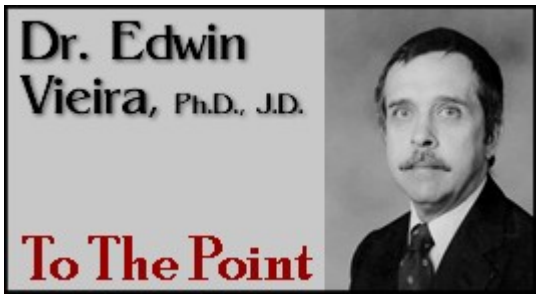
"THE MILITIA OF THE SEVERAL STATES" GUARANTEE THE RIGHT TO KEEP AND BEAR ARMS



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Preface

Some American pundits have recommended compulsory military service for all young adults. In "the Militia of the several States" the Constitution already provides for compulsory service far less dangerous, far more comprehensive, and far more promotive of true American values than what the advocates of some new "national commitment" propose.

I have released an exhaustive study of the "Militia of the several States" and their role in constitutional governance within the United States. I have titled the work *The Sword and Sovereignty,* and made it available in inexpensive CD-ROM format at , Also, see my article about revitalization of the Militia at .

"The Militia of the several States" are obviously less dangerous than a "standing army", because they are no part of a "standing army", but instead the constitutional counterweights to it or any other mechanism of oppression aspiring usurpers and tyrants might attempt to employ. *See, e.g., The Federalist No. 46* (James Madison).

"The Militia of the several States" are obviously more useful—as well as more lawful—than some jury-rigged "national commitment".

First, "the Militia of the several States" are based upon the complete, permanent, and competent organization of the entire community, starting with enrollment at sixteen years of age and continuing for the full active life of every eligible citizen. See, e.g., Chapters 35 and 36 in *The Sword and Sovereignty*.

Second, "the Militia of the several States" are capable of serving myriad purposes—from military, *para*-military, police, and emergency-response functions, to the suppression of political corruption and incompetence, the supervision of honest elections, the establishment and maintenance of a sound monetary system, and on and on, the limits of their application being only one's imagination as to what may be needed for community self-defense and other forms of preparedness which fall within the broad

parameters of “the security of a free State”. See, e.g., Chapters 41 and 42 in *The Sword and Sovereignty*.

Third, participation in “the Militia of the several States” would begin with mandatory premilitia training in middle schools for students from about thirteen years of age, in order to prepare them to enter the Militia at sixteen. They would be taught not only about the Militia’s origins, organization, and operations, but also (and of greater consequence) about the “necessary” rôle of “well regulated Militia” in providing “the security of a free State”. Exposed to in-depth expositions of the Declaration of Independence, the Constitution, and a great deal more from America’s legal and historical heritage, students would be infused with, and become enthusiastic supporters of, the principles and practices of patriotism, social unity, and civic duty necessary to maintain “a Republican Form of Government” against all enemies, foreign and especially domestic. This education in Americanism would continue with ever-more-comprehensive courses in secondary schools and colleges, as part of the students’ on-going Militia duty. How such training would inoculate American youth against the socially destructive virus of cultural Marxism should be self-evident.

Fourth, preparation for and actual service in “the Militia of the several States” would take place primarily at the Local and State levels—with, of course, proper consideration being given to the authority and responsibility of the Militia to be called forth for employment in the service of the United States, as the Constitution provides in Article I, Section 8, Clause 15 and 16, and Article II, Section 2, Clause 1. This would put into practice true federalism “from the bottom up” through Local communities organized in the Militia, not rigid centralization “from the top down” effected through the Armed Forces or some civilian bureaucracy lodged in the District of Columbia.

Fifth, although some species of compulsory “national commitment” in Ameri-Crops (or its equivalent) would constitute “involuntary servitude”, service in “the Militia of the several States” would not, because it rests on a civic duty recognized in American law throughout pre-constitutional times, under the Articles of Confederation, and by the Constitution and laws of the

several States both before and after ratification of the Thirteenth Amendment. Certainly, the Thirteenth Amendment did not repeal the Second Amendment or Article I, Section 8, Clauses 15 and 16, and Article II, Section 2, Clause 1 of the Constitution. And because "well regulated Militia" are "necessary to the security of a free State", service in such Militia cannot rationally be impugned as "involuntary servitude", even though such service is compulsory. Otherwise, the no less compulsory service in the petit juries for which the Constitution provides in Article III, Section 2, Clause 3 and the Sixth Amendment would also fall afoul of the Thirteenth Amendment, which is a preposterous contention. The apparent reasons some deluded souls today condemn the Militia, but not petit juries, as examples of "involuntary servitude" are that these people: (i) are familiar with juries, but unfamiliar with the Militia, and (ii) fail to take into account that, although the Constitution nowhere even intimates that juries are "necessary to the security of a free State", it does so declare with respect to the Militia.

