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DON'T KNOW MUCH ABOUT HISTORY, POLITICS, OR THEORY: A COMMENT

Robert J. Spitzer*

INTRODUCTION

Bernard Harcourt's article¹ in this publication draws our attention to the oft-repeated claims made by gun control foes that an armed civilian population promotes democracy and even civil discourse.² Regarding the latter, witness, for example, the slogan that "An Armed Society is a Polite Society," an aphorism that even has its own gun-centered website.³ Yet the assignment of politeness and civility to guns in this fortune-cookie-claim contradicts the very purpose of weapons when directed at human behavior—to animate human behavior either by threat or actualization of the deaths of human beings. Guns might be used to create a democratic system (although here, too, the gun rights people usually get it wrong), but their use as political instruments, if necessary at times, contradicts the very idea of democratic governance. The unsurpassed virtue of democracy is that it substitutes ballots for bullets.

This observation about governance parallels writings on the Second Amendment that have noted similar distortions of the historical record advanced by those who defend the individual rights view of the Second Amendment. As Garry Wills concluded in his analysis of the individualists, "[b]ad history serves bad logic."⁴ Saul Cornell calls these writings "an exercise in law office history of a particularly bizarre kind."⁵ From the perspective of political science, these

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1. See Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars (A Call to Historians)*, 73 *Fordham L. Rev.* 653 (2004).

2. *Id.*

3. See Polite Society, at <http://www.polite-society.org> (last visited Sept. 13, 2004) (gun information and sale web site that posts the quote prominently, attributing it to the science fiction author Robert Heinlein); see also Philip J. Cook & Jens Ludwig, *Principles for Effective Gun Policy*, 73 *Fordham L. Rev.* 589 (2004).

4. Garry Wills, *A Necessary Evil* 221 (1999); see also Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 *Chi.-Kent L. Rev.* 349, 375 (2000).

5. Saul Cornell, *A New Paradigm for the Second Amendment*, 22 *Law & Hist. Rev.* 161, 164 (2004); see also Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *Fordham L. Rev.* 487 (2004).

individualist writings not only misuse history, but also misunderstand comparative political systems, regime formation and change, and even the nature of governance.

I. THE ROLE OF THE STATE

The first purpose of government is to establish and maintain order, a task that cannot be divorced from the use, or threatened use, of state-sanctioned force. As many political thinkers have noted, human existence before the establishment of governments was chaotic and anarchic. Writing in the seventeenth century, British political theorist Thomas Hobbes noted that life in such a state of nature was “solitary, poor, nasty, brutish, and short.”⁶ The only “law” in this environment was that of self-preservation, when one could only expect the “war” of “every man, against every man.”⁷ To stave off nightmarish anarchic conditions, people formed governments to which citizens traded some of their freedoms, including the “freedom” to kill or be killed without examination or recrimination, in exchange for the order of civil society. In such a “civil state,” according to Hobbes, “there is a power set up to constrain those that would otherwise violate their faith.”⁸ This power to constrain incorporates the state’s use of force.

Writing several decades after Hobbes, British political thinker John Locke concurred, noting that “God hath certainly appointed government to restrain the partiality and violence of men. I easily grant that civil government is the proper remedy for the inconveniences of the state of nature”⁹ That we in America largely take the value of order for granted is a testament to the remarkable and welcome stability of American life.¹⁰ Order is not the only priority for government, of course, since democratic nations value freedom and the protection of basic rights as well, and must continually strive to strike an appropriate balance between these values.¹¹ Nevertheless, order is the first purpose of government because without order there can be no freedom in society, aside from

6. Thomas Hobbes, *Leviathan* 82 (Michael Oakeshott ed., Basil Blackwell 1960) (1651).

7. *Id.* at 83. Writing in 1651, Hobbes cited the example of “many places of America” where such primitive conditions existed. *Id.* Hobbes also said that “the condition of mere nature” is “a condition of war of every man against every man.” *Id.* at 89.

8. *Id.* at 90.

