the right to bear arms."³¹¹ It substitutes this terminology for the terms "collective right" or "states' right" which commentators on both sides have used to describe the same position on the Second Amendment, but to which *Gun Crazy* objects (pg.1205) because, it claims, those terms fail to acknowledge the "narrow" position's individual right component.³¹² Regrettably, this is, at best, misleading, like so much else in *Gun Crazy*.

A crucial implication of describing a thing as an "individual right" rather than a state prerogative is that the right protects choice by the individual or individual liberty in some form. But individual liberty is missing entirely from *Gun Crazy's* "narrow" individual right position. The militia system as it existed in the American colonies required: (1) every household to have a gun (even if its members were exempt from militia service); (2) all law-abiding, respectable men (even those exempt from militia service) to carry a gun at some or all times; and (3) many or most men to appear with their guns when called out for militia service.³¹³

So what *Gun Crazy* apparently takes the Second Amendment to mean is simply that if the state compels individuals to own or carry arms as part of a militia system, the federal government cannot relieve them of that compulsion, confiscate their guns, or otherwise disable them from compliance with the state militia laws. *Gun Crazy's* calling this an "individual right" is mere lip service. The "right" *Gun Crazy* posits is actually the state's because it applies only to individuals acting at the behest of the state and is limited to the state's interest in preserving the group. To call this an individual right is as misleading as it would be to call it "freedom of religion" if the First Amendment meant no more than that Congress could not compel individuals to be Protestants if their state compelled them to be Catholics.

³¹⁰ *Gun Crazy*, *supra* note 7, at 61.

³¹¹ *Id.* at 66. The term "narrow" is used to describe the view espoused by *Gun Crazy*, e.g., "narrow right," "narrow right view," "narrow individual right," "narrow individual right view," "narrow or limited individual right," more than 30 times throughout the article.

³¹² *Id.* at 69.

³¹³ Under the colonial militia laws, every military-age male (excepting the insane, infirm, and criminals) was subject to the requirement to own arms for militia service and to bring them when called out for drill, inspection, or actual military campaigning. Seamen, clergymen, and public officials were generally exempt from the duty of responding to such callouts. Men over the upper military age (which varied from 45 to 60, depending on the colony) were also exempt. But the militia laws required every household to have a gun, even if its occupants were all female, overage, seamen, clergymen, and/or public officials. Similarly, all respectable men were required to carry arms at all times. In practice this was probably not enforced except in times of danger and probably only applied when traveling or going outside the community. *United States v. Miller*, 307 U.S. 174, 179 (1939) (describing colonial practice of expecting all able men to supply themselves with arms to support colonial militia); SENATE SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 97th CONG., THE RIGHT TO KEEP AND BEAR ARMS 3 (1982) [hereinafter THE RIGHT TO KEEP AND BEAR ARMS].

We hasten to add that *Gun Crazy* does not actually say that its "narrow" interpretation of the Second Amendment would preclude the federal government from disarming state militia members. Indeed, it bears emphasizing that (pg.1206) *Gun Crazy* does not actually say *anything* about the Amendment's having *any* application to anything.³¹⁴ Although we shall defer to *Gun Crazy's* objection to its view being called the "states' right" or "collective right" view, we are concerned to find terminology for it more accurate than "narrow individual right view."

We shall therefore describe *Gun Crazy's* view as, in its own terms, the "militia-centric"³¹⁵ theory of the Amendment, though we might well have called it the "makeweight" view. For "makeweight" accurately describes a view under which the Amendment lacks any specific affirmative function or substantive content. *Gun Crazy's* "narrow" view was invented to, and serves only the negative purpose of, fronting for *Gun Crazy's* desired conclusion that there is no constitutional barrier to gun control or prohibition.

The fact that the militia-centric "narrow right" is a mere makeweight is evident from *Gun Crazy's* failure to ascribe to it any substantive content whatever. *Gun Crazy* describes only what the "narrow right" does *not* do, but nothing that it does. Under it, we are told, the state's power to restrict or ban guns is "all-but-unlimited"³¹⁶; and no ban on "any aspect of the private purchase, use, or possession of firearms should see invalidation on Second Amendment grounds."³¹⁷ No explanation is given for how this accords with the fact that "ordinarily when called for service these [militia] men were expected to appear bearing arms supplied by themselves"³¹⁸

As correctly described in *Miller*,³¹⁹ the militia system the Founders knew imposed an obligation on at least the entire suitable and fit military-age male population to appear when called, bearing their own *private* arms. Logically, therefore, a narrow militia-centric view of the Amendment would, at the very least, protect ownership of military-style weapons including semiautomatic rifles, if not machine guns,³²⁰ by the entire military-age male populace.(pg.1207)

Yet *Gun Crazy* strongly affirms both the desirability and constitutionality of prohibitions on such arms, without any attempt to reconcile such prohibitions with its supposedly militia-centric view. *Gun Crazy's* assertion about the "all-but-unlimited scope of [constitutionally] viable gun

³¹⁴ *Gun Crazy's* repeated use of the term "narrow" in such phrases as "narrow individual right" and "narrow focus on the militia in defining the right to bear arms," see *supra* note 312, is as close as *Gun Crazy* gets to explaining what Herz believes the Amendment to do. With no more basis than these statements we extrapolate that Herz believes that, if Congress attempted to take away guns that the state had supplied to its militia, the Amendment would preclude such an attempt. He does not actually say this.

³¹⁵ *Id.* at 80 ("the Amendment had a narrow, militia-centric scope"); *id.* at 144 (referring to "a narrow militia-centric view of the right to bear arms").

³¹⁶ *Id.* at 148.

³¹⁷ *Id.* at 82.

³¹⁸ *United States v. Miller*, 307 U.S. 174, 179 (1939).

³¹⁹ *Id.*

³²⁰ Some advocates of the individual right view of the Amendment, including one of the authors of this Article, have argued that the scope of the weaponry involved is actually much *narrower* than this militia-centric conception, extending Second Amendment protection only to small arms. See the detailed discussion of this point in *Kates*, *supra* note 96, at 258-61.

control"³²¹ implies that some gun control laws would violate the Amendment. But readers of *Gun Crazy* will find no explanation or elaboration.

B. Problems with the Militia-Centric Theory

Gun Crazy's makeweight militia-centric view of the Second Amendment is beset with substantial obstacles. They include the Amendment's text and context in the Bill of Rights, its direct legislative history, the known attitudes of the Framers on the subjects of the personal right to arms and the desirability of an armed citizenry, and the congruent view of those matters taken by the liberal political philosophers they revered.³²² Finally, the implications of the militia-centric theory of the Second Amendment (which its proponents have not bothered to explore) lead to conclusions more frightening and grotesque about limitations on federal power to enact gun laws than does the individual right view. We discuss each of these issues in turn.

1. The Constitutional Text

Doubtless the strongest support for the individual right view and against the makeweight militia-centric view derives from the text of the Amendment itself. The Amendment uses the phrase, "right of the people," a term also used in the First, Fourth, Ninth, and Tenth Amendments, and in the original Constitution, and used to denote the rights of individuals. As William Van Alstyne, Akhil Amar, and other neutral scholars have concluded, the constitutional text unmistakably precludes minimizing the Amendment as a right pertaining just to the states or to the state or federal militias as corporate bodies, or to any group less comprehensive than the entire law-abiding, responsible, adult citizenry.³²³ In the context of the Bill of Rights taken as a (pg.1208) whole, the words of the Second Amendment admit only an individual right interpretation. Clearly,

"the people" referred to in the Second Amendment are the same as "the people" discussed in the First, Fourth, Ninth and Tenth Amendments. It is hardly credible to assume that the Framers' reference to "the people" indicated intent to protect the rights of private individuals to assemble peaceably and petition the government in the First Amendment, but was somehow transformed in the Second Amendment to refer to a right of states to keep and bear arms, and then miraculously reverted to indicate an individual right to be secure in one's person, house, papers and effects in the Fourth Amendment and an individual's residual rights and powers in the Ninth and Tenth Amendments.³²⁴

Characteristically, *Gun Crazy* simply assumes the phrase "well-regulated" in the Second Amendment's introductory clause ("A well regulated Militia, being necessary to the security of a free State") implies that government has the power to forbid gun ownership. Someone less predisposed toward that result might reflect that if this were so the Amendment would be meaningless as a guarantee even of the "narrow" militia-centric right *Gun Crazy* concedes.

³²¹ *Gun Crazy*, *supra* note 7, at 148 (emphasis added).

³²² See *supra* notes 178-90 and accompanying text.

³²³ See sources cited *supra* note 13.

³²⁴ Cottrol & Diamond, *Fifth Auxiliary Right*, *supra* note 13, at 1002.

Had Herz made the attempt, he would have been unable to confirm his assumption by research. For "[I]n eighteenth century military usage, 'well regulated' meant 'properly disciplined,' not 'government controlled.'"³²⁵ The eighteenth century usage of "regulate" had the more specialized meaning of "practiced in the use of arms, properly trained, and/or disciplined."³²⁶ Thus we find Alexander Hamilton in *The Federalist No. 29* referring to "a well-regulated militia" as one that has been sufficiently drilled.³²⁷ (pg.1209)

Even in more general usage, eighteenth and nineteenth century Americans often used "regulate" not in the sense of regulation by law but rather in the now-less-prominent uses given by *Webster's*:

2. to adjust to some standard or requirement, as amount, degree, etc.: *to regulate the temperature* 3. to adjust so as to assure accuracy of operation: *to regulate a watch* 4. to put in good order: *to regulate the digestion*.³²⁸

Consistent with this, President James Polk used "well-regulated" to mean operating in good order, correctly or properly, referring to "well-regulated self-government among men."³²⁹

To construe "well-regulated" as authorizing regulation of arms makes the clause in the Amendment ungrammatical—indeed syntactically senseless. In contrast, when understood in eighteenth century usage, the clause tracks perfectly: "A well regulated [i.e., properly trained and disciplined] Militia, being necessary to the security of a free State"

Like others who would dismiss the Second Amendment, *Gun Crazy* responds to the apparently plain meaning of the text with an *historical* claim about original intent: that the Framers understood the second part of the Amendment, which guarantees the people's right to keep and bear arms, to have been somehow qualified by the first part, which asserts the importance of a militia to a free society. Although a resort to legislative history is not unreasonable in light of the sentence structure of the Second Amendment, there is considerable hypocrisy in this standard response. Those

³²⁵ Lund, *supra* note 13, at 107 n.8.

³²⁶ Robert Dowlut, *The Right to Arms*, 36 OKLA. L. REV. 65, 92 n.133 (1983) (quoting 7 OXFORD ENGLISH DICTIONARY 380 (1933) and 3 *id.* at 416).

³²⁷ Hamilton assumes this meaning throughout *Federalist 29*, but it is made most explicit when he is discussing his reasons why Congress will not undertake to discipline "all the militia of the United States," pursuant to its powers under Article I, § 8 ("to provide for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States"):

To oblige the great body of the yeomanry and of the other classes of citizens to be under arms for the purpose of going through military exercises and evolutions *as often as might be necessary, to acquire the degree of perfection which would entitle them to the character of a well regulated militia*, would be a real grievance to the people, and a serious public inconvenience and loss.

THE FEDERALIST, No. 29, at 78 (Jacob E. Cooke ed., 1961) (emphasis added). Notice also how Hamilton assumes that the militia refers to the entire population.

³²⁸ WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1209 (1989).

³²⁹ James Polk, *Inaugural Address* (1845) in DAVIS N. LOTT, THE PRESIDENTS SPEAK: THE INAUGURAL ADDRESSES OF AMERICAN PRESIDENTS 90 (1961).

who make it would never subscribe to an "originalist" interpretation of any other textual provision such as, for example, the Equal Protection Clause of the Fourteenth Amendment. Such arguments are clearly intended by Herz (and others³³⁰) as (pg.1210) a sop for the benighted.³³¹ Nevertheless, completeness compels us to examine these historical arguments.

2. *The Founders' Understanding of the Amendment*

Reasonable scholars may disagree about the role that the Framers' original understanding of the Second Amendment should play in its interpretation by courts. Indeed one of the authors of this article, Don Kates, takes an originalist approach to interpretation, while the other, Randy Barnett, does not.³³² Nonetheless, we are both in complete agreement that the legislative history of the Second Amendment is as clear as such matters ever get. Indeed it is the overwhelming nature of the evidence that has led to the emergence of a scholarly consensus among an otherwise very disparate group of scholars.³³³

Perhaps the strongest evidence of the founding generation's individual right understanding of the Amendment is that the Founders themselves uniformly described the Amendment as guaranteeing an inalienable individual right (and so did courts and commentators for at least a century thereafter³³⁴). The Founders seem not to have even understood the concept that the Second Amendment was, or could be, something less or different. The very concept of the Amendment as a collective right, a states' right, a right of the state militia, or pertaining only to militiamen is an artifact of the twentieth century gun control debate unknown to the Founders, courts, and commentators for more than a century after their time.^(pg.1211)

The evidence on this point is not solely that the Founders used the "right of the people" phrase to mean individual rights in the First, Second, Fourth, etc. Amendments. A review of other writings, both private and public, finds the Founders consistently and routinely jumbling the Second Amendment together with the freedoms of speech, press, and/or religion in the same sentence and

³³⁰ See, e.g., Garry Wills, *The Right to Keep and Bear Arms*, N.Y. REV., Sept. 21, 1995, at 62.

³³¹ See *Gun Crazy*, *supra* note 7, at 66: "[W]e need not read the Second Amendment exclusively through the eyes of a small group of white property-owning males who lived in a world utterly different than our own. Ours is a Living Constitution, one that must be read against the backdrop of changing social circumstances."

In a footnote to this passage, *id.* at 66 n.29, *Gun Crazy* cites with approval Michael Perry's view that he would "prefer to let the framers sleep. Just as the framers, in their day, judged by their lights, so must we, in our day, judge by ours." MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 75 (1982).

³³² See Randy E. Barnett, *The Relevance of Framers' Intent*, 19 HARV. J.L. & PUB. POL'Y 403 (1996) (distinguishing between interpretation based on a conception of the Framers as wardens and one that is based on a conception of the Framers as designers, and favoring the latter).

³³³ In this section, we unavoidably summarize in a highly abbreviated fashion an extensive body of evidence that has been discussed with sensitivity and nuance by many others. See authorities cited *supra* note 13.

³³⁴ Our discussion of the courts appears *supra* Part I.A. For our discussion of how commentators interpreted the Amendment after it was ratified, see *infra* Part III.B.4.

referring to them jointly as "*human* rights,"³³⁵ "*private* rights,"³³⁶ "essential and sacred rights,"³³⁷ and rights that "respected personal liberty [which] each individual reserves to himself."³³⁸ Remarkably, *no instance whatever* has been found of the Founders referring to the right to arms as being fundamentally different from the others guaranteed in the Bill of Rights in that it was narrow or limited to the militia or to militiamen.³³⁹

Evidence surrounding the legislative history of the Second Amendment in Congress also supports the individual right view. Madison initially proposed that amendments be inserted into the particular parts of the original Constitution they affected or to which they related, not added at the end. Had Madison held an exclusively militia-centric view of the Amendment, he would have planned to place this provision into the Militia Clause of Article I, Section 8. But he proposed to insert it, along with freedom of religion, the press, and other personal rights, in Section 9, following the rights already in the Constitution against bills of attainder and ex post facto laws³⁴⁰ and *immediately following* his proposed rights of freedom of speech, press, and assembly.³⁴¹

Moreover, the text of Madison's initial proposal lacks the awkward sentence structure that has given rise to a militia-centric interpretation: "The (pg.1212) right of the people to keep and bear arms shall not be infringed; a well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."³⁴² Notice also that this entire provision concerns individual rights, both the right of a person to keep and bear arms and the equally individual right of a person to avoid being compelled to bear arms. Indeed, in his notes for his speech to the House Madison refers to these rights as follows: "Read the amendments—They relate 1st to private rights."³⁴³

When Madison introduced his Bill of Rights into Congress his fellow Federalist, Trench Coxe, wrote an explanatory commentary and submitted it to Madison for approval. Having received Madison's imprimatur, it was published in Federalist newspapers all over the nation. It described the

³³⁵ See Kates, *supra* note 96, at 228 (James Monroe included "the right to keep and bear arms" in a list of basic "human rights" that he would propose be amended into the Constitution.).

³³⁶ See Madison's Notes, *supra* note 154, at 64 ("Read the amendments — They relate 1st to private rights.").

³³⁷ Letter by Senator Gallatin of October 7, 1789, *quoted in* Steven Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1797*, 10 N. KY. L. REV. 13, 36 n.90 (1982) (referring to "essential and sacred rights" which "each individual reserves to himself").

³³⁸ See 3 PATRICK HENRY 391 (1951) (letter from U.S. Senator William Gray to Patrick Henry stating that Madison had introduced a "string of amendments" which "respected personal liberty.").

³³⁹ Furthermore, as we discuss *infra* Part III.B.4, "commentators in the antebellum years of the 19th Century wrote of the Second Amendment as a right of individuals. To our knowledge, no commentator in the antebellum era offered an interpretation of the Second Amendment that indicated that the right was only a right of the states or was limited to those actively involved in militia service." Cottrol & Diamond, *Fifth Auxiliary Right*, *supra* note 13, at 1001 n.24.

³⁴⁰ Shalhope, *supra* note 13, at 135.

³⁴¹ See 1 ANNALS OF CONGRESS, *supra* note 149, at 451 (statement of Rep. J. Madison).

³⁴² *Id.*

³⁴³ Madison's Notes, *supra* note 154, at 64.