I hope you enjoy and take hope and inspiration from the following discussion which explains the principles underlying the fact that ONLY the "Militia of the Several States" can possibly enforce the Amendment and other rights that our Constitution guarantees.

Edwin Vieira, Jr., Ph.D., J.D.

1. Introduction – you only *think* you know the 2nd Amendment

One cannot hold to a fanciful, romantic, or even partially erroneous interpretation of the Constitution and nevertheless expect to be able to use the Constitution effectively to protect his rights. For his opponents will inevitably expose the flaws in his position and exploit them against him. Nowhere is this more true than with respect to the right of the people to keep and bear arms.

Most defenders of that right begin and end with the Second Amendment: "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." Inasmuch as the Second Amendment does say that "the right of the people to keep and bear Arms, shall not be infringed", this reliance is not illogical. Less explicable, though, is why so many who advocate that right under color of that part of the Second Amendment nonetheless exclude altogether from their consideration the preceding companion language, "[a] well regulated Militia, being necessary to the security of a free State". Why rely on only a part, but not the whole?

Often, the reason advanced follows these lines:

Even if the right to keep and bear arms is something that will support "[a] well regulated Militia", it is not necessarily the same thing as, or limited to, or even connected with "[a] well regulated Militia". Otherwise, the Second Amendment would simply say that "a well regulated Militia shall not be prohibited", or that "the right of the people to form a well regulated Militia shall not be infringed", or even that "the right of each State to form a well regulated Militia shall not be abridged". Therefore, the right to keep and bear arms can (and should) be defined, established, guaranteed, and protected separate from considerations of "a well regulated Militia".

a. Why we have the duty and right to keep and bear arms

One must wonder, however, why people today believe that such an argument can be valid, when obviously the Founding Fathers--who themselves explicitly conjoined the phrases "[a] well regulated Militia, being necessary to the security of a free State" and "the right of the people to keep and bear Arms, shall not be infringed" in the Second Amendment--subscribed to no such theory of separation in thought, nor consequentially in action, either. Certainly, "[i]t cannot be presumed, that any clause in the constitution is intended to be without effect".[1]

The Founding Fathers, of course, were not writing on a clean slate. All of pre-constitutional American history as well confirms this plain linguistic evidence. From the settling of the first Colonies in the mid-1600s, "the right of the people to keep and bear Arms" was everywhere and always coincident with a duty of the people, as individuals, to keep and bear arms for service (actual or potential) in their Colonial and then State Militia. Indeed, it is impossible to read the dozens of Colonial and State Militia Acts of the pre-constitutional period--in basic form and content strikingly similar to one another, from New Hampshire in the North to Georgia in the South--without concluding that the right and the duty to keep and bear arms were then--and, absent amendment of the Constitution, remain today--two sides of the selfsame coin. Nowhere will a researcher find a body of Colonial or early State laws explicitly recognizing, protecting, and even enabling the right of individuals to keep and bear arms outside of the context of the duty of each individual to keep and bear arms.

Therefore, anyone conversant with this history—which forms the primary legal basis for "the right of the people to keep and bear Arms"--must question the practicality, and worry about the possible pitfalls, of the theory that reliance solely upon the second phrase of the Second Amendment can secure that right. "'In expounding the Constitution of the United States, every word must have its due

1 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). See also *Myers v. United States*, 272 U.S. 52, 151-52 (1926); *Knowlton v. Moore*, 178 U.S. 41, 87 (1900); *Blake v. McClung*, 172 U.S. 239, 260-61 (1898); *Hurtado v. California*, 110 U.S. 516, 534 (1884).

force and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. * * * Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.'"[2] That being so, one hoping to rely on the Second Amendment dissects it at his peril.

b. The Constitution confers no power to restrict arms possession

Moreover, under present conditions, one who hopes to secure "the right of the people to keep and bear Arms" relies exclusively on the Second Amendment itself at his peril. In *The Federalist* No. 84, Alexander Hamilton warned that all bills of rights were not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. * * * Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? * * * [S]uch a provision * * * would furnish, to men disposed to usurp, a plausible pretense for claiming that power. * * * This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.