9. John Locke, *Of Civil Government* 11 (Henry Regnery Co. 1955) (1689).

10. American history is of course pockmarked by civil strife, from the Whiskey Rebellion of 1794 to the 1992 Los Angeles riots following the beating of motorist Rodney King. The greatest threat to public order in American history, the Civil War, nearly destroyed America as we know it. Despite these and other such instances, however, American society has certainly been among the most ordered, despite its size, diversity, and democratic values.

11. The philosophical and practical problems of balancing order and freedom are discussed in Robert J. Spitzer et al., *Essentials of American Politics* 6-9 (2001).

the “freedom” of anarchy (the state of nature to which Hobbes and Locke referred). As political scientist Samuel Huntington once noted, “Men may, of course, have order without liberty, but they cannot have liberty without order.”¹²

The maintenance of public order by governments occurs through the formation and implementation of public policy. The close link between order and public policy is underscored by the interesting semantic fact that “policy” has the same linguistic root as “police.”¹³ Note the link between the two in this definition of public police offered by British constitutionalist William Blackstone in 1769:

[T]he due regulation and domestic order of the kingdom, whereby the inhabitants of the State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations.¹⁴

None of this analysis precludes justifiable personal use of force, such as in the case of self-defense or the questioning of government authority. Freedom is an exalted value, but it takes on the positive attributes so often ascribed to it by Americans only when tempered with order. To take a contemporary, non-American case, witness the fitful process of state-building currently underway in Iraq. In the Iraqi Provisional Constitution, adopted in March 2004, the Iraqi framers included this prohibition as Article 17: “It shall not be permitted to possess, bear, buy, or sell arms except on licensure issued in accordance with the law.”¹⁵ This strict gun control declaration contradicts the gun rights, state-building manifesto which would seek to promote, not inhibit or regulate, private gun ownership as the best way to promote democratic values and a more civil society. It is patently obvious, of course, that democratic state-building would only be frustrated by a policy that encouraged civilian arms carrying and

12. Samuel P. Huntington, *Political Order in Changing Societies* 7-8 (1968).

13. See Carl J. Friedrich, *Constitutional Government and Democracy* 91 (1968); see also Theodore J. Lowi, *The End of Liberalism* 273 (1979). According to the *Oxford English Dictionary*, the definitions of “policy” and “police” both refer to each other, and share the Latin root “politia.” See *Oxford English Dictionary* 22-25, 27-28 (2d ed. 1989). Henry C. Black defined police power as securing “generally the comfort, safety, morals, health, and prosperity of its citizens by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all privileges conferred upon him or her by the general laws.” *Black’s Law Dictionary* 1156 (6th ed. 1990). The police power, Black continues, “is the exercise of the sovereign right of a government to promote order, safety, security, health, morals and general welfare within constitutional limits and is an essential attribute of government.” *Id.* at 1156-57.

14. See 5 *Encyclopedia of the American Constitution* 2506 (Leonard W. Levy et al. eds., 2000) (quoting William Blackstone).

15. Coalition Provisional Auth., *Law of Administration of the State of Iraq for the Transitional Period* (March 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.

use. Indeed, the process of state-building has as its central tenet the establishment and maintenance of a regime in possession of the legitimacy and ability to exercise sufficient force over the nation to maintain order and execute the law. The reality of this bedrock fact is seen in daily news accounts of persistent American efforts to organize, train, and equip the fledgling Iraqi police force, and vehement opposing efforts to terrorize, disperse, and undercut that force by Iraqi insurgents. Further, one cannot help but be struck by the irony that the Bush administration, which has been guided in at least some foreign policy matters by the National Rifle Association (“NRA”),¹⁶ would nevertheless countenance the codification of strict gun control in the Iraqi Constitution.

To cite a different example of a genuinely baffling and bizarre miscomprehension of the importance of governmental order and authority, consider this analysis offered by lawyer David C. Williams in his recent book, *The Mythic Meanings of the Second Amendment*.¹⁷ As if to demonstrate that some legal writers are intent on distorting not only history but political theory, Williams introduces his book by arguing that the militia-based or collective view of the Second Amendment “rests on a Weberian myth: with the sociologist Max Weber (although usually without referring to him) it holds that one of the defining characteristics of the state is its monopoly on the legitimate use of violence.”¹⁸ Williams manages to commit a parade of errors in less than a sentence.