Second Amendment as guaranteeing citizens against the confiscation of "their *private arms*."³⁴⁴ Editorials in Anti-Federalist newspapers agreed, describing the Amendment as a Madisonian plagiarism of the proposal by their champion, Sam Adams, that "peaceable citizens" be guaranteed in the possession of "their own arms."³⁴⁵

Gun Crazy neglects to address this and other evidence presented in the authorities it attacks, choosing instead to borrow its arguments from previously published work by anti-gun activists.³⁴⁶ Like them, *Gun Crazy* argues that, as an historical matter, the Second Amendment was "a compromise between the Federalists' insistence on a strong federal government supported by a *large* standing army, and the Anti-Federalists' demand that the states maintain control over the existing state militias as a counterweight to the expanding federal power."³⁴⁷ Far from "insisting" on a "large" standing army, (pg.1213) however, Federalists repeatedly denied that they wanted a "large" standing army,³⁴⁸ and there is no evidence supporting the idea that they did.

Gun Crazy then asserts that: (1) the Anti-Federalists were dissatisfied with Madison's draft of the Second Amendment because it failed to mention self-defense and hunting; and so, (2) the Anti-Federalists offered specific amendments to guarantee a right to arms for self-defense and hunting, but these amendments were rejected.³⁴⁹ *Gun Crazy* understandably gives no supporting reference for either (1) or (2) because, together, they are fiction.

The Anti-Federalists' problem was precisely the opposite of *Gun Crazy's* claim: Not that the Amendment failed to guarantee an individual right, but that neither it nor the rest of the Bill of Rights addressed their opposition to Article 1, Section 8's provisions for a standing army and substantial federal control over what had heretofore been wholly state-run militias. They complained

³⁴⁴ Trench Coxe, *Remarks on the First Part of the Amendments to the Federal Constitution*, PHILA. FED. GAZETTE, June 18, 1789, at 2 (emphasis added). Coxe's full comment on the Second Amendment was:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the next article [i.e., amendment] in their right to keep and bear *their private arms*.

Id. (emphasis added).

³⁴⁵ Editorial, BOSTON INDEP. CHRON., Aug. 20, 1789, at 2. Adams's original proposal read: "the said constitution be never construed ... to prevent the people of the United States who are peaceable citizens, from keeping *their own arms*." 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 675 (1971) (emphasis added).

³⁴⁶ Compare sources cited *supra* note 12, with *Gun Crazy*, *supra* note 7.

³⁴⁷ *Gun Crazy*, *supra* note 7, at 64. We have added emphasis to illustrate the ahistoricity of *Gun Crazy's* discussion even in its own terms.

³⁴⁸ See, e.g., THE FEDERALIST No. 46 (James Madison), *supra* note 143, at 310:

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....

³⁴⁹ *Gun Crazy*, *supra* note 7, at 66.

that the Amendment did *not* deal with the militia issues, the very issues *Gun Crazy* claims it addresses: "the absolute command vested by [Article I, Section 8] in Congress over the militia, [is] not in the least abridged by this amendment."³⁵⁰ The constitutional amendments they unsuccessfully proposed dealt not with the right to arms (which they fully endorsed), but rather sought to abrogate elements of the standing army and militia provisions of the original Constitution.³⁵¹

Finally, unlike the individual right view, the militia-centric theory implies a conflict between the Second Amendment and the original Constitution. The militia-centric view posits that the Amendment embodies at least some of the Anti-Federalist objections to the federal powers enunciated in Article I, Section 8's military-militia provisions. Thus under the militia-centric view, the (pg.1214) Amendment must be seen as cutting back on those provisions, (though neither Herz nor other partisans of that view have attempted to define what was cut back and how³⁵²). In contrast, in the individual right view, the Amendment merely affirms the Federalists' insistence during the ratification debate that the Constitution give the federal government no power to disarm individuals. Only this interpretation renders the Bill of Rights consistent with Federalist arguments that a bill of rights was unnecessary.³⁵³

The individual right theory also reconciles the goals of two groups: those who wanted an effective militia for national security purposes and to serve as a counterweight to a standing army, and those who wanted to possess and use their own arms for self-protection or hunting. An individual right to keep and bear arms effectively accomplishes both purposes, satisfying both groups, provided it is not limited to the militia or "common defense" context.³⁵⁴

In sum, *Gun Crazy* to the contrary notwithstanding, the text of the Amendment broadly encompasses not just arms possession for militia purposes but also the customary American common law right to possess arms for self-defense and hunting. *Gun Crazy* to the contrary notwithstanding, not a single legislator (Federalist or Anti-Federalist) rose to argue otherwise. And *Gun Crazy* to the contrary notwithstanding, the Anti-Federalists voted for the Amendment without seeking to amend or expand its "right of the people" language in any respect.

3. "Firearms Fundamentalists": The Founders' Beliefs About Guns

If any group of persons deserves the label "pro-gun," it is not Akhil Amar, Sanford Levinson, or William Van Alstyne, but the Founders themselves. They were not ignorant of the enormous harms that can result from the misuse of weapons, particularly firearms. Nor were they unaware of the arguments for banning them from the general populace. Such arguments dated back to at least

³⁵⁰ MALCOLM, ORIGINS, *supra* note 13, at 163 (quoting an Anti-Federalist discussion of the Bill of Rights which stressed this point, without any reference to the complaint that *Gun Crazy* claims motivated the Anti-Federalists, i.e. their supposed belief that the Amendment failed to guarantee the right to possess arms for self-defense or hunting).

³⁵¹ *Id.* at 161. This is yet another point *Gun Crazy*, Henigan et al. fail to mention.

³⁵² Henigan, *supra* note 12, at 116, admits that the Amendment does cut back on the Art. I, § 8 powers. But he makes no attempt to explore the matter.

³⁵³ See Lawson & Granger, *supra* note 150, at 315-26 (discussing the relationship between the Federalist argument that a bill of rights was unnecessary and interpretation of federal powers as limited by the rights retained by the people).

³⁵⁴ We thank Professor Joseph Olson for this insight.

the sixteenth century absolutist Jean Bodin, who denounced the possession of arms as "the cause of an infinite number of murders, he (pg.1215) which weareth a sword, a dagger, or a pistol."³⁵⁵ But such arguments, and the French absolutism of which they reeked, were anathema to the Founders.

Cesare Beccaria's comment on the futility and injustice of banning arms so impressed Thomas Jefferson that he translated it from the Italian and laboriously copied it in longhand in his own book of great quotations. This comment by the Italian thinker and founder of modern criminology is nothing more than a flowery eighteenth century rendition of "when guns are outlawed, only outlaws will have guns":

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty—so dear to men, so dear to the enlightened legislator—and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.³⁵⁶ (pg.1216)

The Founders' attitude towards firearms and the desirability of an armed citizenry would put even the most ardent modern gun extremist to shame. *Gun Crazy* takes ten journal pages to argue that there exists today among gun enthusiasts a form of "firearms fundamentalism."³⁵⁷ But if this characterization is apt, it is as old as this country. Nor is the idea original to *Gun Crazy*. As was

³⁵⁵ To his criminological arguments Bodin joined political ones reflecting his absolutism: "we may not think ever to keep that people in subjection which hath always lived in liberty, if they be not disarmed." The "most usual way to prevent seditions is to take away the subjects' arms"; otherwise they will presume to exercise "the immoderate liberty of speech given orators" in free societies. In nations where the populace is armed and enjoys free speech, that has "translated the sovereignty from the nobility into the people, and changed the Aristocracy into a Democratic or Popular estate." JEAN BODIN, *THE SIX BOOKS OF COMMONWEALE* 106, 389, 542-44, 599, 610-11, 614 (R. Knolles, trans., London, 1606).

³⁵⁶ *THE COMMONPLACE BOOK OF THOMAS JEFFERSON* 314 (G. Chinard ed., 1926) (quoting CESARE BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENTS* 87-8 (1764)). Thomas Paine made a similar observation:

The supposed quietude of a good man allures the ruffian; while on the other hand, arms like laws discourage and keep the invader and the plunderer in awe, and preserve order in the world as well as property. The balance of power is the scale of peace. The same balance would be preserved were all the world destitute of arms, for all would be alike; but since some *will not*, others *dare not* lay them aside.... Horrid mischief would ensue were one half the world deprived of the use of them; ... the weak will become a prey to the strong.

I WRITINGS OF THOMAS PAINE 56 (Conway ed., 1894).

³⁵⁷ *Gun Crazy*, *supra* note 7, at 93.

noted above, the Founders' views "about the relationship between men and arms" has been described as having an "almost religious quality."³⁵⁸

"[O]ne loves to possess arms" wrote Thomas Jefferson to George Washington on June 19, 1796.³⁵⁹ He and Washington maintained sizeable personal armories in their homes. A model bill of rights proposed by Jefferson would have guaranteed that "[n]o freeman shall be debarred the use of arms within his own lands."³⁶⁰ A letter of advice written to a nephew by Jefferson embraces the view—typical in his day, but the epitome of what *Gun Crazy* would deem "extremist"—that firearm ownership and proficiency builds the bold, confident, upright, independent character necessary to a republican citizenry:

A strong body makes the mind strong. 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."³⁶¹

Though claiming to expound a militia-centric view, *Gun Crazy* is silent on the vital issue of *character*, which reinforced the founding generation's attraction to a militia consisting of "all males physically capable of acting in concert for the common defense."³⁶² Many of the Founders believed that the very survival of republican government depended on the "civic virtue ... of the armed freeholder: upstanding, courageous, self-reliant, individually able to (pg.1217) repulse outlaws and oppressive officials, and collectively able to overthrow domestic tyrants and defeat foreign invaders."³⁶³ To the Founders and their intellectual progenitors, it was not only the individual's inalienable right to defend home and family, but a crucial element in his *moral* character that he should both desire and be able independently to do so. In so doing he was also contributing to the defense of the entire community. Likewise, it was a crucial element in his moral character that he join with his fellows in defending their community, both by hunting criminals down when the hue and cry went up, and in more formal posse and militia patrol duties, under the control of public officials.³⁶⁴

Once again, *Gun Crazy*'s silence on the issue of character cannot represent mere ignorance, for that issue is strongly emphasized in articles *Gun Crazy* cites, one of which it discusses in great

³⁵⁸ Asbury, *supra* note 183.

³⁵⁹ 9 WRITINGS OF THOMAS JEFFERSON 341 (A.A. Lipscomb ed., 1903). Jefferson added the caveat that he hoped never to have to use arms.

³⁶⁰ THE JEFFERSON CYCLOPEDIA 51 (Foley ed., reissued 1967).

³⁶¹ *Id.* at 318.

³⁶² *United States v. Miller*, 307 U.S. 174, 179 (1939).

³⁶³ Shalhope, *supra* note 13, at 128.

³⁶⁴ See Kates, *supra* note 185, at 89, 94 (citing Thomas Jefferson, Timothy Dwight, Joel Barlow, and Francis Place); POCOCK, *supra* note 190, at 386 (For the civic republican, "the bearing of arms is the essential medium through which the individual asserts both his social power and his participation in politics as a responsible moral being."); Shalhope, *supra* note 216, at 603 ("Civic virtue came to be defined as the freeholder bearing arms in defense of his property and of his state.").

detail.³⁶⁵ Rather it reflects the fact that its author, like other anti-gun activists, simply cannot cope with the attitudes that motivated the adoption of the Amendment, attitudes that still flourish among a large segment of the public whom *Gun Crazy* disparagingly describes as "firearms fundamentalists."³⁶⁶

Gun Crazy may have been disingenuous when it presented at length³⁶⁷ its claim that pro-gun beliefs have a "religious"³⁶⁸ dimension that merits the label "firearms fundamentalism,"³⁶⁹ but it is on to something nonetheless. Indeed, the beliefs of anti-gun enthusiasts are no less religious or "fundamentalist" than those of gun aficionados.³⁷⁰ (pg.1218)

Gun Crazy fails, however, to consider the ominous implication of this claim. For the only solution that has ever worked when two religious movements clash (or when a majority persecutes a dissenting religious minority), is *toleration*,³⁷¹ not persecution. Indeed, if *Gun Crazy* is right then we would be better focusing, not on the Second Amendment, but on the First Amendment's protections of the right of free exercise and its prohibition on the establishment of a religion. For the rationales of those provisions apply here as well.

We offer this argument in all seriousness. Anti-gun activists' radical disconnection from, lack of empathy for, and willingness to use legal coercion and incarceration to suppress the culture that produced and that still supports the Second Amendment are potentially disastrous for a pluralistic society. As observed prophetically twenty years ago by B. Bruce-Briggs:

[U]nderlying the gun control struggle is a fundamental division in our nation. The intensity of passion on this issue suggests to me that we are experiencing a sort of low grade war going on between two alternative views of what America is and ought to be. On the one side are those who take bourgeois Europe as a model of civilized society: a society just, equitable, and democratic; but well ordered, with the lines of responsibility and authority clearly drawn, and with decisions made rationally and correctly by intelligent men for the entire nation. To such people, hunting is atavistic, personal violence is shameful, and uncontrolled gun ownership is a blot on civilization.

On the other side is a group of people who do not tend to be especially articulate or literate, and whose world view is rarely expressed in print. Their model is that of the independent frontiersman who takes care of himself and his family with no interference from the state. They are "conservative" in the sense that they cling to America's unique

³⁶⁵ See, e.g., Kates, *supra* note 96, at 232 ("[T]he ideal of republican virtue was the armed freeholder, upstanding, scrupulously honest, self-reliant and independent—defender of his family, home and property, and joined with his fellow citizens in the militia for the defense of their polity.").

³⁶⁶ *Gun Crazy*, *supra* note 7, at 93. See also notes 184-90 and accompanying text.

³⁶⁷ Herz devotes ten pages to his thesis that firearms proponents constitute a religious system. See *id.* at 93-103.

³⁶⁸ See, e.g., *id.* at 93 (where *Gun Crazy* asserts that "[t]he gun lobby's cavalier treatment of the constitutional text, and of the judicial consensus rejecting the broad view of the Second Amendment, must be understood as a quasi-religious movement....").

³⁶⁹ More likely, however, Herz is merely using "fundamentalist" as a pejorative term intended to diminish the legitimacy of claims made by pro-gun groups.

³⁷⁰ See *infra* notes 525-31 and accompanying text.

³⁷¹ See, e.g., John Locke, *Letter Concerning Toleration* (1689), reprinted in 35 GREAT BOOKS OF THE WESTERN WORLD, 1-24 (Hutchins ed., 1952).

pre-modern tradition—a non-feudal society with a sort of medieval liberty writ large for everyman.³⁷²

Briggs then adds, presciently in light of the growth of the so-called patriot and militia movements and of recent tragedies:

From the point of view of a right-wing threat to internal security, these are perhaps the people who should be disarmed first, but in practice they will be the last.... They ask, because they do not understand the other side, "Why do these people want to disarm us?" They consider themselves (pg.1219) no threat to anyone; they are not criminals, not revolutionaries. But slowly, as they become politicized, they find an analysis that fits the phenomenon they experience: Someone fears their having guns, someone is afraid of their defending their families, property, and liberty. *Nasty things may begin to happen if these people begin to feel that they are cornered.*³⁷³

One persecutes "fundamentalists" at one's peril.

4. *Subsequent Commentary on the Constitution*

As indicated in our earlier discussion of certain nineteenth century Supreme Court opinions and commentators, the very concept that the Amendment guaranteed only a right of the states or related to their militias appears to have been completely unknown before the twentieth century.³⁷⁴ That the individual right interpretation was the common understanding is shown by the earliest American legal commentary on the Second Amendment. That commentary was written by a distinguished early law professor, and a colleague and correspondent of Jefferson and Madison, St. George Tucker, "one of the leading jurists of the day."³⁷⁵ Tucker's American edition of Blackstone was annotated with his own notes on American constitutional law.

To Blackstone's comments on the limited (but absolute and clearly individual) right to arms in the English Bill of Rights,³⁷⁶ Tucker added a note on the Second Amendment headed with the same partial quotation that *Gun Crazy* castigates the NRA for using:³⁷⁷ "The right of the people to keep and bear arms shall not be infringed."³⁷⁸ Omitting all reference to the militia, Tucker added that in their federal constitution, Americans are guaranteed this right "without any qualifications as to their condition and degree as in England."³⁷⁹ (pg.1220)

³⁷² B. Bruce-Briggs, *The Great American Gun War*, 45 PUB. INTEREST 37, 61 (1976).

³⁷³ *Id.* (emphasis added). See also Randy E. Barnett, *Foreword: Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443 (1995).

³⁷⁴ See *supra* notes 71-77, 82-87 and accompanying text.

³⁷⁵ Shalhope, *supra* note 13, at 137 n.81.

³⁷⁶ The primary purpose of the English right to arms, which was specified as applicable only to Protestants, was self-defense of individuals, albeit it also facilitated their service in the militia. See MALCOLM, ORIGINS, *supra* note 13, at 113-34.

³⁷⁷ See *Gun Crazy*, *supra* note 7, at 103-04 ("Official NRA products, from belt buckles to beer mugs, eliminate that troublesome introductory clause.").

³⁷⁸ TUCKER, *supra* note 184, at 144.