Howsoever Hamilton himself may be justly criticized as an advocate of too powerful a central government and of too many "constructive powers", on this point he has proven all too prescient. "Why", one may ask with him, "should it be said that the [right of the people to keep and bear arms] shall not be [infringed], when no power is given by which restrictions may be imposed? * * * [S]uch a provision * * * would furnish, to men disposed to usurp, a plausible pretense for claiming that power." And so Hamilton's prediction has become America's reality--with "men disposed to usurp" today using the very existence of the Second Amendment as a "handle[ ]" and "a plausible pretense for claiming th[e] power" to do precisely what the Amendment prohibits.

2 *Williams v. United States*, 289 U.S. 553, 572-73 (1933).

2. Specious arguments against the right to keep and bear arms

But was Hamilton correct that "no power is given [in the original Constitution] by which restrictions may be imposed"? Everyone who pays attention to the issue of "gun control" is familiar with the "gun controllers'" contentions that:

1. If the Second Amendment did not exist, Congress and the States would enjoy plenary power to ban all private possession of firearms--Congress, through the powers "[t]o lay and collect Taxes" and "[t]o regulate Commerce", which form the jurisdictional predicates for all modern "gun control" emanating from the General Government. Article I, Section 8, Clauses 2 and 3. And,
2. Even though the Second Amendment does exist, it confines the powers of Congress and the States in that particular only to the limited degree the courts (that is, the General Government and the States themselves) permit.

a. Who needs really powerful weapons?

Everyone, too, has heard the argument that "the right of the people to keep and bear Arms" does not protect the private, personal possession of suitcase nuclear weapons, or anti-aircraft missiles, or heavy artillery--and that if Congress and the States may "regulate" to the point of absolute prohibition the private possession of such "Arms" as these, then they may also "regulate" to the point of absolute prohibition (or licensing, or registration) the private possession of any other "Arms", the sole question in every case being whether some judge will deem such a "regulation" to be "reasonable". (Of course, this line of reasoning is hopelessly illogical. Just because "the right of the people to keep and bear Arms" might not include certain things that can be called "Arms" does not mean that it does not extend to the very types of "Arms" to which history proves the Second Amendment refers, or that it could ever be *constitutionally* "reasonable" to do precisely what the Amendment prohibits. But, as Emerson would have agreed, where the spoils of usurpation and tyranny are at stake, "a foolish consistency is the hobgoblin of little minds".)

b. Who needs assault and sniper rifles?

From arguments such as these--coupled with the imprudent concession by many supporters of "the right of the people to keep and bear Arms" that that right need not necessarily be construed in relation to or in light of what constituted "[a] well regulated Militia" in American experience--arises the "gun controllers'" latest all-purpose theory that, at the most, the Second Amendment protects the private possession of only some innocuous "sporting" "Arms", but not of any inherently dangerous military "Arms", such as so-called "assault rifles", .50 BMG caliber rifles, "sniper rifles" of all calibers (that is, very accurate rifles, typically with optical sights), and so on. This theory exemplifies the old adage, "to kill a dog you must first call him mad". And it presupposes that construction of the Constitution may be reduced to puerile "name calling"--or at least that most Americans are so juvenile as to accept such a procedure. Yet, notwithstanding (or is it perhaps because of?) that fatal logical demerit, this jurisprudence of nasty names enjoys remarkable popularity among today's politicians, judges, and trial lawyers.

c. Frightening terminology to make guns seem more dangerous

The epithets that pass for legal reasoning these days are all too familiar--such as "gangster weapons", "Saturday night special" (a bad name with an even worse racist background[3]), "concealable handgun", "sawed-off shotgun" (essentially, a shotgun plus a hacksaw), "cop-killer bullet" (and soon "cop-killer weapons", because a criminal can employ any firearm to kill a policemen), ad nauseam. Most elastic and therefore dangerous, perhaps, is "weapon of choice for criminals"--because America's Colonial Militiamen were themselves all "criminals" under British law, as would be any modern Militiamen fighting usurpers and tyrants, if judged according to the usurpers' and tyrants' "laws"! Thus, under this reasoning-by-labels, notwithstanding the Second Amendment Americans could be denied "the right * * * to keep and bear Arms"