First, Williams never cites any Second Amendment writers who cite Weber in this connection, for the obvious reason that he assigns to these Second Amendment writers a Weberian contraption of Williams’s own construction. That these writers fail to “refer” to Weber owes, no doubt, to the fact that their writing has nothing in particular to do with Weber. Second, aside from repeating Weber’s name, Williams never consults, quotes, or cites any of Weber’s writings in his book, leaving the reader to wonder how and why Williams can lay any meaningful claim to what he dubs Weberian analysis. Third, some of the collective or militia-based writing on the Second Amendment predates Weber,¹⁹ undercutting Williams’s claim that this school of thought is “Weberian” in any sense of being derived from Weber’s writings or thought. Fourth, the views of state power he assigns to Weber predate Weber, as the discussion in this Essay demonstrates. And fifth, Williams evinces no understanding of

16. See Robert J. Spitzer, *Gun Rights for Terrorists? Gun Control and the Bush Presidency*, in *Transformed By Crisis: The Presidency of George W. Bush and American Politics* 158-60 (Jon Kraus et al. eds., 2004).

17. David C. Williams, *The Mythic Meanings of the Second Amendment* (2003).

18. *Id.* at 5.

19. See Robert J. Spitzer, *The Right to Bear Arms* 24-35, 72 (2001) [hereinafter Spitzer, *The Right to Bear Arms*]; Spitzer, *supra* note 4, at 385; see also *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1876).

how political theory has evolved on the question of state authority, power, and the “use of violence,” apropos of Hobbes, Locke, and other theorists. Yet none of this impedes Williams’s seat-of-the-pants analysis. “Weberians,” he asserts, “offer an image of a very simple world: unless one wants to accept Timothy McVeigh’s terrorism as constitutional, then one must give all power over violence to the government.”²⁰ Perhaps by assigning to Weber (whose life spanned from 1864 to 1920) alone the idea that the state has a unique claim to authority regarding the use of force, Williams hopes to minimize the theoretical formulations behind the proposition. But not only does this notion span the writings of Hobbes and Locke,²¹ it traces back to Aristotle²² and even before. Indeed, one of the most ancient, pre-Aristotelian governing principles is that “[e]very sovereign. . . has the right to punish anyone who pretends to a private revelation in order to oppose the laws.”²³

The writings of French political philosopher Jean Bodin (1530-1596) illustratively echo, and long predate, Weber’s construct. In his *Six Books on the State*, Bodin offered a detailed formulation of modern state authority, including its monopoly over the use of force. “The state is a lawful government, with sovereign power. . . . [W]e speak of the state as ‘lawful government’ in order to distinguish it from bands of robbers and pirates, with whom it can have no part, commerce, or alliance.”²⁴ Bodin continued, “Sovereignty is the absolute and perpetual power of the state, that is, the greatest power to command.”²⁵ Bodin made clear that the exercise of sovereignty is applicable in democratic as well as monarchical regimes: “While they are in authority they still cannot call themselves sovereign rulers, inasmuch as they are only custodians and keepers of sovereign power until it shall please the people or the prince to recall it”²⁶ This power of the state, according to Bodin, encompasses power over the aristocracy and the people at large, as “power to dispose of their property and persons.”²⁷

20. Williams, *supra* note 17, at 103.

21. Williams gives brief mention to these two theorists, but seems oblivious to the broader underpinnings uniting Weber, Hobbes, Locke, and other theorists. See *id.* at 123, 141, 374 n.174 (discussing Hobbes); *id.* at 29-38, 87-88, 126-27 (discussing Locke).

22. For example, see William Ebenstein, *Great Political Thinkers* (1969), who notes that Aristotle framed the question of state authority as “moral sovereignty,” reflecting his more organic view of governing in the context of Greek city-states. *Id.* at 69. By the seventeenth century, according to Ebenstein, the state was “sharply distinguished from all other organizations because it alone possesses sovereignty, or the highest authority in a politically organized community, and the legal monopoly of enforcing such authority in its territory.” *Id.* at 68-69.