³⁷⁹ *Id.*

Tucker's Appendix contained a more extensive discussion of the Bill of Rights. The section on the right to arms both quoted the whole Amendment and noted the militia purpose. But the militia is only the second of three purposes mentioned for the right to arms. The first is self-defense and the third is hunting. Moreover, Tucker denounces attempts (like those in *Gun Crazy*) "to confine this right within the narrowest limits possible"; for the right to arms is "the true palladium of liberty" and where it "is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction."³⁸⁰

Finally, when discussing the need for judicial review of Congress's power to pass laws under the Necessary and Proper Clause he gave a revealing example:

If, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts, under the construction of the words necessary and proper, here contended for, would be able to pronounce decidedly upon the constitutionality of these means. But if congress may use any means, which they choose to adopt, the provision in the constitution which secures to the people the right of bearing arms under such an act, might be without relief; because in that case, no court could have any power to pronounce on the necessity or propriety of the means adopted by congress to carry any specified power into complete effect.³⁸¹

According to Tucker, then, Congress's power under the Necessary and Proper Clause to violate the retained right of the people to keep and bear arms which was enumerated in the Second Amendment was limited and any such law was subject to judicial review.³⁸² Moreover, in asserting the legitimacy of judicial review of such legislation, Tucker once again made no mention of any militia-centric limitation in construing this right.

Bear in mind that, when Tucker's comments were published, the majority of those who had served in the Congress and state legislatures that enacted the Second Amendment, including Madison himself, were still alive. If these comments were magnifying or misreading the Amendment, surely Madison or one or more other former legislators would have remonstrated with the author (pg.1221) or publisher and, if correction was not forthcoming, publicly clarified the record. But none did.

After Tucker's commentary in 1803, the next interpretation came in the 1825 constitutional commentary authored by William Rawle.³⁸³ He too distinguished the unqualified American right from the limited English one and flatly and repeatedly denied that Congress has any authority to

³⁸⁰ *Id.* at 300.

³⁸¹ *Id.* at 289.

³⁸² See Lawson & Granger, *supra* note 150, at 303 (arguing that one plausible interpretation of this passage is "that laws that violate individual rights are not 'proper,' regardless of whether they are 'necessary.'"). See also Barnett, *supra* note 150 (discussing natural rights and the Necessary and Proper Clause).

³⁸³ WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 122 (2d ed. 1825). A distinguished lawyer, Rawle was prominent enough in the late eighteenth century to have several times been asked by George Washington to serve as Attorney General.

legislate on the subject of personal firearms ownership. He did give first and most emphatic mention to the militia as a reason for the guarantee, but also mentioned self-defense and hunting.³⁸⁴

Justice Story's 1833 *Commentaries on the Constitution* described the Second Amendment as a "right of the citizens" and portrayed it as a deterrent to oppression rather than a mechanism for serving government. Because *Gun Crazy* avers that Levinson falsifies Story,³⁸⁵ we quote the full passage:

The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.³⁸⁶

Further context is provided by another of Story's comments about the Amendment, with which *Gun Crazy* fails to acquaint readers: "One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offense to keep arms
...."³⁸⁷

The authors of the Fourteenth Amendment were equally unaware of any concept confining the right to arms to militia members or requiring that it be construed more narrowly than other rights of the people. A recent history of the Fourteenth Amendment concludes that "among the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States were the right[s] to freedom of speech ... due process ... and ... to bear arms."³⁸⁸ Significantly, all these references stressed the need to (pg.1222) guarantee that freedmen and white southern Unionists could have arms *for personal defense* against the KKK and similar attackers.

As Akhil Amar has noted ironically,³⁸⁹ the authors of the Fourteenth Amendment could not have understood the right they were hailing as being limited to militia service or having the sole purpose of countervailing federal standing armies. After all, they were maintaining a standing army as the governing body in the South and one of its duties was to suppress southern militias, both official and private.

In sum, although there are innumerable examples of the broad individual right understanding of the Amendment by eighteenth, nineteenth, and early twentieth century commentators and courts, there is no evidence that they even comprehended the concept of a right to arms that pertained only

³⁸⁴ *Id.*

³⁸⁵ *Gun Crazy*, *supra* note 7, at 140.

³⁸⁶ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 746 (1833) (emphasis added).

³⁸⁷ STORY, *supra* note 182, at 264.

³⁸⁸ CURTIS, *supra* note 13, at 104 (footnote omitted). For statements surrounding the origins and ratification of the Fourteenth Amendment that extol the right to arms or equate it to free expression, religious liberty, due process, jury trial, and against unreasonable search, etc., see *id.* at 52, 53, 56, 72, 88, 140-81, 164. *Gun Crazy* does not discuss or cite Curtis's work.

³⁸⁹ Amar, *Bill of Rights*, *supra* note 13, at 1162-73.

to the state or its militia.³⁹⁰ That concept appears to be an artifact of the twentieth century gun debate, a concept of which prior generations had no inkling.

5. Congressional Construction of the Second Amendment

During the period 1866-1986, Congress enacted three statutes expressly recognizing the Amendment as an individual right.³⁹¹ *Gun Crazy* mentions only the third of these enactments and a congressional report reaching the same conclusion, which *Gun Crazy* dismisses with factual selectivity.³⁹² As (pg.1223) *Gun Crazy* presents the matter, congressional interpretation officially accepting the individual right to arms is nothing more than "Political Leaders' Dereliction of Dialogic Responsibility": that is, their failure to accept *Gun Crazy's* view of the Second Amendment as demonstrated by their "perpetuat[ing] the constitutional false consciousness... [and] the empty refrain about the 'right to bear arms'...."³⁹³

Ironically, judicial opinions, which Andrew Herz repeatedly states decisively bind all writers who offer an interpretation of the Constitution,³⁹⁴ suggest that congressional interpretations are entitled to more weight than lower federal court opinions. Although the congressional interpretation of a constitutional provision does not bind the Supreme Court (this is especially true of *narrow*

³⁹⁰ For other nineteenth and early twentieth century commentaries to the same effect see SPOONER, *supra* note 87, at 98; TIFFANY, *supra* note 87, at 99; Aynes, *supra* note 13, at 84 (quoting TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES* (1867)); Kates, *supra* note 185, at 87 n.1; HENRY C. BLACK, *HANDBOOK OF AMERICAN CONSTITUTIONAL LAW* 543 (3d ed. 1910) (citing JOHN N. POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* 152-53 (1868)); ALBERT H. PUTNEY, *UNITED STATES CONSTITUTIONAL HISTORY AND LAW* 363 (1908); JAMES SCHOUER, *CONSTITUTIONAL STUDIES: STATE AND FEDERAL* (1897); THEODORE SHROEDER, *FREE SPEECH FOR RADICALS* 104 (reprint ed. 1969); JOHN RANDOLPH TUCKER, *2 THE CONSTITUTION OF THE UNITED STATES* 671 (Henry Tucker ed., 1899); HERMANN E. VON HOLST, *5 THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES* 307 (John J. Lalor trans., Callaghan & Co. 1885); Levinson, *supra* note 13, at 649-50 (citing THOMAS COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 298 (3d ed. 1898)).

³⁹¹ See discussion and citations given in Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995).

³⁹² See *Gun Crazy*, *supra* note 7, at 72 n.50 (citing THE RIGHT TO KEEP AND BEAR ARMS, *supra* note 313, at 68). *Gun Crazy* characterizes this as "a one-sided, misleading document" which "has the feel of having been written by the gun lobby ... because it effectively was: The authors included two prominent gun-rights advocates—Stephen Halbrook and David Hardy." *Id.* at 122. Apparently *Gun Crazy's* definition of a one-sided and misleading document is one in which two of the exhibits consist in articles written by Halbrook and Hardy respectively. They appear in an appendix to the Report entitled "Other views of the second amendment" which (though *Gun Crazy* neglects to mention it) also includes anti-gun submissions by: the Association of the Bar of the City of New York; David J. Steinberg, Executive Director, National Council for a Responsible Firearms Policy; Michael K. Beard and Samuel S. Fields of the National Coalition to Ban Handguns; and two anti-gun law review articles. There is also an official submission by three lawyers who work for the NRA.

In other words, having reviewed materials from each side, the Senate Judiciary Committee's Subcommittee on the Constitution accepted the "broad individual right" position in its Report and attached the views of each side for readers to make up their minds. We are informed by Stephen Halbrook that he had no part in writing the Report (it simply printed his submission in its Appendix). Personal communication (Aug. 16, 1995). But Herz's claim about authorship is, in any event, irrelevant. Hard though *Gun Crazy* may try to evade the fact and its implications: it is inescapable that a report accepting the individual right view issued not from Stephen Halbrook, but from the Senate Judiciary Committee's Subcommittee on the Constitution.

³⁹³ *Gun Crazy*, *supra* note 7, at 121. "Political Leaders' Dereliction of Dialogic Responsibility" is the title of the section in which these statements appear.

³⁹⁴ A canon of interpretation that we reject.

interpretations of the Bill of Rights³⁹⁵), they are entitled to cognizance and "to great consideration"³⁹⁶ Thus, according to *Gun Crazy's* standards of "dialogical responsibility," Herz was bound to reveal and "acknowledge fully" the fact that Congress has thrice rejected his militia-centric conception of the Second Amendment.^(pg.1224)

C. Does the Initial Purpose of a Right Limit its Scope?

Unable to controvert the textual and historical analysis, *Gun Crazy* claims to view the Amendment as an individual right, but only a "narrow right" to have arms for the purpose of militia service. Assuming *arguendo* this interpretation were accurate, *Gun Crazy* makes no attempt to explore or define what it might entail.

That failure is understandable, because exploring *Gun Crazy's* thesis necessarily entails rejecting its claim that gun "controls" can be extended to the prohibition of handguns, "assault weapons," or firearms generally.³⁹⁷ Even if the Amendment's sole purpose *were* to preserve an armed citizenry so that government could call armed citizens to militia service when necessary, the constitutional command would still bar laws designed to disarm that citizenry.³⁹⁸ The permissible scope of gun control laws opened up by that view of the Amendment would be limited to weaponry not clearly of the kind useful for military purposes.³⁹⁹

Gun Crazy and proponents of other makeweight militia-centric conceptions do not realize this, of course. Perhaps this is due to an unstated and unexamined assumption that the Amendment is somehow less binding if based not on a belief that individuals have a right to arms, but on a belief that society benefits by allowing arms.^(pg.1225)

Compare Article I, Section 2, Clause 2, which establishes twenty-five as the minimum age for members of the House of Representatives. Clearly, this is not a matter of individual right, but only of the Founders' belief that the age limit benefits *society* by assuring mature and competent

³⁹⁵ See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276-77 (1855).

³⁹⁶ *Veazie Bank v. Fenno*, 75 U.S. 533, 544 (1869). See *United States v. Nixon*, 418 U.S. 683, 703 (1974) ("great respect"); *Ray v. Blair*, 343 U.S. 214 (1952). See also *Franklin v. Massachusetts*, 505 U.S. 788, 803-04 (1992) ("persuasive") and authority there cited.

³⁹⁷ *Gun Crazy*, *supra* note 7, at 148 (referring to "the all-but-unlimited scope of viable gun control measures").

³⁹⁸ The current descendant of the First Militia Act is 10 U.S.C. § 311(1994), which provides that the entire male citizenry at least 17 and less than 45 years of age is liable for call-up to service in time of emergency. But that definition does not so limit the scope of the militia whose arms the Amendment protects. In an extreme emergency the federal government might have to extend the ages covered by the law to 60 as did the German government when it organized a militia at the end of the Second World War and as did various colonial militia laws. See MALCOLM, *ORIGINS*, *supra* note 13, at 139 ("All men between sixteen and sixty were liable for militia service...."). This is somewhat misleading because it lumps together different statutes from different times in different colonies or states. See, e.g., STEPHEN P. HALBROOK, *A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILL OF RIGHTS AND CONSTITUTIONAL GUARANTEES* (1989) at, inter alia, 32 (1787 North Carolina statute with militia age range of 15-50); 46 (late eighteenth century Massachusetts statutes with militia age range of 18-45); 74 (1786 New Hampshire statute with militia age range of 16-40); 83 (1786 New York statute with militia age range of 16-44). Generally, earlier colonial statutes would have tended to encompass a greater age range than later colonial and early state statutes.

³⁹⁹ See *Kates*, *supra* note 96, at 260-61 (arguing that the Amendment allows the banning of brass knuckles, blackjacks, switchblade knives, "Saturday Night Specials" (defined as low caliber handguns of substandard manufacture), but not of military quality handguns and other firearms, especially "assault weapons," many of which are directly related to current military issue arms).

legislators. Yet, just as clearly, regardless of what underlies the constitutional command, Congress cannot flout it with a statute permitting anyone over the age of eighteen to serve in the House, or, for that matter, by substituting thirty-five as the minimum age and excluding a duly elected member because she is only thirty-three.⁴⁰⁰

It bears emphasis that other rights can be characterized as having been motivated by a concern for social benefit rather than the guarantee of an individual right, the most prominent example being free expression. The earliest and still the most universally accepted theories posit that the Founders deemed free expression vital to a free and republican governmental structure and/or that they embraced the free market in ideas as the optimum means for society to make public policy determinations. Yet, even if those theories of social benefit were the sole basis for the First Amendment, it would not follow that its commands may be ignored by a Congress or a state legislature *which rejects those theories*. The fact that most constitutional rights were enacted—or can be perceived as having been enacted—for reasons that involve social benefit, at least partially, in no way negates their status as constitutional imperatives that are binding upon governmental action.

D. Evading the Text by Claiming the Amendment Is an Anachronism

1. Suppose the Amendment Is an Anachronism

Gun Crazy argues that the Amendment has become an anachronism because the militia has been succeeded by the National Guard, a select militia that is armed by the federal government.⁴⁰¹ But even if the Amendment's only purpose were preserving the militia, and even if the militia were an anachronism, that point offers no constitutional basis for legislation in derogation of the Amendment.^(pg.1226)

Asserting that "[o]urs is a 'Living Constitution,' one that must be read against the backdrop of changing social circumstances,"⁴⁰² *Gun Crazy* invokes what Herz apparently believes are the views of Justice Brennan.⁴⁰³ But although Brennan, among others, has offered that perspective in favor of *expanding* constitutional protections when necessary to apply the protections of the Bill of Rights to circumstances that have arisen since its enactment, neither he nor any other Justice has ever suggested that such changes allow the courts to *contract* or to set a constitutional right (or other

⁴⁰⁰ See, e.g., *Powell v. McCormack*, 395 U.S. 486, 541-47 (1969).

⁴⁰¹ *Gun Crazy*, *supra* note 7, at 66-67. Herz is apparently unaware of the continued existence of state militias and the fact that they have generally been composed partially or entirely of citizens having their own weapons. See Reynolds & Kates, *supra* note 13, at 1752, 1760.

⁴⁰² *Gun Crazy*, *supra* note 7, at 66.

⁴⁰³ The ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

Id. at 67 (quoting William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986)).

provision) aside. On the contrary, innumerable opinions affirm that courts have no power to rewrite the Constitution and that, however obsolete, its provisions remain binding until repealed.⁴⁰⁴

For instance, conditions have obviously changed greatly since the enactment of the Seventh Amendment requirement of jury trial in all civil cases where \$20 or more is in controversy. Moreover, critics, including Supreme Court Justices, suggest that jury trial is anachronistic, at least as to complex antitrust and other industrial or economic disputes.⁴⁰⁵ Yet, far from setting the Seventh Amendment aside, or even confining it to cases that would have been tried to juries in the eighteenth century, the Supreme Court has consistently expanded it, while still using the \$20 standard. A jury trial is required in modern fact-intensive claims that did not exist in the eighteenth century or that were exclusively or primarily equitable, including stockholders' derivative, antitrust, and other complex economic issue cases.⁴⁰⁶ In applying the (pg.1227) spirit of the right to civil jury trial expansively, the Court has rejected eighteenth century precedent limiting the right of jury trial as irrelevant in light of modern procedures;⁴⁰⁷ applied the jury trial requirement to new causes of action based on analogy to common law claims that would have been covered;⁴⁰⁸ disregarded the fact that a remedy has traditionally been deemed equitable, holding that the decisive issue is whether "it is legal or equitable in nature"⁴⁰⁹; rejected the "equitable clean-up" doctrine under which primarily equitable claims would be tried to the court even though incidental damage issues were also involved;⁴¹⁰ held that the post-eighteenth century merger of law and equity reduces the inadequacy of legal remedies and therefore expands the scope of the civil jury requirement;⁴¹¹ held that the fact that a pleading seeks purely equitable relief is not dispositive if legal relief may be involved or if it

⁴⁰⁴ See, e.g., *Ullman v. United States*, 350 U.S. 422, 428 n.3 (1956) (endorsing speech by Senator Alfred J. Beveridge appealing "to the whole Constitution, not to a mutilating selection of those parts only which for the moment find favor."); *Eastlake v. Forest City Enters.*, 426 U.S. 668, 676 (1976); *Curry v. McCannless*, 307 U.S. 357, 373-74 (1939) and cases cited therein. See also *Browning-Ferris Indus. v. Kelso Disposal, Inc.*, 492 U.S. 257, 264 n.4 (1989) ("We look to the origins of the Clause and the purposes which directed its framers."); *United States v. Ramsey*, 431 U.S. 606, 619 n.14 (1977) (same); *Michigan v. Tucker*, 417 U.S. 433, 439-40 (1974) (same).

⁴⁰⁵ See Georgiana G. Rodiger, *Has the Right to Jury Trial as Guaranteed Under the Seventh Amendment Become Outdated in Complex Civil Litigation?*, 8 PEPPERDINE L. REV. 189, 190 (1980) (quoting Justices Burger and Stevens). For similar statements, and even suggestions that civil jury trial be abandoned altogether, see *id.* at 214-16 (citing, inter alia, Judge Jerome Frank and Deans Griswold and Prosser).

⁴⁰⁶ See *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33 (1989) (action by bankruptcy trustee against defendant who had not made a claim in bankruptcy to recover fraudulent conveyance); *Tull v. United States*, 481 U.S. 412 (1987) (suit by federal government under Clean Water Act: right to jury determination of civil liability, but not civil penalty); *Pernell v. Southall Realty*, 416 U.S. 363 (1974) (landlord's specially created statutory action for summary eviction analogized to common law action for recovery of possession of realty); *Curtis v. Loether*, 415 U.S. 189 (1974) (action for violation of Fair Housing Act); *Ross v. Bernhard*, 396 U.S. 531 (1970) (stockholders' derivative action); *Beacon Theatres v. Westover*, 359 U.S. 500 (1959) (antitrust).