3 See Kenneth V.F. Blanchard, Black Man with a Gun: A Responsible Gun Ownership Manual for African Americans (Baltimore, Maryland: American Liberty Press, 2000), chapter 3.

to defend even "the security of a free State", if their possession of "Arms" threatened the usurpers and tyrants intent on destroying that "security", and the usurpers and tyrants enacted "laws" banning such possession! This last example emphasizes that the "gun controllers'" ultimate goal is to demonize not just certain specific adjectives, but the general nouns: "weapon", "rifle", "handgun", "shotgun", "bullet", and so on--that is, ANY AND EVERY firearm and type of ammunition--as the excuse for the utter elimination of them all from private possession, and with that the exposure of common Americans to whatever usurpation and tyranny surely will follow.

d. The insanity of having gun-free zones

Where "gun controllers" cannot prohibit the private possession of firearms altogether by smearing them with bad names, they work to proscribe possession in certain places by playing on the feel-good modifier "gun free"--as in "gun-free school", "gun-free airport", "gun-free streets", or simply "gun-free zone". If generalized (which is the "gun controllers'" objective), this tactic would gradually prohibit the private possession of firearms except within one's own home--and probably not allow it even there, given that slogans such as "gun-free home" or "gun-free family" doubtlessly will appeal strongly to those people who pay attention to sounds rather than substance.

One can hope that even the dullest American will recognize why, in the real world, where actions have consequences and effects follow from causes, any "gun-free zone" is actually a "self-defense prohibited zone" and a "free-fire zone for criminals and psychopaths", *advertised and guaranteed as such to the predators under color of law*. It amounts to locking the visitors at the zoo inside the cages with hungry lions and tigers, jackals and hyenas, at feeding time. In short, *it is politically mandated and imposed victimization of innocent citizens, through public officials' intentional aiding and abetting of criminal activities*. (Another egregious case of contemporary politicians' penchant for using the law to break the law.)

3. Crucial importance of modern arms in the hands of citizens

As commonsensical as this insight is, though, it would be unnecessary if many advocates of "the right of the people to keep and bear Arms" did not concede that the Second Amendment can or even should be construed without reference to "[a] well regulated Militia", and therefore without reference to the actual history and principles of the pre-constitutional American Militia. For, under all of the pre-constitutional Militia Acts, individuals kept the latest military firearms, ammunition, and accoutrements of their day in their own homes, in their private possession, at all times. No public official or "gun-control" group would ever have dared to propose anything as ridiculous as a ban on "assault weapons" or "sniper rifles", when the muskets and rifles the laws required individuals to possess were the premier "assault weapons" and "sniper rifles" of that era. And no Militia Act ever created any "zone" where people who were required to possess arms could not go about armed. To the contrary, in the days of greatest danger Militia Acts specifically designated even such places as town meetings and houses of worship to which individuals were required to bring their firearms in order to provide security for the community[4]--a practice which, if followed in today's governmental schools (the most extensive and indefensible of America's "gun-free zones"), probably could have stopped in their tracks the deplorable shooting rampages of recent years.

Thus, no free American needs any special reason, excuse, license, or permission to possess firearms or to go armed at home or in most public or private places, because these are not only constitutional rights, but also constitutional duties.[5] The

4 See, e.g., By the Body Politicke in the Ile of Aqethnec, Inhabiting this Present, 25 of 9: month. 1639, in Records of the Colony of Rhode Island and Providence Plantations in New England, 1636 to 1792 (J.R. Bartlett editor, 10 vols., 1856-1865), Volume 1, at 94; At a Generall Towne Meeting at Portsmouth, 1st of March, 1643, in ibid. at 79; ACT LVI, A Grand Assembly Holden at James City the 21st of ffebruary 1631-32, in The Statutes at Large; Being a Collection of all the Laws of Virginia from the First Session of the Legislature, in the year 1619 (W.W. Hening, 13 vols., 1819-1823), Volume 1, at 174; ACT XLI, At a Grand Assemblie Holden at James City the Second Day of March 1642-3, in ibid. at 263.