23. Laurence Berns, *Thomas Hobbes*, in *History of Political Philosophy* 390 (Leo Strauss & Joseph Cropsey eds., 1981).

24. Ebenstein, *supra* note 22, at 354.

25. *Id.*

26. *Id.*

27. *Id.* at 355.

Let me offer this brief effort to prop up Williams's otherwise hapless foray into political theory. It is true that Weber wrote about the use of force (although, apparently unbeknownst to Williams, Weber was hardly the first, as the writings of Bodin and others illustrate): "The claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and of continuous organization."²⁸ Yet this does not mean that citizens are stripped of any recourse to justifiable violence, as Weber also noted that "the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it."²⁹ Thus, for example, a citizen acting for personal self-defense acts as an individual, but is nevertheless accountable to the state's judgment under the law. Weber elsewhere clarifies the antecedents and consequences of the state monopoly over the use of force. In this writing, two features emerge: that Weber's analysis is empirical (an analysis of what is true), and that it represents his own formulation arising from past theorists. "Every state is founded on force,"³⁰ Weber noted. "If no social institutions existed which knew the use of violence, then the concept of 'state' would be eliminated, and a condition would emerge that could be designated as 'anarchy' . . ."³¹ Weber here is referencing the Hobbesian state of nature, and making the empirical observation that the very existence of the modern nation state rests upon state-exercised force.

Referencing state authority to exercise violence or force, under circumstances established by the laws of the state and as the fountainhead of politics, Weber continues: "The state is considered the sole source of the 'right' to use violence. Hence, 'politics' for us means striving to share power or striving to influence the distribution of power, either among states or among groups within a state."³² It is because of this state monopoly that non violent politics can occur. Were it not for the state's monopoly, politics would quickly devolve into violence—precisely what occurs when regimes in the modern world are toppled by violence without stable regime replacement or succession. The very reasons that American troops continue to occupy Iraq more than a year after toppling the Hussein regime, and that so much effort is being exerted to establish an indigenous police force (and why these forces are the focus of rebel attacks and disruption), are to avoid the horrors of a lawless society where no

28. Max Weber, *The Theory of Social and Economic Organization* 156 (Talcott Parsons ed., Oxford Univ. Press 1947).

29. *Id.* Weber does not cite the example of personal self-defense, but does give a similar example: that of a parent disciplining a child. Weber was writing in the nineteenth century, when familial corporal punishment was more widely accepted. *Id.*

30. Max Weber, *From Max Weber: Essays in Sociology* 78 (H.H. Gerth & C. Wright Mills eds., 1946).

31. *Id.*

32. *Id.*

regime is capable of exercising a monopoly over the use of force, and to pave the way for a regime that is able to exercise such authority with, one hopes, an appropriate counterbalancing of individual rights and democratic structures. America has already delivered freedom to Iraq; but the American military effort there will be judged a success or failure by its ability to establish a stable, non-tyrannical order.

II. WHAT THE NAZI CASE TELLS US

To build on Harcourt's analysis of the case of Nazi Germany, consider an article published by NRA lead lawyer Stephen P. Halbrook, in which he attempts to show that gun control laws enacted first during the post-World War I Weimar Republic, and then strengthened during the Nazi regime in the 1930s, were key to Nazi consolidation of power and the regime's effort to disarm, terrorize, and kill political opponents, including Jews.³³ In his article, Halbrook consulted primary sources from the 1920s and 1930s to chronicle German gun control legislation and efforts to harass Jews using legal gun confiscation as the pretext. As Halbrook said, "how might the course of history been different had Germany . . . been a country where large numbers of citizens owned firearms without intrusive legal restrictions and where the right to keep and bear arms was a constitutional guarantee?"³⁴ How, indeed.