⁴⁰⁷ Whether a remedy at law is adequate, so that a case should be determined by jury trial rather than in an equitable proceeding must be determined "not by precedents decided under discarded procedures, but in light of the remedies now made available" *Beacon Theatres*, 359 U.S. at 507.

⁴⁰⁸ See *Tull*, 481 U.S. at 417.

⁴⁰⁹ *Id.* at 417-18. See also *Granfinanciera*, 492 U.S. at 42.

⁴¹⁰ See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

⁴¹¹ See *id.* at 478.

provides an adequate remedy in lieu of purely equitable relief;⁴¹² and rejected "purely semantic" eighteenth century distinctions between law and equity.⁴¹³

When the First Amendment was adopted, anyone with a little capital could start up a newspaper, but establishing a newspaper today is impossible for all but the very wealthy. That change of conditions was adduced in 1974 in the state's brief supporting a law requiring newspapers to accord persons they attack a right of reply. But the Court dismissed the argument because it conflicted with "the express provisions of the First Amendment" and judicial interpretation thereof "over the years."⁴¹⁴ (pg.1228)

2. *The Amendment is Not an Anachronism*

As will be discussed below,⁴¹⁵ anti-gun advocates oppose the right to arms because they feel that armed self-defense is immoral and/or not cost-effective. But supposing this to be true, that would not render the right an anachronism, even if one also allowed that *Gun Crazy* was correct in its undefended assumption that anachronistic provisions of the Bill of Rights can be ignored.

As *Gun Crazy* itself portrays the matter, it does not meet the definition of anachronism that a constitutional provision is, or has become, controversial or partially outmoded. To be an anachronism, we maintain, a constitutional provision must have unquestionably and unequivocally lost all utility in modern conditions. Clearly, if the Second Amendment's purposes are deemed to include possession of arms for self-defense, as we contend, the Amendment is not an anachronism. The criminological evidence reviewed below⁴¹⁶ shows: (a) that victims who use firearms in self-defense are much less likely to be injured—or to be robbed, raped, or assaulted—than are victims who comply or who resist with other weapons; (b) that handguns are used by good citizens in self-defense at least hundreds of thousands of times annually; and (c) that felons fear and take steps to avoid armed victims. In short, if the Amendment is viewed as a guarantee of a right to possess arms for self-defense, it is clearly not something which has, beyond any question, lost all utility through the passage of time.

But *Gun Crazy* conceives of the Amendment as something that relates only to preserving the state's capacity to mobilize armed citizen militias. From that premise, *Gun Crazy* asserts that the Amendment is obsolete because the militia has fallen into desuetude and whatever utility it had in the eighteenth century is now served by the National Guard.⁴¹⁷ Even were the Amendment limited to this purpose, however, the claim that it has lost its utility is untrue.

In rural areas of the nation where law enforcement agencies with a few dozen personnel have hundreds of square miles to patrol, armed civilian volunteers are often formally enrolled into an

⁴¹² See *id.* at 477-78.

⁴¹³ See *Granfinanciera*, 492 U.S. at 49 n.7.

⁴¹⁴ *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 248-54 (1974).

⁴¹⁵ See *infra* Part IV.C.

⁴¹⁶ See *infra* Part IV.B.3.

⁴¹⁷ *Gun Crazy*, *supra* note 7, at 65-67.

institution called something like "the sheriff's posse," which is used sometimes for auxiliary patrol, and particularly (pg.1229) for massive search and rescue operations.⁴¹⁸ Additionally, it is not uncommon for rural officers to exercise their legal power in an emergency to call civilians to their assistance; and, as a practical matter, those called are generally those who the officers know have ready access to arms.⁴¹⁹ These phenomena exist less often in urban areas, but many urban police departments still maintain police auxiliary units composed of armed civilians.⁴²⁰

In broader compass, personally armed citizens are the state's ultimate resource, for instance in disasters such as hurricanes, earthquakes, floods, and riots. This is particularly true if an emergency overwhelms police resources at a time when the Armed Forces and National Guard are overseas (as they were during the Persian Gulf war and World Wars I and II), or when disruption of transportation precludes their deployment. In such situations a call-up of the armed citizenry provides the only backup available. Citizens armed with their own weapons were called up and deployed to defend beach areas as recently as Pearl Harbor, and served in sentry police and other volunteer defense duties throughout World Wars I and II.⁴²¹

Gun Crazy notes none of these facts, though once again most were available to Herz when he wrote, as they appear in an article he mined for all the points he wished to make.⁴²² *Gun Crazy* does note that federal law continues to make most of the adult male citizenry liable to be called for militia duty in emergencies. It does not note that state laws also provide both for an ongoing state militia system and for calling ordinary citizens to militia duty in emergencies.⁴²³ (pg.1230) More importantly, *Gun Crazy* fails to note that when emergencies requiring call-ups actually occur, the citizens mustered are largely limited to those possessing their own firearms. The authorities generally have no firearms to issue to unarmed citizens nor any time to train them in the safe and effective use of arms with which the citizens are not familiar.

Gun Crazy's most important omission on this issue, however, is the fact that the role of federal and state militias and the personally armed citizenry is *growing* rather than receding due to modern military policy. Since the 1980s, military doctrine has posited "the National Guard's growing

⁴¹⁸ Personal communication from professor Preston Covey (Nov. 16, 1996). Professor Covey, who is Director of the Center for Advancement of Applied Ethics at Carnegie-Mellon University, is also, by avocation a Special Deputy Sheriff (a fully sworn officer performing training duties) with the Allegheny County Sheriff's Reserve, (Pittsburgh, PA); a member of the American Society of Law Enforcement Trainers, who serves on its ethics committee; and one of five members of the International Association of Law Enforcement Firearms Instructors who have been honored by election by its board as "life members" of the organization.

⁴¹⁹ *Id.*

⁴²⁰ Professor Covey informs us that reservists with the Allegheny County Sheriff's Reserve are especially used in crowd control and riot control work. Reservists also have both a river patrol (boat) unit and a motorcycle patrol unit. *Id.*

⁴²¹ See Cole, *State Defense Force*, 39 MIL. COLL. & HIS. 152 (1987) [hereinafter *State Defense*] (wartime experiences of Maryland armed volunteer force in disorder suppression and general guard duties); Treacy, *Maryland Minute Men*, 6 GLADES STAR 214 (1988) (same); Cole, *United States Guards*, 40 MIL. COLL. & HIS. 2 (1988) (armed volunteer force in both disorder suppression and general guard duties nationally under joint federal-state control during World War I); OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE, U.S. DEPT. OF DEFENSE, U.S. HOME DEFENSE FORCES STUDY, 32-34 (1981) (describing use of individual citizens as substitute for national guard).

⁴²² See Kates, *supra* note 96, at 271-72.

⁴²³ See, e.g., CAL. MIL. & VET. CODE §§ 121, 122 (West 1988); COLO. REV. STAT. §§ 18-8-107, 28-3-102, -103(6), -103(8), -104 (1989) (classifying the male population aged 18 to 45 of California and Colorado, respectively, as the unorganized militia, subject to call at the command of designated public officers).

involvement in the 'Total Force' concept of national defense. This doctrine assigns many National Guard units to virtual front-line combat status in the opening stages of future wars."⁴²⁴ Thus, the progressive downsizing of the Armed Forces since the 1980s has greatly increased the likelihood of a deployment of National Guard units overseas in the event of any major overseas crisis. In such a scenario the backup role of an armed citizenry is ever more important.

This last point illustrates another significant weakness of Herz's and other anti-gun advocates' implicit claim that constitutional commands become nonbinding by reason of their supposed anachronism. This claim rests on yet another unexamined assumption: That anachronism occurs by unidirectional progression, so if that which was viable in 1789 has become anachronistic in the years since, it will never again be useful. Anachronism is not, however, a matter of unidirectional progression. As illustrated by the now-growing utility of the armed citizenry as a backup to the police, a 1789 concept may become more, as well as less, relevant with the passage of time.

In any event, the Second Amendment is not based just on the utility of an armed citizenry to the state, but on its value in preserving liberty and its status as an individual right. As Joseph Story's words illustrate, late eighteenth century Americans, being classically educated, took as gospel Aristotle's lessons that basic to tyrants is "mistrust of the people; hence they (pg.1231) deprive them of arms,"⁴²⁵ and that confiscation of the Athenians' personal arms had been instrumental to the tyrannies of Pisistratus and the Thirty.⁴²⁶

Far from being an anachronism, possession of arms served importantly and recently to protect political speech and action even in our own nation, as veterans of the civil rights struggle in the South have attested.⁴²⁷ Based on actual experience in the South, it has been observed that armed self-defense brings police intervention and martyrdom does not. Public authorities and influential elites may be content to see unarmed victims injured or slain, if the violence can be so confined. But when victims can arm themselves, authorities feel compelled to take action, lest incidents lead to widespread bloodshed and disorder.⁴²⁸

⁴²⁴ Cole, *State Defense*, *supra* note 421, at 154.

⁴²⁵ ARISTOTLE, THE POLITICS 218 (Thomas A. Sinclair trans., Penguin Books 1962). *Cf.* STORY, *supra* note 182, at 264 ("One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people and making it an offense to keep arms."). *See also supra* text accompanying note 384.

⁴²⁶ ARISTOTLE, THE ATHENIAN CONSTITUTION 47, 105 (H. Rackham trans., 1935).

⁴²⁷ John R. Salter, Jr. & Don B. Kates, Jr., *The Necessity of Access to Firearms by Dissenters and Minorities whom Government Is Unwilling or Unable to Protect*, in RESTRICTING HANDGUNS, *supra* note 167, at 186-91; John R. Salter, Jr., *Civil Rights and Self-Defense*, AGAINST THE CURRENT, July-Aug. 1988, at 23, 23-25; John R. Salter, Jr., *Guns Kept Klan Enemies at Bay in the Deep South*, GRAND FORKS (N.D.) HERALD, Oct. 9, 1994.

The necessity of dissenters' and racial minorities' having access to arms for their own protection is also suggested by the history of the second Ku Klux Klan of the 1910s and 1920s, which was a major or even controlling force in many northern states. *See* DAVID M. CHALMERS, HOODED AMERICANISM 66, 67, 179, 239, 248, 249, 273, 338, 348 (1965) (citing incidents of armed resistance by individuals or groups, and of bearing arms for protection against potential KKK attack); NANCY MACLEAN, BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN 13-14 (1994). *See generally*, Cottrol & Diamond, *supra* note 164.

⁴²⁸ Don B. Kates, Jr. & Daniel D. Polsby, *Of Genocide and Disarmament*, 86 J. CRIM. L. & CRIMINOLOGY 297 (1995) (reviewing JAY SIMKINET AL., LETHAL LAWS (1995)); Salter & Kates, *supra* note 427, at 186. *Cf.* Chalmers, *supra* note 427, at 228 (Florida's "Gov. Martin spoke out forcefully. Such a situation in which 'mobs formed at night to terrorize the community and citizens had to carry concealed weapons' [for their own protection] could not continue.") *See also id.* at 59-65 (describing the defeat of the KKK in Louisiana).

Indeed, it has been argued that the personal right to defensive arms is particularly relevant in a century which has seen almost 160 million unarmed civilians murdered by governments or by private groups or militias acting with government acquiescence or encouragement.⁴²⁹ Noting that "the right (pg.1232) to arms is essentially a question of the balance of power between a people and the state that governs them," Cottrol and Diamond urge that "that question is *far more important today* than when it was first formalized...."⁴³⁰ Nor is it clearly, absolutely, unquestionably the case that, because civilians cannot resist the massive power of the modern state, the Amendment is today an anachronism. Sanford Levinson comments:

It is simply silly to respond [to the value of an armed citizenry] that small arms are irrelevant against nuclear-armed states: Witness contemporary Northern Ireland and the territories occupied by Israel, where the sophisticated weaponry of Great Britain and Israel have proved almost totally beside the point. The fact that these may not be pleasant examples does not affect the principal point, that a state facing a totally disarmed population is in a far better position, for good or ill, to suppress popular demonstrations and uprisings than one that must calculate the possibilities of its soldiers and officials being injured or killed.⁴³¹

As Justice Black expressed in his *Adamson* dissent: "[I]t is true that [the provisions of the Bill of Rights] were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century whenever excessive power is sought by the few at the expense of the many."⁴³²

E. The "Insurrectionary" Implications of the Second Amendment

We conclude our discussion of *Gun Crazy's* treatment of the Second Amendment by responding to what is, in the wake of the tragic Oklahoma City bombing, a particularly malicious straw man argument. *Gun Crazy* labels the individual *right* position an "insurrectionary" view based on "the idea of a right to bear arms [which allows private groups] *to organize independent armies* or to prepare for insurrection against a potentially despotic government."⁴³³ While we do not deny that a right to keep and bear arms makes "insurrection against a potentially despotic government" more feasible, we do deny that the Second Amendment protects a *right* of insurrection or a *right* to

⁴²⁹ The 1945-47 India-Pakistan Partition riots involved upwards of a million deaths perpetrated by private groups or individuals largely without firearms. The same is true of the 1960s murders of 500,000 to 1 million ethnic Chinese and other suspected Communists in Indonesia, and of the more recent genocides in Cambodia, Rwanda, and Burundi. However, the "auto-genocide" of 2-3 million Cambodians was perpetrated by soldiers who had guns, but largely starved, clubbed, and bayoneted their victims to death to save bullets. See Kates & Polsby, *supra* note 428, at 247-56.

⁴³⁰ Cottrol & Diamond, *Fifth Auxiliary Right*, *supra* note 13, at 1025-26 (emphasis added).

⁴³¹ Levinson, *supra* note 13, at 657.

⁴³² *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting).

⁴³³ *Gun Crazy*, *supra* note 7, at 70 (emphasis added).

organize independent armies.⁴³⁴ Herz offers no reference to show that such (pg.1233) an argument has been made by the scholars it traduces, or anyone else for that matter.

Moreover, this argument by *Gun Crazy* reveals, once again, that Herz, Henigan, et al. have never examined the implications of their militia-centric theory, and that their theory is intended solely as a makeweight. They portray the Amendment as embodying the Anti-Federalists' objections to the military-militia provisions of Article I, Section 8 and their "demand that the states [be allowed to] maintain control over the existing state militias *as a counter-weight* to the expanding federal power."⁴³⁵ In other words, their militia-centric view is fully as "insurrectionary"⁴³⁶ as the individual right view. The only difference is that the former envisions state militias as the revolutionary actors where the latter envisions "the people."

Anti-gun advocates share at least as much blame for the rise of the "private" militia movement as do the gun-rights groups. True, the so-called private militias vehemently oppose new anti-gun laws and the anti-gun groups' prohibitionist agenda, and many of them despise those who enforce existing laws. But the inspiration for "private" militias comes from taking seriously the anti-gun refrain that the right to arms is only a collective right, a position that pro-gun advocates and groups have consistently rejected.⁴³⁷ We place quotation marks around "private" to emphasize an important and potentially disquieting aspect of this development. The militia movement is not necessarily or always private at all. In Arizona and Idaho it has substantial approval from state-level officials, and in those states and areas like the Florida panhandle and far northern California it tends to have the explicit approval or sanction of local government.⁴³⁸ (pg.1234)

Anti-gun fundamentalists posing as constitutional theorists should be careful what they wish for. Someone might take them seriously.

IV. GUNS AND PUBLIC SAFETY

Gun Crazy only poses as a serious analysis of the proper interpretation of the Second Amendment. Ultimately, Herz's real concern is that adherence to the Second Amendment is just bad policy. Herz is horrified at gun violence, which he blames on the guns rather than on the violent. In

⁴³⁴ Some organizational activity, however, may well be protected by the First Amendment right of association as well as by the Ninth Amendment. This issue is, however, beyond the scope of our present inquiry, which concerns the meaning of the Second Amendment. Although it serves a number of purposes, the Second Amendment does so by protecting only an individual right to keep and bear arms.

⁴³⁵ *Gun Crazy*, *supra* note 7, at 64 (citing Ehrman & Henigan, *supra* note 12, at 21) (emphasis added).

⁴³⁶ By this *we* mean it makes insurrection easier, not that it creates a constitutional right to insurrection.

⁴³⁷ Anti-gun advocates will doubtless protest that the militias interpret "collective right" far differently than do they, but that is as misleading as it is true. What the militias actually do is take seriously a slogan which anti-gun advocates never interpreted, but only used as a makeweight against the individual right position. The purpose of their collective right view was to render the Amendment an oxymoron, a non-right, as it has no effect and can never be invoked by anyone against any gun law. Like such left-wing extremists as the Symbionese Liberation Army, who kidnapped Patricia Hearst in 1974, the right-wing extremists of the militia movement associate themselves with "the people," and, as "the people," they deem themselves to have the *collective* right to arms guaranteed by the Amendment.

⁴³⁸ Several Florida counties have gone so far as to declare that their entire populations constitute their militias, and thus are exempt from the federal "assault weapon" ban. See Larry Dougherty, *Militia Groups Attract Hundreds of Floridians*, ST. PETERSBURG TIMES, Apr. 30, 1995, at 1A. See also Reynolds & Kates, *supra* note 13, at 1755-56 n.55.

this he resembles many Americans who are less concerned with what the Founders thought about banning guns than with the criminological wisdom of such a ban. As Dan Polsby observes, many Americans would not care whether the Constitution guarantees individuals a right to possess arms if they believed the right was "very dangerous to public safety.... That would be a case for repealing the Second Amendment, not respecting it."⁴³⁹ Does respecting the Second Amendment lead to disastrous consequences? We conclude our reply to *Gun Crazy* by examining the criminological evidence that addresses this question.