5 The limiting adjective "most" is necessary, because some exceptions are conceivable: for example, when a citizen visits a prisoner in a public jail; or when a private owner requests

Constitution is every American's reason, license, *and requirement* to be armed. And therefore the notions that whole classes of firearms suitable for Militia service can be proscribed by giving them bad names, or that huge geographical zones can be carved out in which individuals can be prohibited from exercising and performing their constitutional rights and especially duties, dissolve in the acid of their own absurdity.

a. “Compelling government interest” – the ruse and the reality

Now, no one can deny that proponents of the Second Amendment have done yeoman service in both courts and legislatures, defending and often even advancing "the right of the people to keep and bear Arms"--such as through legislation in many States that expands the right of private citizens to carry concealed handguns in public. Nonetheless, in contemporary judicial practice the Second Amendment constitutes something of a weak reed on which to lean while opposing prohibitions on the private possession of "bad-name guns", or the establishment of feel-good "gun-free zones". Every lawyer who has engaged in constitutional litigation knows that judges often allow the General Government and the States to abridge, infringe, violate, or otherwise set aside even rights the Supreme Court considers "fundamental" (including the freedoms of speech and of the press), if government lawyers can satisfy the judges that there is some so-called "compelling interest" for doing so, and the means being employed are supposedly "least restrictive" of the right at issue.

This "compelling governmental interest test" (or "balancing test", as the courts often style it) is hopelessly incoherent, as Justice Hugo Black, dissenting, proved in the early decision in *Konigsberg v. State Bar of California*.[6] An even more fundamental point than Black made in that case, though, is that any government's most "compelling" interest is to protect its citizens in the enjoyment of their lives, liberties, and property. Every citizen "owes [the government] allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal

that his guests not bring firearms onto his property.
6 *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance."[7] Absent protection from the government, no citizens owe allegiance to it; but absent citizens' owing allegiance to it, there can be no "government" at all, rightly understood, because a "government" without loyal citizens is a contradiction in terms. As the Declaration of Independence asserted in its indictment of King George III, "[h]e has abdicated Government here, by declaring us out of his Protection and waging War against us." So, how can there possibly ever be a more "compelling interest" that justifies abridging the government's most "compelling interest", upon the achievement of which its very existence and legitimacy depend?

Notwithstanding the self-contradictory nature of the "compelling governmental interest test", the courts now routinely employ it. And inasmuch as they apply it even to the First Amendment--the constitutional provision most beloved by the legal *intelligentsia*, because it offers them the greatest range of opportunities for subverting, debasing, and generally corrupting America's culture--judges will certainly enforce it with even more gusto against the Second Amendment, which the legal *intelligentsia* despise, fear, and desire to destroy. Moreover, a "compelling government interest" and the "least-restrictive means" to achieve it are matters that judges themselves will decide, whilst recognizing no requirement for their decisions to rest on actual evidence, historical facts, objective standards, or even common sense.

For example, assume that Congress enacts a purported statute which bans the transportation, receipt, sale, barter, gift, transfer, or possession in interstate commerce of all handguns by private individuals. "Surely a clear-cut violation of the Second Amendment!" you say. Not so, as any $500-an-hour "gun-control" shyster attorney can easily demonstrate in the contemporary kangaroo courts:

- Criminals use "concealable handguns" to commit violent crimes.

7 *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 165-66 (1875). Accord, *Luria v. United States*, 231 U.S. 9, 12 (1913).

- The government has a "compelling interest" in reducing the incidence of all crimes, including those committed with "concealable handguns".
- Because all handguns are more or less "concealable", all handguns are "concealable handguns".
- Criminals obtain handguns in the markets, white or black, which operate through or affect interstate commerce.
- If all these markets were absolutely denuded of handguns, criminals could not obtain them, and then could not use them to commit crimes.
- If interstate commerce were absolutely denuded of handguns, there would be none in the markets.
- The only way to remove all handguns from interstate commerce is to prohibit them absolutely.
- Therefore, the "least-restrictive means" to serve the "compelling interest" is to outlaw transportation, receipt, et cetera of all handguns in interstate commerce. And,
- Inasmuch as the Second Amendment protects only the right of common individuals to possess "sporting" firearms (the Amendment's "well regulated Militia" phrase being irrelevant), the government's "compelling interest" in banning all firearms outweighs any individual's personal interest in possessing any firearm, because the suppression of crime is undoubtedly more important than the pursuit of a mere hobby. Q.E.D.