Assuming that Halbrook offered an accurate historical picture of German gun legislation and Nazi tactics, he nevertheless fails to accurately portray the Weimar era and the reasons for Hitler's ascent. In fact, even the most casual examination of the Weimar early Nazi era leads to two contrary conclusions. First, that guns and gun control were a very minor component of Nazi ascension. Second, to the extent that gun possession and use played any role, it was the extra-legal use of violence (and Nazi gun possession and use, to the limited extent it existed) by Hitler's paramilitary gang, the S.A., which fought pitched battles in the streets against Communists and Social Democrats. In other words, if gun control facilitated the rise of Hitler at all, it was because of Germany's weak Weimar regime, which was unable to suppress the pitched battles, and other bullying political tactics, between warring factions in German streets. Once Hitler won election in 1932 and consolidated power, he surely did take steps to confiscate guns as part of the larger campaign to disarm and render powerless opponents of the state, but by this point the intra-German battle against Hitler had been lost.

That Halbrook missed the salient characteristics of this era is clear from two glaring omissions: the failure to cite, with a handful of

33. Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 *Ariz. J. Int'l & Comp. L.* 483 (2000).

34. *Id.* at 530.

exceptions, any of the standard secondary historical and political literature on the era,³⁵ and the failure to examine in any detail Hitler's rise to power culminating in his election as chancellor. Hitler's ascension can be generally attributed to at least three key facts: the popularity of his movement in the context of Germany's defeat and humiliation following World War I, his brilliance as a propagandist and orator, and Germany's dire economic conditions especially in the early 1930s. Hitler's S.A. was an effective terrorist force that wreaked violence and intimidation against other political factions, in part because it included significant numbers of World War I veterans who were well-trained and experienced in military tactics and discipline, and who were also allowed to keep their military weaponry at the end of the war.³⁶

Halbrook wanted to argue that strict gun laws facilitate, if not cause, authoritarian regimes, and therefore to conclude that nations with few gun laws and strong gun rights are more likely to be breeding grounds for democracy. The problem with his analysis was that actual cases of nation-building and regime change, including but not limited to Germany, if anything support the opposite proposition.

III. GUN CONTROL: THE LONG MARCH BACKWARD

In a very different, if similarly illuminating way, Kristin Goss's analysis of the gun control movement³⁷ also directs our attention to the disparity between political imagery and political reality as it has played out in the last five decades. According to Goss, the gun control movement's policy approach in the 1960s and 1970s—to seek a “rational national” solution to gun control—yielded steady political reversal. Over time, control strategists came to appreciate the value of political incrementalism after finding ambitious national policy restrictions rebuffed, and after suffering political rebukes by gun rights groups that successfully painted their opponents as neo-fascist “gun-grabbers.”

The irony of the arc of the gun control movement is that the trend from a comprehensive, policy-rational approach in the 1960s-1970s to a much narrower, incremental approach since the 1980s (epitomized by the control side's two greatest recent political victories—the Brady Law of 1993 and the Assault Weapons Ban of 1994), is that this policy

35. Out of 290 footnotes, Halbrook cited barely a dozen secondary sources, an especially alarming fact given that he is neither a scholar nor expert on 1920s-1930s Germany. *See generally id.*

36. Some standard works on the subject (none of which is cited by Halbrook) include: Michael Burleigh, *The Third Reich: A New History* (2000); Erich Eyck, *A History of the Weimar Republic* (1970); Rudolph Heberle, *From Democracy to Nazism* (Grosset & Dunlap 1970); Detlev J.K. Peukert, *The Weimar Republic* (1992).

37. *See* Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 *Fordham L. Rev.* 681 (2004).

arc began much earlier. Indeed, an examination of America in the 1920s shows that the national gun control debate of that time was not only less polemical, but was more far-reaching, and from a gun rights perspective, extreme, than that of recent decades.