A. Vilifying One's Opponents

Herz demonizes gun owners and gun groups, claiming that they do "evil."⁴⁴⁰ He bases this on three disputable assumptions, which we address individually. Gun owners and gun groups do evil, says *Gun Crazy*, by their:

[(1)] insistence on virtually unrestricted access to all manner of firearms [(2), which insistence is only] in order to satisfy personal desires, when [(3)] that unrestricted access [is a, if not the, major cause of the gun violence which] imposes on the rest of society an extraordinary toll in human suffering and health-care costs.⁴⁴¹

... the gun lobby has played an important role in blocking potential gun control legislation, and [thereby] in perpetuating our extraordinary level of gun violence.⁴⁴²

Item (1) is demonstrably untrue. While the criminological value of the well-known pro-gun proposals for "gun control" is certainly debatable, the (pg.1235) claim that gun groups seek "virtually unrestricted access to all manners of firearms" is not just hyperbolic but patently false. Herz must necessarily be aware that for seventy-five years gun groups have insisted on, supported, and actually drafted laws against handgun possession by felons, "use-a-gun, go-to-jail" laws, ever-harsher penalties for gun possession by felons, gun misuse, and "three strike" laws, etc.⁴⁴³ Had *Gun Crazy*

⁴³⁹ Daniel D. Polsby, *The False Promise of Gun Control*, ATLANTIC MONTHLY, March 1994, at 59.

⁴⁴⁰ *Gun Crazy*, *supra* note 7, at 113 (section entitled "The Evil That Gun Men Do").

⁴⁴¹ *Id.* at 58. *See also id.* at 84-97, 148-53.

⁴⁴² *Id.* at 62.

⁴⁴³ *See* KENNET & ANDERSON, *supra* note 96, at 192-95; LA PIERRE, *supra* note 97, at 223-24 (NRA Executive Vice President describing NRA policies and goals). *Gun Crazy* refers in its footnotes to the Second of these references. *Gun Crazy*, *supra* note 7, at 138 n.354.

Whether "use-a-gun, go-to-jail," "three strikes," and similar proposals offer real benefits is unclear. Criminologists have been skeptical of these pro-gun answers to gun violence, as has one of the authors of this article. *See, e.g.,* Don B. Kates, *Conclusion*, in FIREARMS AND VIOLENCE, *supra* note 256, at 527 n.8; Alan Lizotte & Marjorie S. Zatz, *The Use and Abuse of Sentence Enhancement for Firearms Offenses in California*, 49 L. & CONTEMP. PROBS. 199 (1986); Colin Loftin et al., *Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control*, 17 L. & SOC'Y REV. 287 (1983); Don B. Kates & Nicholas Johnson, *Three Strikes and You're Out Is a Fraud*, PHILA. INQUIRER, May 12, 1994, at A23. *But cf.* Daniel Fife & William R. Abrams, *Firearms' Decreased Role in New Jersey Homicides After a Mandatory Sentencing Law*, 29 J. TRAUMA 1548 (1989) (suggesting that laws mandating prison for felons who misuse a gun may reduce homicide); David McDowall et al., *Criminology: A Comparative Study of the Preventive Effects of Mandatory Sentencing Laws for Gun Crimes*, 83 NW. J. CRIM. L. & CRIMINOLOGY, 378 (1992) (same).

In contrast to "use-a-gun, go-to-jail," most "three strikes" proposals are arguably counterproductive. The evidence is clear that violent crime is a young man's game. As violent felons grow older, they are progressively disillusioned about the viability of a life of violent crime, and tend to limit themselves to less dangerous offenses. A life sentence for a 37 year-old felon who is convicted of a third felony, which may be far less serious than his first two, expends scarce prison resources on a felon who is less dangerous than other potential candidates for the same cell.

sought to accurately identify the difference between its position and that of the gun owners, the paragraph we have quoted would have had to read something like this:

Gun owners and the gun lobby do evil by their insistence on limiting gun laws to proposals I believe are ineffective in stemming our extraordinary level of gun violence, and their blocking of potential gun control legislation which they believe is ineffective, counter-productive, and unconstitutional, but which I believe would alleviate the extraordinary toll in human suffering and health-care costs associated with gun violence.

Item (3) of *Gun Crazy's* indictment is as hyperbolic as then-Attorney General Meese's claim that the ACLU promotes crime by "irresponsibly" challenging police practices.⁴⁴⁴ Herz and Meese each assume their own premise (that the activities of gun groups and the ACLU, respectively, promote crime) and then foist that premise on to their opponents, who reject it. Now burdened (pg.1236) with beliefs they do not hold, gun groups and the ACLU can be denounced for irresponsibly opposing things which they believe worthless for combating crime, but which Herz and Meese, respectively, think will be effective.

Indeed, *Gun Crazy's* indictment is even more unfair than Meese's because of item (2)'s falsity. Gun groups do not defend gun ownership only "in order to satisfy personal desires." Unlike those who defend the interests of smokers or drinkers on purely "freedom of choice" grounds, gun owners truly believe widespread gun ownership is an affirmative social good that deters tyranny and both deters and thwarts criminal attack. As will be seen in the next section, there is considerable criminological support for the latter conclusion (and, as we have seen, the Founders strongly endorsed both). But, regardless of whether gun owners are correct in their faith, *Gun Crazy's* lengthy and vicious vilification of those citizens who may simply be mistaken about a matter of public policy is—dare we say it?—a Dereliction of Dialogical Responsibility.

B. The Criminology of Guns and Violence

Readers may have less interest in the degree of *Gun Crazy's* dialogical responsibility than in the truth or falsity of item (3) in its indictment: Herz's assumption that widespread gun ownership is a cause of crime rather than just a reaction to it.⁴⁴⁵ As we show, this assumption cannot be validated by criminological evidence and *Gun Crazy's* recital of the evidence supposedly supporting item (3) is highly misleading.

1. Foreign Comparisons

⁴⁴⁴ *Charges by 2 Associates of Reagan Challenged by Civil Liberties Union*, N.Y. TIMES, May 18, 1981.

⁴⁴⁵ The assumption that gun availability is a cause of violence rather than an effect thereof is enunciated in the article's very first footnote and often repeated throughout. *See, e.g., Gun Crazy, supra* note 7, at 57 n. (No kids "should have to grow up in the dark shadow of so many guns."); *id.* at 55 n.2 ("[U]nrestricted access [to guns] imposes on the rest of society an extraordinary toll in human suffering and health-care costs."); *id.* at 113 ("The gun lobby has perpetuated societal conditions that have seen more Americans die during the past twenty-five years in gun-related murders than were killed in the Vietnam War, the Korean War, and World War I combined.").

Gun Crazy begins with international statistics—after they have been carefully selected and truncated.⁴⁴⁶ *Gun Crazy* avoids highlighting the (pg.1237) sociocultural factors that actually cause differences in international homicide rates by citing only statistics of the comparative use of handguns in murders in various nations. Handgun murders turn out to be far more frequent in the U.S. than in various other industrialized Western nations having much smaller populations.⁴⁴⁷ But to dispel *Gun Crazy's* assumption that more handguns explain why the U.S. has higher murder rates, just add back in the statistics Herz has omitted: the statistics for murders committed with knives, blunt instruments, etc. Doing so shows that the U.S. has not only more handgun murders but also more non-gun murders than other industrialized Western nations; indeed, the *non-gun* U.S. murder rate exceeds those nations' *total* murder rates (i.e., their combined total for murders with handguns, long guns, knives, blunt instruments, and all other weapons). Obviously, gun ownership cannot be the reason why America has so many more *non-gun* murders than other societies. The inevitable conclusion when all methods of murder are considered is that something beyond guns must explain the differentials between the U.S. and other nations.⁴⁴⁸

International comparisons lend themselves to making all sorts of spurious points if one ignores sociocultural and economic differences and focuses instead on particular public policies as single-cause explanations. For instance, then-Attorney General Meese could have buttressed his assault on the ACLU with the same kind of spurious correlation: Our civil liberties restraints on the police far exceed those in other industrialized Western nations, and, thus, we have far higher rates of murder and other violence.⁴⁴⁹ (pg.1238)

The definitive study of American and foreign gun policies and violence rates appeared in 1992 and received the American Society of Criminology's Comparative Criminology Award for that year.⁴⁵⁰ Briefly summarized, the evidence shows:

⁴⁴⁶ See *Gun Crazy*, *supra* note 7, at 59 n.5 (comparing handgun murders in the U.S. and in selected foreign nations).

⁴⁴⁷ *Id.* To exaggerate the matter *Gun Crazy* presents the comparison in terms of total murders rather than in the rate per populace. The standard criminological comparison is murders per 100,000 population.

⁴⁴⁸ For a full and accurate comparison of international murder and suicide statistics, see Don B. Kates, et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 563, tbl. 1 (1995). It also shows a fact routinely undisclosed by anti-gun advocates when they claim that both American homicide and American suicide are caused by the availability of guns, and (as does Herz) give gun death figures in which homicide and suicide are combined. Because homicide and suicide are both the results of sociocultural and economic factors, rather than the mere availability of particular means of death, it turns out that, while the U.S. does have a much *higher* murder rate than Western European countries, it has a much *lower* suicide rate. *Id.* This comparison holds whether the comparison is to nations like Denmark where handguns are strictly forbidden or to nations like Switzerland and Austria where it is as easy to own a handgun as in most American jurisdictions. *Id.*

When evaluating gun deaths in the U.S., anti-gun activists have taken to combining homicide and suicide rates to inflate the numbers of "gun-related" deaths. However, if homicide and suicide are combined for *international* comparisons, which anti-gun advocates do not do, it turns out that the U.S. falls *below* the median in international comparisons. The lowest combined homicide-suicide rate, incidentally, is for Israel, a nation in which guns are far more available than in the U.S. *Id.*

⁴⁴⁹ This correlation is actually slightly less misleading than *Gun Crazy's* handgun murder correlation since it requires only genuine murder and violent crime statistics. Meese would not have to truncate the statistics as *Gun Crazy* does to exclude data that undercut its argument.

⁴⁵⁰ DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?* (1992). Kopel's work provided in-depth comparisons and coverage of Australia, Canada, Great Britain, Jamaica, Japan, New Zealand, and Switzerland. The observations made in the subparagraphs numbered (a)-(c) which follow are based on the corresponding chapters in the Kopel book as well as on the specific references given.

(a) Laws against gun ownership cannot have caused low Western European murder rates, since those low rates long preceded the gun laws. Violence was low, and falling, in Western Europe from at least the mid-nineteenth century, but anti-gun policies only appeared after World War I, aimed not at crime but at the political turmoil of that tumultuous era. Nevertheless, Western Europe has suffered far more political gun violence than the U.S., with its generally less restrictive gun policies.⁴⁵¹

(b) Other nations with strict anti-gun policies have not achieved comparably satisfactory results. Although *Gun Crazy* cites the low number of handgun murders in Canada, whose strict gun laws have been praised by American anti-gun advocates, Canada-wide studies conclude that any differences in homicide rates relate to socioeconomic and cultural differences, and that Canadian gun laws have no more effect than the less restrictive American laws.⁴⁵² By the same token, if anti-gun laws explain low Japanese homicide rates, why does Taiwan (where gun possession is a capital offense) have a (pg.1239) higher murder rate than the U.S?⁴⁵³ Why does Russia also have much higher homicide rates,⁴⁵⁴ despite a longtime, highly stringent gun control policy⁴⁵⁵ and the adoption by the Soviet Army of different caliber weapons than any Western nation, a measure which hampered soldiers returning with souvenirs from World War II and later wars from obtaining ammunition?⁴⁵⁶

(c) Austria, Israel, and Switzerland, which have gun possession rates equaling or exceeding those in the U.S., have homicide rates fully as low or lower than the highly gun-restrictive nations of Western Europe.⁴⁵⁷ An Israeli criminologist notes that Israel's murder "rates are ... much *lower* than in the United States ... despite the *greater availability* of guns to law-abiding [Israeli] civilians."⁴⁵⁸

⁴⁵¹ See generally *id.* at 59-136; COLIN GREENWOOD, FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES 1-58 (1972); Ted Robert Gurr, *Historical Trends in Violent Crimes: A Critical Review of the Evidence*, in 3 CRIME & JUST.: ANN. REV. RES. 295 (Michael Tonry & Norval Morris eds., 1981); Frank Morn, *Firearms Use and the Police: A Historic Evolution of American Values*, in KATES, FIREARMS AND VIOLENCE, *supra* note 256, at 496-500; Eric H. Monkonen, *Diverging Homicide Rates: England and the United States, 1850-1875*, in 1 VIOLENCE IN AMERICA 80 (Ted Robert Gurr ed., 1989).

⁴⁵² See Brandon S. Centerwall, *Homicide and the Prevalence of Handguns: Canada and the United States, 1976 to 1980*, 134 AM. J. EPIDEMIOLOGY 1245 (1991); David B. Kopel, *Canadian Gun Control: Should the United States Look North for a Solution to Its Firearms Problem?*, 5 TEMP. INT'L & COMP. L.J. 1 (1991); Gary A. Mauser & Richard A. Holmes, *An Evaluation of the 1977 Canadian Firearms Legislation: An Econometric Approach*, 16 EVALUATION RES. 603 (1992); Robert Mundt, *Gun Control and Rates of Firearms Violence in Canada and the United States*, 32 CANADIAN J. CRIM. 137 (1990). *But see also* KOPEL, *supra* note 450, at 13-19 (discussing contrary findings of earlier, less complete studies).

⁴⁵³ See Kates, *Current Evidence*, *supra* note 256, at 200-01.

⁴⁵⁴ The Russian homicide rate for 1992 was 15.5 murders per 100,000 people. *Russia's Mafia: More Crime than Punishment*, ECONOMIST, July 9, 1994, at 19, 20. The American rate for the same year was 8.5 per 100,000. See *infra* note 494 and accompanying text.

⁴⁵⁵ Raymond G. Kessler, *The Political Functions of Gun Control*, in KATES, FIREARMS AND VIOLENCE, *supra* note 256, at 457, 472.

⁴⁵⁶ See entries for various nations' military arms and the calibers thereof in EDWARD CLINTON EZELL, SMALL ARMS OF THE WORLD: A BASIC MANUAL OF SMALL ARMS (11th rev. ed. 1977).

⁴⁵⁷ See Kates, *Current Evidence*, *supra* note 256, at 200. Switzerland is yet another nation *Gun Crazy* cites as having a very low handgun homicide rate. *Gun Crazy*, *supra* note 7, at 153.

⁴⁵⁸ See Abraham N. Tennenbaum, *Israel Has a Successful Gun Control Policy*, in GUN CONTROL: CURRENT CONTROVERSIES 250 (Bruno Leone et al. eds., 1992) (emphasis added). Professor Tennenbaum teaches in the Department of Criminology at Bar Ilan University in Israel.

Indeed, American gun owners might cite the Israeli experience as proof of the value of making guns available to potential victims. Though Israeli law requires a license to own a gun, licensure is routine for every law-abiding, responsible, trained Israeli who wishes to buy a handgun. Alternatively, those Israelis who want a pistol or submachine gun for temporary use just draw it out of the local police armory, unlike in the U.S., where fully automatic weapons have been illegal or severely controlled since the 1930s, and the importation and manufacture of even semiautomatic Uzis are now prohibited.⁴⁵⁹ Unlike the United States, where carrying a concealed handgun has, until recently, been almost universally illegal, in Israel if you legally possess a firearm (by loan or licensure), you

are allowed to carry it on your person (concealed or unconcealed). The police even recommend you carry it [concealed] because then the gun is protected from thieves or children. The result is that *in any big crowd of (pg.1240) citizens, there are some people with their personal handguns on them (usually concealed).*⁴⁶⁰

American massacres, in which dozens of unarmed victims are mowed down before police can arrive, astound Israelis,⁴⁶¹ who note

what occurred at a Jerusalem [crowd spot] some weeks before the California McDonald's massacre: three terrorists who attempted to machine-gun the throng managed to kill only one victim before being shot down by handgun-carrying Israelis. Presented to the press the next day, the surviving terrorist complained that his group had not realized that Israeli civilians were armed. The terrorists had planned to machine-gun a succession of crowd spots, thinking that they would be able to escape before the police or army could arrive to deal with them.⁴⁶²

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* at 248 (emphasis added). At around the time Professor Tennenbaum's paper was written (it was read at the 1991 annual meeting of the American Society of Criminology) a host of American States were changing their laws to mandate issuance of licenses to carry concealed firearms to law-abiding, responsible adult applicants with suitable training. Currently 31 states comprising about 55% of the American population have mandatory issuance laws. See Clayton E. Cramer & David B. Kopel, "Shall Issue": *The New Wave of Concealed Carry Handgun Permit Laws*, 62 TENN. L. REV. 679 (1995) (detailing and evaluating concealed carry permit laws); John R. Lott & David D. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997).

⁴⁶¹ See Abraham Tennenbaum, Editorial, *Handguns Could Help*, BALTIMORE SUN, Oct. 26, 1991, at 9A.

⁴⁶² Kates, *Current Evidence*, *supra* note 256, at 209 (footnote omitted). Such events are not uncommon in Israel. The following example is from the *Baltimore Sun*:

JERUSALEM—A Palestinian opened fire with a submachine gun at a bus stop near the port of Ashdod today, killing one Israeli and wounding four before being shot to death by bystanders, officials said

...

National police spokesman Eric Bar-Chen said today's attacker, who was armed with an Uzi submachine gun, was shot and killed by a civilian and a soldier who were at the bus stop and hitchhiking post used by soldiers.

Mr. Bar-Chen identified the gunman as a Palestinian from the Shati refugee camp in the Gaza Strip. Six ammunition clips and a knife were found on his body, he added.

Palestinian Kills Israelis, Is Slain, BALTIMORE SUN, Apr. 7, 1994, at 1A.

The experience of England, the nation generally cited as the prime exemplar of the value of strict firearms prohibitions, in fact demonstrates their irrelevancy. By the middle of the nineteenth century, England had moved from its eighteenth century status as one of the world's most violent nations to its present peaceful state. This shift is attributable to vast socioeconomic changes in this period. Certainly it cannot be attributed to gun laws—for mid-nineteenth century England had none, beyond a policy that police would not carry firearms. Severe English gun restrictions, like those on the Continent, (pg.1241) did not appear until after World War I; and their purpose was not to restrain ordinary crime (of which England had far less then than now), but to disarm the politically unreliable.⁴⁶³

In the nineteenth century, as today, American reformers were appalled at rising U.S. homicide rates and sought answers by comparing our institutions unfavorably to those of peaceful England. But gun control could not be among those answers because England had far less gun control in the nineteenth century than did the U.S. The lesson that contemporary reformers principally drew was that capital punishment was useless, and perhaps even counter-productive, because the U.S. executed many more people than did England and yet had a large and rising murder rate, while England's was low and falling.⁴⁶⁴

England's leading analyst of gun control is Colin Greenwood, a now-retired chief superintendent of police. His thesis on English gun control, which was done at Cambridge University's Institute of Criminology,⁴⁶⁵ also goes unmentioned in *Gun Crazy*. Greenwood comments that there was much less gun violence in England "when there were no controls of any sort and when anyone, convicted criminal or lunatic, could buy any type of firearm without restriction."⁴⁶⁶ That remains true whether one is comparing England to the U.S. at that time, or to England in the 1960s when Greenwood was writing, much less to the England or the U.S. of today. Of course, Greenwood is not endorsing the idea that there should be no controls, or that felons, lunatics, and children should be allowed to own guns. Rather, his point is that the incidence of violence and homicide in a society is really determined by socioeconomic and cultural factors. Policies regarding the mere ownership of particular weaponry can have marginal effects at most.

It is worth noting that *every* Western society has experienced a vast increase in crime since the end of World War II, particularly since the 1960s.⁴⁶⁷ In many of these nations, the rate of increase is several times higher than the rate at which U.S. crime increased during the same period.⁴⁶⁸ They compare so favorably to U.S. homicide and other crime rates (pg.1242) only because the base from

⁴⁶³ KOPEL, *supra* note 450.

⁴⁶⁴ See DAVID BRION DAVIS, *HOMICIDE IN AMERICAN FICTION, 1798-1860: A STUDY IN SOCIAL VALUES*, 239-65 (1957) (citing nineteenth century American tracts).

⁴⁶⁵ Published as GREENWOOD, *supra* note 451.

⁴⁶⁶ *Id.* at 243.

⁴⁶⁷ See KOPEL, *supra* note 450; Gurr, *supra* note 451, at 295, 321, 324.

⁴⁶⁸ Gurr, *supra* note 451 (noting that in 1974 the American murder rate was 40 times higher than the English, but 15 years later it was only 10 times higher). This does reflect about a 10% decline in American murder rates but, obviously, it is far more attributable to the steep rise in English homicide.

which they started is so much lower, a base established at a time when they had few or no controls over firearms ownership.

2. *Defensive Gun Use in the United States*

The most recent and exhaustive data analysis concludes that handguns are used by victims to defend themselves about three times more often than they are misused by criminals in violent crime.⁴⁶⁹ This conclusion rests on consistent results in ten different surveys yielding estimates of the numerical frequency of defensive gun use. Particularly impressive support for this conclusion has been supplied through its endorsement by an eminent criminologist who is deeply opposed to gun ownership,⁴⁷⁰ and by the premier study of the effect of laws allowing law-abiding, responsible adults to obtain licenses to carry concealed handguns.⁴⁷¹

The precise incidence of defensive gun use is still open to question, but there is no doubt that it is very large. The victim survey evidence showing large amounts of defensive gun use is confirmed by an independent body of data from the other parties involved, for example, surveys taken among inmates of various federal and state prisons over the past two decades. Some of these surveys are methodologically crude and/or involve inadequate samples. Because the results of all these surveys are mutually consistent and supportive, it will suffice to refer to the latest and most recent, which was conducted under the auspices of the National Institute of Justice in state prisons across the country.⁴⁷²

While most of the study's questions on arms possession by victims focused on the deterrent effect, several did address self-defense. Responding thereto, 34% of the convicts "said they had been scared off, shot at, wounded or (pg.1243) captured by an armed victim, [quoting the actual question asked] and about two-thirds (69%) had at least one acquaintance who had this experience."⁴⁷³ Also suggestive of the frequency of defensive gun use were the responses on two other points: 34% of the felons said that in contemplating a crime they either "often" or "regularly" worried that they "[m]ight get shot at by the victim"; and 57% agreed that "[m]ost criminals are more worried about meeting an armed victim than they are about running into the police."⁴⁷⁴

As to the comparative value of gun bans versus gun possession in reducing violence, two further findings dovetail dramatically: on the one hand, the felons most frightened "about confronting an armed victim" were those "from states with the greatest relative number of privately

⁴⁶⁹ See Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995); see also GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL ch. 5 (forthcoming 1997), for a comprehensive discussion of the subject, including several additional supporting surveys.

⁴⁷⁰ Marvin E. Wolfgang, *A Tribute to a View I Have Opposed*, 86 J. CRIM. L. & CRIMINOLOGY 188 (1995).

⁴⁷¹ Lott & Mustard, *supra* note 460.

⁴⁷² See JAMES WRIGHT & PETER ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS (1986).

⁴⁷³ *Id.* at 154.

⁴⁷⁴ *Id.* at 145 & tbl. 7.2.

owned firearms";⁴⁷⁵ while, on the other hand, the highest robbery rates are in the jurisdictions which are most restrictive of gun ownership.⁴⁷⁶

Finally, recent data establish that Handgun Control, Inc. is wrong in advising submission as invariably the best strategy for victims of rape or robbery: "the best defense against injury is to put up no defense—*give them what they want* or run."⁴⁷⁷ Analysis of nationwide victimization data gathered for the U.S. Department of Justice shows that, far from defensive gun use endangering gun-armed victims, those who resist with guns are injured far less often than *either* those who submit or those who resist with other weapons.⁴⁷⁸ Of course, gun-armed resisters are also much less likely to be (pg.1244) robbed, raped, or otherwise harmed.

3. *The Ordinary Gun Owner and the Aberrant Murderer*

American anti-gun advocates manifest an elitist contempt for ordinary citizens by their portrayal of the common person as a potential murderer. This myth asserts that most murders are committed, not by criminals, but by ordinary people; therefore, if guns were banned most potential

⁴⁷⁵ *Id.* at 151.

⁴⁷⁶ Philip J. Cook, *The Effect of Gun Availability on Robbery and Robbery-Murder: A Cross Section Study of 50 Cities*, 3 POL. STUD. REV. ANN. 743, 776-78 (1979). An unpublished aspect of a more recent study is the finding that the few major cities with handgun bans have higher gun-robbery rates than cities that allow handgun ownership. These results were not published because the author does not consider them strong enough, given the very limited number of jurisdictions involved. Personal communication from Gary Kleck (July 4, 1995) (regarding unpublished data run for Gary Kleck & E. Britt Patterson, *The Impact of Gun Control and Gun Ownership Levels on Violence Rates*, 9 J. QUANTITATIVE CRIMINOLOGY 249-87 (1993)).

⁴⁷⁷ NELSON "PETE" SHIELDS, GUNS DON'T DIE, PEOPLE DO 124-25 (1981) (by then-Chairman of Handgun Control, Inc.) (emphasis added). Submission, running away, or screaming is also the advice offered by M. Yeager and the Handgun Control Staff of the U.S. Conference of Mayors, MATTHEW E. YEAGER, ET AL., U.S. CONFERENCE OF MAYORS, HOW WELL DOES THE HANDGUN PROTECT YOU AND YOUR FAMILY? (1976). In fact, however, running away or screaming is far more dangerous and far less effective than resisting with a gun. Sarah E. Ullman & Raymond A. Knight, *Fighting Back: Women's Resistance to Rape*, 7 J. INTERPERSONAL VIOLENCE 31 (1992); Sarah E. Ullman & Raymond A. Knight, Sequential Analysis of Sexual Assaults, Paper presented at annual meeting of the American Society of Criminology (Oct. 29, 1993).

⁴⁷⁸ See Don B. Kates, *The Value of Civilian Arms Possession as Deterrent to Crime or Defense Against Crime*, 18 AM. J. CRIM. L. 113, 147-50 (1991). Gary Kleck's analysis of 1979-85 national data in *Point Blank* shows the following comparative rates of injury: only 12.1-17.4% of gun-armed victims resisting robbery or assault were injured; 24.7-27.3% of victims who submitted were nevertheless injured; 40.1-48.9% of those who screamed were injured, as were 24.7-30.7% of those who tried to reason with or threaten the attacker, and 25.5-34.9% of those who resisted passively or sought to evade; 29.5-40.3% of those resisting with a knife were injured; 22-25.1% of those using some other kind of weapon were injured; 50.8-52.1% of those resisting bare-handed were injured). See *id.* at 166 (table summarizing findings in KLECK, *supra* note 279, at 123-36).

Data from subsequent years have yielded confirming results. "A fifth of the victims defending themselves with a firearm suffered an injury, compared to almost half of those who defended themselves with weapons other than a firearm or who used no weapon." BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIME DATA BRIEF: "GUNS AND CRIME" 2; 1987-91 data summarized in BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SELECTED FINDINGS FROM NAT'L STATISTICAL SERIES: "FIREARMS AND CRIMES OF VIOLENCE" 8 (1994) (emphasis added):

in nearly 400,000 incidents of violence, the victim had a firearm for self-protection [and] [i]n 35% of these incidents, the offender was also armed with a firearm. About a fifth [i.e. 20%] of the victims using a gun for self-defense were injured. [But] [a]mong victims defending themselves with a weapon other than a firearm or having no weapon, about half [i.e., 50%] sustained an injury.

murderers would docilely comply with the ban, and most disputes would end in fistfights at worst.⁴⁷⁹ (pg.1245)

But homicide studies discredit this, showing instead that murderers are highly aberrant. They tend to have lifelong histories of felony, extreme violence, and other hazardous behaviors (toward themselves as well as those around them), including car and gun accidents, substance abuse, and psychopathology.⁴⁸⁰ The homicide data collected over the past thirty-five years have consistently shown that 70-80% of those charged with murder had prior adult records, with an average adult criminal career of six or more years, including four major adult felony arrests.⁴⁸¹ Indeed, over 10% of accused murderers were actually out on pretrial release, that is, they were awaiting trial on some other offense when the murder was committed. Nor should it be thought that the 20-30% of accused murderers who do not have prior crime records are ordinary citizens; 14.1% are juveniles and so cannot have an adult criminal record.⁴⁸² Upon investigation however, it turns out that "many have histories of committing personal violence in childhood, against other children, siblings, and small animals."⁴⁸³ A four-year sample of Boston youth murders analyzed by the Kennedy School of Government at Harvard University describes the arrested youth as "a relatively small number of very

⁴⁷⁹ See, e.g., Katherine Kaufer Christoffel, *Toward Reducing Pediatric Injuries from Firearms: Charting a Legislative and Regulatory Course*, 88 PEDIATRICS 294, 300 (1991) (article by a doctor who founded and heads her own medical gun prohibition group, stating that "most shootings are not committed by felons or mentally ill people, but are acts of passion that are committed using a handgun that is owned for home protection"); Daniel W. Webster et al., *Reducing Firearms Injuries*, 7 ISSUES SCI. & TECH. 73 (1991) (article by officer of the Maryland affiliate of Handgun Control, Inc. stating that "most [murderers] would be considered law-abiding citizens prior to their pulling the trigger"). See also, MAYOR JOHN LINDSAY, THE CASE FOR FEDERAL FIREARMS CONTROL 22 (1973) (pamphlet published by N.Y. City) (claiming that the overwhelming majority of convicted murderers are "previously law abiding citizens committing impulsive gun-murders while engaged in arguments with family members or acquaintances"); NATIONAL COALITION TO BAN HANDGUNS, A SHOOTING GALLERY CALLED AMERICA (asserting that "each year" thousands of "gun murders [are] done by law-abiding citizens who might have stayed law-abiding if they had not possessed firearms" and "that most murders are committed by previously law abiding citizens where the killer and the victim are related or acquainted."); David Kairys, *A Carnage in the Name of Freedom*, PHILA. INQUIRER, Sept. 12, 1988, at A15 ("That gun in the closet to protect against burglars will most likely be used to shoot a spouse in a moment of rage.... The problem is you and me—law-abiding folks....").

⁴⁸⁰ See Kates et al., *supra* note 448, at 480, 579 (reviewing in detail the criminological findings).

⁴⁸¹ Compare an FBI data run of murder arrestees nationally over a four-year period in the 1960s which found 74.7% to have had prior arrest(s) for violent felony or burglary, D. MULVIHILL ET AL., CRIMES OF VIOLENCE: REPORT OF THE TASK FORCE ON INDIVIDUAL ACTS OF VIOLENCE 532 (1969), with late 1980s samplings by the Bureau of Criminal Statistics finding that, nationally, 76.7% of murder arrestees had criminal histories, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE SPECIAL REPORT, "MURDER IN FAMILIES" 5, tbl. 7 (1994); U.S. DEPARTMENT OF JUSTICE, MURDER IN LARGE URBAN COUNTIES, 1988 (1993) (78% of murder defendants being prosecuted in state courts had criminal histories); FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORT 3 (1971) (One year FBI data run in 1970s showing that 77.9% of arrestees had prior arrests).

Local U.S. figures are similar. The annual Chicago Police Department bulletin, *Murder Analysis*, shows the following figures for the percentage of convicted murderers who had prior crime records: 1991: 77.15%; 1990: 74.63; 1989: 74.22; 1988: 73.59; 1987: 73.81 (The five-year average for 1987-91 is 74.68%). CHICAGO POLICE DEP'T, MURDER ANALYSIS (1987-91).

By way of comparison Canadian murder statistics show that, out of the "582 [murders] in which an accused was identified in 1991," 249 had previous records of violent offenses: 103 for property offenses and 10 for drug offenses. CANADIAN CTR. FOR JUSTICE STATISTICS, MINISTER OF INDUS., SCI. & TECH., JURISTAT. SERV. BULLETIN (1992).

⁴⁸² For this 1991 figure see Heide, *Weapons Used by Juveniles and Adults to Kill Parents*, 11 BEHAV. SCI. & L. 397, 398 (1993). Juvenile criminal records are generally not available. The one study of which we are aware that was able to check at least the prior juvenile arrests in the locality in question found that 75% of juveniles who shot another had local criminal records. M. Denise Dowd et al., *Pediatric Firearm Injuries, Kansas City, 1992: A Population-Based Study*, 94 PEDIATRICS 867, 871 (1994).

⁴⁸³ R. HOLMES & S. HOLMES, MURDER IN AMERICA 8-9 (1994).

scary kids."⁴⁸⁴ Overall, during their years as minors these 125 arrestees ran up records (pg.1246) which averaged 9.7 prior offenses per person. Adding their records together, these 125 arrestees had been charged with 3 murders; 160 armed violent crimes; 151 unarmed violent crimes; 71 firearms offenses; and 8 offenses involving other weapons; plus vast numbers of property and drug offenses. It is noteworthy that their victims had substantially similar records.⁴⁸⁵ Nor are adults convicted of murder, who have no prior arrest record, likely to be ordinary citizens. Rather, they are likely to be involved in domestic and intrafamily murders, and have long histories of violence that have not resulted in arrest because the violence was directed against domestic partners or other family members.⁴⁸⁶

The term "acquaintance homicide" misleads anti-gun advocates to conjure up images of law-abiding citizens killing each other in domestic quarrels and neighborhood arguments. The reality is that, almost invariably, statistics of "acquaintance homicide" involve a far different milieu and very aberrant people. "These are not previously law-abiding people killing each other, but abusive men killing women [and/or children] they have savaged on many prior occasions or gang members and drug dealers killing each other—or being killed in 'ripoffs'" by addicts or other robbers.⁴⁸⁷

These facts, gleaned from studies of the perpetrators, are fully confirmed by studies of the victims. For instance, the District of Columbia "Police Department classifies most homicides by motive: the fraction classified as drug-related increased from 21% to 80% between 1985 and 1988."⁴⁸⁸ Likewise, a Philadelphia study showed that "84% of [murder] victims in 1990 had antemortem drug use or criminal history";⁴⁸⁹ 71% of children and adolescents injured in Los Angeles drive-by shootings "were documented members of violent street gangs";⁴⁹⁰ in Harlem, "the great majority of both perpetrators and victims of assaults and murders had previous arrests, probably over eighty percent or more";⁴⁹¹ from a study of all gunshot wounds reported to (pg.1247) Charlotte, North Carolina police during the period July 1, 1992, to June 30, 1993, 71% of the 545 adult victims had known criminal records.⁴⁹²

⁴⁸⁴ Interview with David M. Kennedy, Professor at the Kennedy School of Government of Harvard University in Boston Massachusetts (Oct. 15, 1996) (study results to be published in an as-yet-untitled article by David M. Kennedy, Anne M. Piehl, and Anthony A. Bragg, in L. & CONTEMP. PROBS. (forthcoming).