While it may seem strange today, there was much national discussion and debate in the 1920s over the enactment of gun laws that, by contemporary standards, would be considered very strict. The gun control debate of the 1920s was brought on mostly by growing public dismay at the rising toll of handgun-related deaths and "mayhem" (witnessed especially in urban areas), dating back to the late 1800s, and by the rise of gangster-related violence witnessed after alcohol prohibition took effect in 1919. Chief among proposed gun policy reforms was licensing of gun owners, strict regulation or outlawing of more powerful weapons, such as the Tommy gun, and the outright banning of pistols. This latter proposal is especially interesting because it represents the most extreme and dramatic proposed gun regulation raised in the public forum from the 1920s to the present. Numerous books, articles, and countless editorials in the 1920s discussed the many facets of a ban on pistols and other gun control measures.³⁸ For example, an entire book of essays and arguments on the virtues and problems of a pistol ban was published in 1926.³⁹ This book consists of a detailed summary of the arguments on both sides, followed by a bibliography of over ninety articles, mostly from newspapers and magazines, and eleven articles reprinted in full. The book begins with a resolution offered in typical forensic debate format: "That the manufacture, sale, importation, transportation, and possession of pistols and of cartridges to fit them should be prohibited except as needed for army, navy, police, and other official purposes."⁴⁰ This proposition had already won the support of prosecutors, police chiefs, judges, many lawmakers around the country, and the American Bar Association through its Special Committee on Law Enforcement.⁴¹

An even more startling fact of the gun debate in the 1920s was the active and affirmative role played by gun groups. A leading and pioneering force in the authorship of model uniform firearms legislation was the United States Revolver Association, "a non-commercial organization of amateur experts in the use of revolvers."⁴² While it worked to insure that responsible gun owners could continue to obtain access to firearms, including pistols, it also supported tough gun regulations to keep guns out of the wrong hands. In 1923 alone, California, North Dakota, and New Hampshire all adopted firearms

38. Frederick L. Hoffman, *The Homicide Problem* (1925).

39. *Outlawing the Pistol* (Lamar T. Beman, ed. 1926).

40. *Id.* at 7.

41. *See generally id.*

42. Charles V. Imlay, *The Uniform Firearms Act*, 12 A.B.A. 767, 767 (1926).

legislation copied from the Revolver Association's recommendations.⁴³

Even though strict pistol regulations were widely discussed and debated in the press, state capitals, and Congress in the 1920s, the federal government failed to act except for a 1927 law that barred the sale of handguns to private individuals through the mail. This law passed muster in the pre-New Deal era in part because its advocates argued that the measure supported, rather than eroded, state sovereignty. More far-reaching efforts to regulate handguns, including a proposal to regulate interstate handgun sales, died in congressional committee. The failure of these more ambitious efforts was attributable in large measure to opposition by President Calvin Coolidge, the general belief of the time that the federal government should be little involved in policy matters considered to be the prerogative of the states, and the related belief that state action was the most appropriate venue for policy change.⁴⁴

This state-centered view of federalism underwent seismic change in the depths of the Great Depression and as a consequence of Franklin D. Roosevelt's New Deal in the 1930s, when the national government assumed sweeping new powers and responsibilities formerly left to the states or to private individuals. Some state governments responded with tougher laws in the 1920s, but even then policymakers realized that sporadic state responses were likely to be ineffective without a uniform national standard. Even so, the range of national policy debate was still markedly broader in the 1930s than in subsequent decades. For example, Roosevelt's first attorney general, Homer Cummings, said in a 1935 speech: "[N]or do I believe that any honest citizen should object to having all classes of lethal weapons placed under registration."⁴⁵ Two years later, he said: "Show me the man who does not want his gun registered and I will show you a man who should not have a gun."⁴⁶ Cummings's successor as attorney general, Robert Jackson, recommended to Congress in 1940 that all firearms be registered, that all weapons transfers be recorded, and that each transfer be taxed.⁴⁷

Whether one agrees or disagrees with these proposals, most would agree that no attorney general in the modern era, of either political party, would dare to venture such opinions as part of the public debate on guns in America. If a healthy public policy debate on any policy subject is defined by its breadth, then this may be taken as additional evidence of the stunted nature of the current gun policy debate in America.

43. Spitzer, *The Right to Bear Arms*, *supra* note 19, at 79.

44. See Robert J. Spitzer, *The Politics of Gun Control* 110-11 (3d ed. 2004).

45. Selected Papers of Homer Cummings 82 (Carl Brent Swisher ed., 1939).

46. *Id.* at 89.

47. See *A 1940 Proposal: Register Firearms*, *N.Y. Times*, Apr. 11, 1989, at A31.