⁴⁸⁵ *Id.*

⁴⁸⁶ See Kates et al., *supra* note 448, at 583-84 (surveying studies to this effect).

⁴⁸⁷ *Id.* at 583.

⁴⁸⁸ Philip J. Cook, *The Technology of Personal Violence*, in 14 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 1 (M. Tonry ed., 1991).

⁴⁸⁹ Michael D. McGonigal et al., *Urban Firearm Deaths: A Five-Year Perspective*, 35 J. TRAUMA 532-34 (1995).

⁴⁹⁰ H. Range Hutson et al., *Adolescents and Children Injured or Killed in Drive-By Shootings in Los Angeles*, 330 NEW ENG. J. MED. 324, 325 (1994).

⁴⁹¹ A. SWERSEY & E. ENLOE, HOMICIDE IN HARLEM 17 (1975). See also studies in three major trauma care centers finding urban knife and bullet wounds to be "a chronic recurrent disease peculiar to unemployed, uninsured law breakers." R. Stephen Smith et al., *Recidivism in an Urban Trauma Center*, 127 ARCHIVES OF SURGERY 668, 670 (1992) (describing the conclusions in D.W. Sims et al., *Urban Trauma: A Chronic, Recurrent Disease*, 29 J. TRAUMA 940 (1989); T.B. Morrisey et al., *The Incidence of Recurrent Penetrating Wound Trauma in an Urban Trauma Center*, 31 J. TRAUMA 1536 (1991)).

⁴⁹² For a discussion of this preliminary data run by University of North Carolina professors Richard C. Lumb and Paul C. Friday, see Kates et al., *supra* note 448, at 587 n.325.

4. The "More Guns = More Murders" Shibboleth

It is already against the law for people with felony records, or histories of violence, substance abuse, dangerous accidents, or insanity to possess firearms.⁴⁹³ Should we be optimistic that such people will comply with gun laws? Obviously not, for they are already refusing to comply with existing federal and state gun laws. However, to anti-gun advocates the problem is not criminal gun ownership, but widespread gun ownership by the citizenry in general. They believe that independent of any other factor, "more guns = more murder," a premise adopted without serious examination, simply as a matter of faith, and despite the contrary empirical evidence. In *Gun Crazy* that premise is assumed in the very first footnote and reiterated throughout the article without once being examined.

Until about 1980 anti-gun advocates did actually attempt to prove their faith. They routinely cited statistics to show that from the early 1960s through the early 1970s crime and gun ownership both steadily increased.⁴⁹⁴ But this only assumed that the increased number of guns was causing crime, without examining the equally plausible alternative that increased crime was causing frightened noncriminals to buy more guns.

The statistics from 1960s and early 1970s showing *both* rising crime and a rising gun ownership simply did not permit an inference of a causal relationship or, if so, what that relationship might be. But in recent years these two (pg.1248) figures have *diverged*, thus undermining empirically the anti-gun belief that "more guns = more crime."⁴⁹⁵ Consider the following table:⁴⁹⁶

TABLE: GUNSTOCK INCREASES OVER 20-YEAR PERIOD

1973			
<i>Total Gun Stock</i>		<i>Guns per 1,000 pop.</i>	
Handguns	All Guns	Handguns	All Guns
36,910,819	122,304,980	175.9	610.3

⁴⁹³ Compare 18 U.S.C. § 922(g)(1) with the fairly comprehensive California system of state laws: CAL. PENAL CODE §§ 12021ff, 12072, 12076, 12100-01, 12551-52 (West Supp. 1997); and CAL. WELF. & INST. CODE §§ 8100-8105 (West Supp. 1997). It might reasonably be suggested that a person who has rehabilitated herself ought not to be barred from gun ownership for life because of a 20 year-old felony conviction or mental commitment, particularly if it did not involve a violent crime. Perhaps, therefore, a better policy would be to bar felons, etc., from firearms ownership, subject to a licensing procedure administered by the local police or courts.

⁴⁹⁴ See, e.g., Sam Fields, *Handgun Prohibition and Social Necessity*, 23 ST. LOUIS U. L.J. 35 (1979).

⁴⁹⁵ The implication of these recent statistics may explain the absence from *Gun Crazy* and other anti-gun works of data attempting to correlate homicide with gun ownership trends after the early 1970s.

⁴⁹⁶ The information regarding firearms ownership in this table was graciously supplied to us by Professor Gary Kleck of the School of Criminology at Florida State University. It will appear in Table 3.1 of his forthcoming book, TARGETING GUNS: FIREARMS AND THEIR CONTROL, *supra* note 469. Homicide rates are taken from BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, 365, tbl. 3.111 (1993) [hereinafter 1993 SOURCEBOOK]; and BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1989, 365, tbl. 3.118 (1989) [hereinafter 1989 SOURCEBOOK].

Homicide rate: 9.4 per 100,000 population

1992

<i>Total Gun Stock</i>		<i>Guns per 1,000 pop.</i>	
Handguns	All Guns	Handguns	All Guns
77,144,448	221,967,343	302.5	870.4

*Homicide rate: 8.5 per 100,000 population*_(pg.1249)

If the "more guns = more murder" shibboleth were true, massive increases in guns should translate into massive increases in murders.⁴⁹⁷ There might not be a perfect correlation. The 81.5% increase in gun ownership generally and the 100% increase in handgun ownership would not necessarily have resulted in identical percentage increases in murder in the twenty year period 1973-1992. But if guns really were the "primary cause" of murder, or just "one of the main causes," as anti-gun advocates have asserted, gunstock increases of 80-100% should have been accompanied by a consistent, marked increase in murders over those decades, as predicted by anti-gun advocates who bewailed those gun increases as they occurred.⁴⁹⁸

At the very least, murder should have increased somewhat. But there was no consistent and marked increase in murder. In 1973, the American firearm stock totaled 122 million, the handgun stock was 36.9 million, and the homicide rate was 9.4 per 100,000 population. At the end of 1992, twenty years later, the firearm stock had risen to 221.9 million, the handgun stock had risen to 77.1 million, but the homicide rate was 8.5, that is, almost ten percent *lower* than it had been in 1973.⁴⁹⁹ Nor had the percentage of murders committed with firearms increased either. In 1973, 68.5% of murders were committed with guns.⁵⁰⁰ At the end of 1992, twenty years later, the firearm stock had risen to almost 222 million, the handgun stock had risen to 77.1 million, but 68.2% of homicides were committed with guns.

We are not contending here that increased gun ownership reduced the rates of homicide or other violence, although as we have seen there is reason to think that criminals will understandably tend to avoid attacking persons who they think are armed.⁵⁰¹ We are simply disputing the

⁴⁹⁷ The argument in this and the next four paragraphs has been taken from Kates et al., *supra* note 448, at 572.

⁴⁹⁸ See, e.g., JOSEPH D. ALVIANI & WILLIAM R. DRAKE, U.S. CONFERENCE OF MAYORS, *HANDGUN CONTROL: ISSUES AND ALTERNATIVES* 42-43 (1975); RAMSEY CLARK, *CRIME IN AMERICA* ch. 7 (1970).

⁴⁹⁹ 1993 SOURCEBOOK, *supra* note 496, at 365, tbl. 3.111.

⁵⁰⁰ KLECK, *supra* note 279, at 262, tbl. 6.5.

⁵⁰¹ See data discussed *supra* Part IV.B.2. There is also reason to think that the gun-ridden West was peaceful by inner-city standards. See BRUCE L. BENSON, *THE ENTERPRISE OF LAW* 312-15 (1990) (summarizing the "growing literature that concludes that the West was not very violent.").

unexamined article of faith among anti-gun advocates such as Andrew Herz: that guns are the primary cause of murder and that more guns, particularly more handguns, equals more murder. The data examined so far do not bear this out.

In presenting the 1973-92 data we are not suggesting that homicide rates (pg.1250) steadily declined during that period. In the five-year period 1973-77, the homicide rate first rose to 9.8% (1974) and then dropped to 8.8% (1977). Then it rose steeply to its highest point ever, 10.2% (1980). Five years later, in 1984, it had dropped 22.5% to 7.9%. Then in 1986 it began rising again, with some fluctuations, to its 1992 level of 9.3%. As for homicides committed with guns, over the 20-year period they fell to as low as 58.7% (1985), but then rose back to 68.2% by 1992.⁵⁰²

In sum, over a twenty-year period of radically increasing gun purchases, homicide rates were erratic and unpatterned. This is completely inconsistent with the shibboleth that doubling the number of guns, especially handguns, would increase homicide rates. Geographic and demographic studies of homicide are equally inconsistent with this claim. For instance, studies trying to link gun ownership to violence rates find either no correlation or a negative one, that is, that cities and counties with high rates of gun ownership suffer *less* homicide and other violence than demographically comparable areas with a lower rate of gun ownership.⁵⁰³

No less telling are the experiences in Florida, Oregon, Pennsylvania, and other states whose laws have been amended to mandate licensure for any law-abiding, responsible applicant seeking a license to carry a concealed handgun (CCW license). If more access to guns necessarily produced more murder, the issuance of hundreds of thousands of CCW licenses in these states since the mid-1980s should generally have produced an increase in homicide. Instead, however, the homicide trends in each state have been generally lower.⁵⁰⁴ (pg.1251)

What about the possibility that, although the granting of large numbers of CCW licenses in the states increased the incidence of murder, the trend was concealed because sociocultural, economic, and other factors that are more important determinants of homicide caused an overall decline in the murder rate? This theory is undermined by the statistics from Florida where the

⁵⁰² BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FIREARMS AND CRIMES OF VIOLENCE: SELECTED FINDINGS FROM NATIONAL STATISTICAL SERIES 13, tbl. 2 (1994).

⁵⁰³ See, e.g., David J. Bordua, *Firearms Ownership and Violent Crime: A Comparison of Illinois Counties*, in THE SOCIAL ECOLOGY OF CRIME 156 (James M. Byrne & Robert J. Sampson eds., 1986); David J. Bordua & Alan L. Lizotte, *Patterns of Legal Firearms Ownership: A Situational and Cultural Analysis of Illinois Counties*, 2 L. & POL'Y Q. 147 (1979); Chris W. Eskridge, *Zero-Order Inverse Correlations Between Crimes of Violence and Hunting Licenses in the United States*, 71 SOC. & SOC. RES. 55 (1986); Gary Kleck, *The Relationship Between Gun Ownership Levels and Rates of Violence in the United States*, in FIREARMS AND VIOLENCE, *supra* note 256; Kleck & Patterson, *supra* note 476, at 249-87; Alan J. Lizotte & David J. Bordua, *Firearms Ownership for Sport and Protection: Two Divergent Models*, 45 AM. SOC. REV. 229 (1980); David McDowall, *Gun Availability and Robbery Rates: A Panel Study of Large U.S. Cities, 1974-1978*, 8 L. & POL'Y Q. 135 (1986); Douglas Murray, *Handguns, Gun Control Laws and Firearm Violence*, 23 SOC. PROBS. 81 (1975).

⁵⁰⁴ Lott & Mustard, *supra* note 460; Cramer & Kopel, *supra* note 460. We note that another study documented an increase in homicide in three Florida cities during the same period. See David McDowall et al., *Easing Concealed Firearm Laws: Effects on Homicide in Three States*, 86 J. CRIM. L. & CRIMINOLOGY 193 (1995). This does not seem to be a matter of any significance given that homicide, overall, declined across the state. In addition, the authors were unable to connect the increased homicide in the three cities to the issuance of gun carry licenses there. See Daniel D. Polsby, *Firearms Costs, Firearms Benefits and the Limits of Knowledge*, 86 J. CRIM. L. & CRIMINOLOGY 207 (1995). In any event McDowall's results from a five-city sample are refuted by the contrary results from Lott & Mustard's sample of over 3,000 counties (all in the United States).

licensing agency meticulously tracks the licensing process and its results. If the "more guns = more murder" axiom were correct, issuing licenses which have allowed approximately 186,000 Florida residents to carry a concealed handgun wherever they go should have resulted in an increase in homicide *by them*, even though other, more important, factors might have caused a decline in the overall murder rate. But the Florida data for the five years since the liberal licensure law passed show *not one* unlawful killing by any of the responsible, law-abiding persons to whom licenses have been issued.⁵⁰⁵ Again, this suggests that gun ownership by the law-abiding general citizenry is simply not a risk factor for criminal homicide.

5. *The Tragedy of Homicide Among Young African-American Urban Males*

Despite Americans arming themselves at an unprecedented rate, the murder rate has held stable or decreased for every segment of American society save one: murders committed by young African-American males in the inner cities have greatly increased since the mid-1980s.⁵⁰⁶ While the rate of murders by non-Hispanic whites in the "gun-ridden" U.S. is no greater than in many gun-banning European nations, this trend has been offset and concealed by the (pg.1252) enormously increasing murder rate among young African-American *urban* males.

Of particular relevance here is the fact that this tragic increase in homicides committed by young African-American urban males contradicts the faith that "more guns = more homicide" in two respects. First, guns are far more available to *rural* blacks than to urban blacks,⁵⁰⁷ —yet the homicide rate among young urban black men is almost 900% greater than among their rural counterparts.⁵⁰⁸ Second, the rise in the rate of murders by young African-American males corresponding to a decline in murders by whites is *inversely* correlated to the pattern of American gun ownership. As criminologist Gary Kleck notes, "[w]hites are much more likely to own guns or handguns than blacks...."⁵⁰⁹ Observing this non-correlation, two other criminologists comment that, even though violence is primarily a male phenomenon,

rates of male firearms ownership tend to be inversely correlated with violent crime rates, a curious fact if firearms stimulate aggression. It is hard to explain that where firearms are most dense, violent crime rates are lowest, and where guns are least dense violent crime rates are highest... [Moreover data show that] when used for protection firearms can seriously inhibit aggression and can provide a psychological buffer against the fear of crime.

⁵⁰⁵ We are informed by David B. Kopel that a homicide outside the state was committed by a homeless person who had a fraudulently obtained Florida carry license. One homicide among 180,000 people over a six-year period works out to approximately .10 homicides per 100,000 people annually. That is approximately one-eightieth the annual homicide rate of the nation at large during each of those years. Personal communication with David B. Kopel (Aug. 24, 1995).

⁵⁰⁶ See Lois A. Fingerhut et al., *Firearm Homicide Among Black Teenage Males in Metropolitan Counties: Comparison of Death Rates in Two Periods, 1983 Through 1985 and 1987 Through 1989*, 267 JAMA 3054 (1992); Lois A. Fingerhut et al., *Firearm and Nonfirearm Homicide Among Persons 15 Through 19 Years of Age: Differences by Level of Urbanization, United States, 1979 Through 1989*, 267 JAMA 3048 (1992) [hereinafter Fingerhut et al., *Urbanization*]; Lois A. Fingerhut & Joel C. Kleinman, *International and Interstate Comparisons of Homicides Among Young Males*, 263 JAMA 3292, 3295 (1990); Polsby, *supra* note 504.

⁵⁰⁷ KLECK, *supra* note 279, at 23 (indicating that rural black homes have guns at roughly the rate of rural white homes. This is higher than the rate of urban white homes and vastly higher than the rate of urban black homes).

⁵⁰⁸ See Lois A. Fingerhut et al., *Urbanization*, *supra* note 506, at 3049, tbl. 1.

⁵⁰⁹ KLECK, *supra* note 279, at 22.

Furthermore, the fact that national patterns show little violent crime where guns are most dense implies that guns do not elicit aggression in any meaningful way. Quite the contrary, *these findings suggest that high saturations of guns in places, or something correlated with that condition, inhibit illegal aggression.*⁵¹⁰

Thus, the catastrophic increase in young urban African-American male homicide correlates not to any radical increase in gun availability, but to other developments in ghetto areas. Many now believe that the relative absence of natural fathers, abetted in ghetto households by welfare policy, has a pernicious effect on male children.⁵¹¹ The War on Drugs has also perversely exacerbated violence among black males in at least four ways:⁵¹² (a) the (pg.1253) black market uses violence to enforce agreements and fight over turf;⁵¹³ (b) turf fights are exacerbated by imprisoning established sellers; and (c) black market sellers are routinely murdered for their money or their drugs. Finally, and generally overlooked, (d) by imprisoning massive numbers of African-American males, the War on Drugs has taken untold thousands of fathers away from their male children, thereby perpetuating the climate of violence among inner-city youth.

While we do not pretend to know all the reasons why homicide among inner-city African-American males is so common, we do know this: a preoccupation with guns has distracted many from addressing the real problems. The problem of violence among young urban black males

will not yield to simplistic, uncausal solutions. In this connection, it is useful to point out that everything that leads to gun-related violence among youths is already against the law. What is needed are not new and more stringent gun laws but rather a concerted effort to rebuild the social structure of inner cities.⁵¹⁴

In sum, anti-gun advocacy is not just irrelevant to solving these problems, it is *counterproductive*.

In this connection it is useful to contrast the data *Gun Crazy* offers to that which we have supplied. The only data *Gun Crazy* provides goes to the truism that guns can be dangerous, that is, statistics on their use in murder and other crime. From this *Gun Crazy* leaps to the assumptions: (1) that the perpetrator's having a gun caused him to commit the crime; and (2) that if guns were

⁵¹⁰ Hans Toch & Alan J. Lizotte, *Research and Policy: The Case of Gun Control*, in PSYCHOL. & SOC. POL'Y (Peter Sutfeld & Philip Tetlock eds., 1992) (emphasis added).

⁵¹¹ See, e.g., James A. Mercy & Mark Rosenberg et al., *Public Health Policy for Preventing Violence*, 12 HEALTH AFF. 7, 19-21 (1993) (suggesting that neglectful, unstable, abusive, violent family environments are "pivotal influence[s]" in turning children into violent adolescents and adults).

⁵¹² See generally, Stephen B. Duke & Albert C. Gross, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS (1993); DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENT CONTROL (Ronald Hamowy, ed. 1987); Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593 (1994) (book review).

⁵¹³ A "study of 218 homicides in New York City classified as drug-related found that twenty-one were caused by the pharmacological effect of alcohol and five by the effect of crack; the rest resulted from the turf wars, robberies, and other violence engendered by drug prohibition, just as alcohol prohibition caused violence in a previous era." KOPEL, *supra* note 285, at 347 (citing Paul J. Goldstein et al., *Drug-Related Homicide in New York: 1984 and 1988*, 38 CRIME & DELINQ. 459 (1992); Paul J. Goldstein, *Crack and Homicide in New York City, 1988: A Conceptually Based Event Analysis*, 16 CONTEMP. DRUG PROBS. 651 (1989)).

⁵¹⁴ Joseph F. Sheley et al., *Gun-Related Violence in and Around Inner-City Schools*, 146 AM. J. DISEASES CHILDREN 677, 682 (1992).

outlawed for the law-abiding, criminals would also be disarmed.⁵¹⁵ *Gun Crazy* makes no attempt to show even a correlation between gun availability and the rise of homicide among young African-American (pg.1254) urban males. *Gun Crazy* just *assumes* that premise and proceeds to heap epithets and vituperation upon gun owners, gun-rights groups, and manufacturers ("necromerchants"). No attention is paid to the crucial question: If the law cannot prevent drug dealers and their runners from continuously obtaining and selling supplies of illegal drugs, how could it prevent them from making a single purchase of a gun and a few hundred rounds of ammunition?

C. The Prohibitionist Goal of the Gun Control Movement

Gun Crazy denounces the gun lobby for "conjuring up [false] visions of powerful gun-grabbing Washington confiscators knocking down the doors of law-abiding citizens,"⁵¹⁶ and capitalizing on paranoid gun owners' "fear of Big Brother's storm troopers confiscating their weapons,"⁵¹⁷ while, so *Gun Crazy* asserts, "[v]irtually no one in the gun control movement calls for confiscation."⁵¹⁸ Who's kidding whom? This is a denial which no one familiar with the gun control movement could honestly make. Indeed, *Gun Crazy's* disclaimers are undermined by the very sources it cites.

For example, *Gun Crazy* cites an article by gun control advocate Andrew Jay McClurg⁵¹⁹ who candidly admits, based on analyses carried out by two major national gun control groups, that wholesale confiscation first of handguns and then of all guns, is indeed their goal: "the extreme views of many gun control supporters make the slippery slope argument understandable."⁵²⁰ McClurg criticizes the slippery slope argument not because it misstates what gun control groups desire, but because their goals are too unrealistic for gun owners to reasonably fear. "Despite the yearnings of many champions of gun (pg.1255) control, guns are so deeply entrenched in this country's history and culture that there is virtually no chance that they ever will be banned."⁵²¹

⁵¹⁵ See *supra* notes 444, 445, 449 and accompanying text.

⁵¹⁶ *Gun Crazy*, *supra* note 7, at 95.

⁵¹⁷ *Id.* at 89.

⁵¹⁸ *Id.* at 89 n.126. See also *id.* at 142 n.384 (deriding "'The gun lobby bogeyman of disarmament and confiscation").

⁵¹⁹ *Id.* at 83 n.108 & 137 n.353 (citing Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53 (1992)).

⁵²⁰ McClurg, *supra* note 519, at 89. On the preceding page McClurg distinguishes such arguments against anti-gun laws from slippery slope arguments in the First Amendment context that would be plainly silly:

Many Brady Bill supporters [do] want to prohibit private possession altogether. This is what differentiates the Second Amendment slippery slope argument from most other arguments [e.g., that accepting the law of libel imperils the First Amendment]. Persons who believe in a civil remedy for libel are not ultimately looking to abolish newspapers.

Id. at 88.

⁵²¹ *Id.*

Another anti-gun activist whom *Gun Crazy* repeatedly cites⁵²² is Katherine Christoffel, M.D., who asserts:

Guns are a virus that must be eradicated.... They are causing an epidemic of death by gunshot, which should be treated like any epidemic—you get rid of the virus.... Get rid of the guns, get rid of the bullets, and you get rid of the deaths.⁵²³

The article in which Christoffel's views are quoted notes that her views are widely approved by other anti-gun medical professionals and that Dr. Christoffel has founded her own national group of such gun ban advocates.⁵²⁴

Although not calling for complete prohibition, Deborah Prothrow-Stith, Dean of the Harvard School of Public Health, does call for widespread confiscation: "My own view on gun control is simple. *I hate guns and I cannot imagine why anyone would want to own one.* If I had my way, guns for sport would be registered, and all other guns," that is, guns for self-defense, "would be banned."⁵²⁵ Her prejudice against civilian self-defense represents a perspective widely shared among anti-gun advocates.

Not all anti-gun activists share Betty Friedan's belief "that *lethal violence even in self-defense only engenders more lethal violence* and that gun control should override any personal need for safety."⁵²⁶ But there can be no doubt that a crucial tenet of anti-gun advocacy over the past three decades is epitomized by the words of Gary Wills:(pg.1256)

Mutual protection should be the aim of citizens, *not individual self-protection.* Until we are willing to *outlaw the very existence* or manufacture of civilian handguns we have no right to call ourselves citizens or consider our behavior even minimally civil.⁵²⁷

In this view the individual who defends herself, or owns a firearm for defense, is seen as arrogating to herself, and encroaching on, prerogatives reserved to the state alone. In the words of Handgun

⁵²² *Gun Crazy*, *supra* note 7, at 83 n.107, 152 n.424 (citing a medical news article profiling and quoting Christoffel as an anti-gun medical activist).

⁵²³ Quoted in Janice Somerville, *Gun Control as Immunization*, AM. MED. NEWS, Jan. 3, 1994, at 9. However, as Daniel Polsby has observed: "[c]learly, firearms have at least one characteristic that distinguishes them from smallpox viruses: nobody wants to keep smallpox viruses in the nightstand drawer." Polsby, *supra* note 439, at 64.

⁵²⁴ Somerville, *supra* note 523.

⁵²⁵ DEBORAH PROTHROW-STITH, DEADLY CONSEQUENCES 198 (1991) (emphasis added). Note that by "banned" Prothrow-Stith means confiscated, as distinguished from other guns which could be kept if they were registered.

⁵²⁶ Ann Japenga, *Would I Be Safer with a Gun?*, HEALTH, Mar. 1994, at 52-54 (interview with Betty Friedan) (emphasis added to highlight that Ms. Friedan's concern is based on a moral belief at least as much as, or instead of, criminological belief). In the same interview she denounces "the trend of women buying guns [as] 'a horrifying, obscene perversion of feminism.'" *Id.*

⁵²⁷ Garry Wills, *John Lennon's War*, CHI. SUN-TIMES, Dec. 12, 1980, at 56 (emphasis added). Wills has also written: "Every civilized society must disarm its citizens against each other. Those who do not trust their own people become predators upon their own people. The sick thing is that haters of fellow Americans often think of themselves as patriots." Garry Wills, ... *Or Worldwide Gun Control?*, PHILA. INQUIRER, May 17, 1981, at 8E. We were disappointed to see that Wills's opinions on guns have apparently led him to write a one-sided and derisive critique of Second Amendment scholarship. See Wills, *supra* note 330. *But see also, To Keep and Bear Arms: An Exchange*, N.Y. REV., Nov. 16, 1995, at 61 (responses to Wills by Sanford Levinson, David Williams, Glenn Harlan Reynolds, and John Lattimer).

Control, Inc. chairperson Sarah Brady, "[T]he only reason for guns in civilian hands is for sporting purposes."⁵²⁸ According to the *Washington Post*, "[t]he need that some homeowners and shopkeepers believe they have for weapons to defend themselves [represents] the worst instincts in the human character."⁵²⁹

Representatives of the Presbyterian Church USA affirmed before Congress the Church's view that armed self-defense is morally equivalent to murder, and indistinguishable therefrom, as well as the Church's support for a federal (pg.1257) law to ban and confiscate all handguns. "The General Assembly [of the Presbyterian Church USA] has declared in the context of handgun control and in many other contexts, that it *is opposed to 'the killing of anyone, anywhere, for any reason.'*"⁵³⁰

The Presbyterian Church USA is a member of the premier anti-gun group, the National Coalition to Ban Handguns (NCBH), which was founded, and is still sponsored by, the Board of Church and Society of the United Methodist Church. That sponsorship reflects the Methodist Board's view that a woman's Christian duty is to submit to rape rather than do anything that might imperil her rapist's life. "Is the Robber My Brother?" is the question rhetorically posed in the title of an article published by the Methodist Board and written by the editor of its official publication. And the answer to that is "yes," for, though the burglary victim

or the woman accosted in the park by a rapist is [not] likely to consider the violator to be a neighbor whose safety is of immediate concern.... Criminals are members of the larger

⁵²⁸ Jackson, *Keeping the Battle Alive*, TAMPA TRIB., Oct. 21, 1993 (interview with Sarah Brady). Compare this with the following statements: "The only *legitimate* use of a handgun that I can understand is for target shooting...." *Oversight of the 1968 Gun Control Act: Hearings on Handgun Crime Control Before the Subcomm. on Juvenile Delinquency of the Senate Judiciary Comm.*, 93d Cong. 1974 (1975) (testimony of Professor Robert Replegle, M.D., organizer of a local Chicago gun control group); "For target shooting, that's ok. Get a license and go to the range. For defense of the home—that's why we have police departments." *In Step With: James Brady*, PARADE June 26, 1994, at 18 (quoting James Brady in response to the question whether gun ownership can be legitimate). See also Ramsey Clark, CRIME IN AMERICA 107 (1970) (denouncing defensive gun ownership as "anarchy, not order under law—a jungle where each relies on himself for survival," and an insult to government, for "[a] state in which a citizen needs a gun to protect himself from crime has failed to perform its first purpose.").

⁵²⁹ Editorial, *Guns and the Civilizing Process*, WASH. POST, Sept. 26, 1972, at A16. Compare this with the confiscatory advocacy of the N.Y. TIMES: "[O]ne way to discourage the gun culture is to remove the guns from the hands and shoulders of people who are not in the law enforcement business." *The Gun Culture*, N.Y. TIMES, Sept. 24, 1975 (editorial). See also *Taming the Gun Monster: How Far to Go*, L.A. TIMES, Oct. 22, 1993 (editorial) (recommending that federal law limit ordinary citizens to "ownership [only] of sporting and hunting weapons."); *Taming the Monster: The Guns Among Us*, L.A. TIMES, Dec. 10, 1993 (editorial) ("Under our plan individuals could own sporting weapons only if they had submitted to a background check and passed a firearms safety course. Other special, closely monitored exceptions could be made, such as for serious collectors.").

⁵³⁰ 1985-86 *Hearings on Legislation to Modify the 1968 Gun Control Act*, House Judiciary Comm., Subcomm. on Crime, Part I at 128 (emphasis added). Like many of the secular opponents of handgun ownership we have cited, the Presbyterian Church emphasizes that there is no objection to long (i.e., hunting) guns because they are owned for "sports." Handguns—"weapons of death"—are what the Church condemns, making no distinction between their use by criminals and their use by victims in lawful self-defense. Their reason is that, "[t]o be opposed to killing is to be opposed to the instruments that make killing possible, that are designed solely for the purposes of killing" and that, "[t]here is no other reason to own a handgun (that we have envisioned, at least) than to kill someone with it." *Id.* at 127, 128. For the similar views of the Union of American Hebrew Congregations and the General Board of Church and Society of the Methodist Church (condemning handgun ownership for self-defense as "vigilantism"), see *id.* at 121-23.

community no less than are others. As such they are our neighbors or, as Jesus put it, our brothers....⁵³¹

NCBH itself calls its position "very clear"; it seeks legislation to ban the manufacture, sale, *and possession* of all handguns, except by police, the military, licensed security guards, and pistol clubs.⁵³² NCBH has now been renamed the Coalition to Stop Gun Violence to reflect its present advocacy of banning many long guns as well as handguns.⁵³³ Handgun Control, Inc.'s (pg.1258) (HCI) ultimate goal is more sweeping, though perhaps less confiscatory (and would presumably enjoy NCBH's support as an addition to its program, but not as a substitute). HCI's goal is a federal licensing requirement to own any gun, with licensure being available only to people desiring firearms for sport; self-defense would not be an allowable ground for gun ownership.⁵³⁴ In the interim HCI seeks legislation similar to the legislation that it and NCBH successfully lobbied for in Washington, D.C., which precludes self-defense by requiring householders who own guns of any type to keep them unloaded and disassembled.

Senator Dianne Feinstein (D-CA), author of the recent ban on "assault weapon" sales, recently admitted that the only reason she does not seek the banning and confiscation of all guns is because that is not politically feasible at this time: "If it were up to me, I would tell Mr. and Mrs. America to turn them in—turn them all in," she told Lesley Stahl in an interview CBS's *60 Minutes* aired on February 24, 1995.⁵³⁵

Finally, on the same page on which *Gun Crazy* complains that "[g]un lobby leaders" have often "misrepresented the provisions of pending legislation,"⁵³⁶ *Gun Crazy* asserts that although "Senator John H. Chafee (R-RI) has called for a ban on handguns, [his bill] does not contemplate confiscation."⁵³⁷ *Gun Crazy* assigns this denial to a footnote without explaining what the Chafee bill actually requires: that the handgun owner either surrender the gun or keep it locked in a licensed handgun club or a facility under police supervision.⁵³⁸ In other words, while the Chafee bill does not

⁵³¹ Rev. Allen Brockway, *But the Bible Doesn't Mention Pistols*, ENGAGE—SOCIAL ACTION FORUM, May 1977, at 39-40. The language quoted from this issue has been published as a separate pamphlet by the METHODIST BD. OF CHURCH & SOC., *HANDGUNS IN THE UNITED STATES*. See Don B. Kates, Jr., *Gun Control: Separating Reality from Symbolism*, 20 J. CONTEMP. L. 353, 357 n.11 (1994).

⁵³² Testimony of NCBH head Michael K. Beard in Support of 8-132 before the Committee on the Judiciary, March 22, 1989 (emphasis added).

⁵³³ Deane Calhoun, *From Controversy to Prevention: Building Effective Firearm Policies*, INJ. PREVENTION NETWORK NEWSL., Winter 1989-90, at 17 (hailing the name change as indicative of NCBH's view "that guns are not just an inanimate object, but in fact are a social ill.").

⁵³⁴ Erik Eckholm, *A Little Gun Control, A Lot of Guns*, N.Y. TIMES, Aug. 15, 1993, at 4-1 (quoting Sarah Brady). For similar proposals from the L.A. TIMES, see *supra* note 529.

⁵³⁵ Don Feder, *Gun Control Delusions*, WASH. TIMES, Aug. 30, 1994 (quoting Senator Feinstein).

⁵³⁶ *Gun Crazy*, *supra* note 7, at 89 ("Gun-lobby leaders and their supporters have frequently misrepresented the provisions of pending legislation.").

⁵³⁷ *Id.* at 89 n.126 ("Although one proposal, that of Senator John H. Chafee (R-R.I.), has called for a ban on handguns, it does not contemplate confiscation.").

⁵³⁸ See S. 892, 103d Cong., §§ 942, 943 (1993) (making it "unlawful for a person to manufacture, import, export, sell, buy, transfer, receive, own, possess, transport, or use a handgun or handgun ammunition" except for those persons in the military, law enforcement, who work as security guards, or who are members of a licensed handgun club that must "maintain possession and control of the handguns used by its members."); Polsby, *supra* note 439, at 61 (under the Chafee bill "existing handguns would have

propose to confiscate the property itself, it would preclude the sole or primary use the property owner has for it to defend self, family, and home.^(pg.1259)

In sum, *Gun Crazy's* claim that "[v]irtually no one in the gun control movement calls for confiscation,"⁵³⁹ reflects either ignorance or deceit. The dominant forces in the anti-gun movement see self-defense as a moral wrong indistinguishable from criminal violence and they want to impose that belief on the American people by enacting laws to effectively preclude armed self-defense. Accusing those who take them at their word of paranoia is to add insult to injury.

CONCLUSION: SHOOTING THE MESSENGERS

It may reasonably be argued that the Second Amendment does not preclude such gun regulations as registration, licensing, background checks, prohibition of arms to the deranged, children, and people with felony or violence convictions.⁵⁴⁰ What seems no longer open to dispute is that the Amendment guarantees every law-abiding, responsible adult a constitutional *right* to choose to possess arms.

In 1989, Sanford Levinson speculated that the then-comparative paucity of writing by law professors on the Amendment might reflect "a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even winning interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation [of firearms]."⁵⁴¹ Nonetheless, Akhil Amar, William Van Alstyne, and a host of other scholars have now considered the issue. Almost unanimously, scholars have concluded that the Amendment does indeed present real hurdles to the banning of guns. If there is an intellectually viable response, it has yet to be made. Certainly the resort to character assassination, guilt by association, and the other trappings of McCarthyism instead of legal reasoning is not an intellectually viable response. It amounts to shooting the messenger because one does not like the message.

to be surrendered.").

⁵³⁹ *Gun Crazy*, *supra* note 7, at 89 n.126.

⁵⁴⁰ It is not our purpose here to analyze the constitutionality of various gun regulatory measures. For two conflicting discussions of this topic, see Kates, *supra* note 232; and Halbrook, *supra* note 260.

⁵⁴¹ Levinson, *supra* note 13, at 642.