Thus the Second Amendment is rendered (or proves itself) impotent.

Now, no true constitutionalist would ever admit that the foregoing "gun control" argument is even cogent, let alone unanswerable. To the contrary, properly contested it, and the "balancing test" on which it rests, are easily demolished. Nonetheless, this little mental exercise demonstrates that as soon as one accepts the propositions that (i) the only or best protection for "the right of the people to keep and bear Arms" comes from those words in the Second Amendment, coupled solely with the further phrase "shall not be infringed", (ii) the "Arms" to which the

Amendment refers have no necessary relation to "[a] well regulated Militia", and (iii) the Amendment's prohibition on any "infringe[ment]" of "the right of the people to keep and bear Arms" is always subject to the Judiciary's crackbrained "compelling governmental interest test", then the path to destruction of that right is straight downhill.

b. People ignore gun laws when Government fails to protect them

For a somewhat different example, assume that Congress enacts a purported statute which bans the private possession of all firearms, and requires them to be surrendered to the BATFE[8] for immediate destruction. On its face, such a statute is legally psychotic: On the one hand, to require individuals voluntarily to surrender their firearms to a governmental agency is to demand that they demonstrate their allegiance to the government by such an act. Yet, on the other hand, to disarm those individuals is to deny them the means of self-defense and self-preservation both from common criminals and (more importantly) from usurpers and tyrants. Self-defense is the only recourse left to citizens from common criminals when the police are not on the scene (which is most of the time), and especially when usurpers and tyrants control the police and employ them to enforce their usurpation and tyranny (which in that event is all of the time). A true "government" is obliged, as a condition of its legitimacy and authority, to provide its citizens with protection under all circumstances--which requires it to empower, enable, or at least allow those citizens to possess and use efficacious means for self-defense when it cannot protect them directly, which is the case from time to time when common criminals or psychopaths strike unexpectedly, or at all times when society finds itself ground down under the iron heels of sociopathic usurpers and tyrants. For public officials affirmatively and intentionally to make impossible self-protection by the citizens, by requiring them to surrender their firearms and render themselves utterly defenseless in the face of deadly aggression, puts an end to the citizens' "reciprocal obligation[ ]" of allegiance to the government. But if that allegiance is nonetheless forced by, say,

8 Bureau of Alcohol, Tobacco, Firearms, and Explosives

requiring citizens to suffer in silence house to house searches for and seizures of firearms, under color of law, what other than tyranny has been established? A government that refuses protection to its citizens, but instead exposes them to destruction, cannot demand their allegiance; and a government that demands their allegiance without offering them protection--let alone while prohibiting them from protecting themselves--is no government at all, only a criminal conspiracy among the public officials constituting it.[9]

Thus, the very existence of such a statute, intended to further, and as an overt act evidencing, a criminal conspiracy against society, is itself a perfect legal justification for disobeying its commands, as well as any purported court order or other mechanism aimed at its enforcement. Disobedience to such a statute, order, or other mechanism could not be a crime, because "[a]n unconstitutional act is not a law; * * * it imposes no duties; it is, in legal contemplation, as inoperative as though it had never been passed".[10] "An unconstitutional act is not a law; it binds no one".[11] "An unconstitutional law is void, and is as no law. An offence created by it is not a crime."[12]

Observe that, in the course of this argument, the Second Amendment, "compelling governmental interests", and "least-restrictive means" find no place at all, because the first is not necessary and the other two are not proper.

4. Your political duty: use militia to make government a servant

As a matter of practical politics--or, perhaps more descriptively, of criminal politics--when America reaches the point at which Congress or some police-state agency Congress has created to do the dirty work unconstitutionally demands: "Turn them all in!" the only response for patriots short of accepting the "due Subjection and Obedience" of slavery will have to be "MOLON

9 See Title 18, United States Code, Sections 241 and 242.
10 *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).
11 *Huntington v. Worthen*, 120 U.S. 97, 101-02 (1887).
12 *Ex parte Siebold*, 100 U.S. 371, 376 (1880), quoted with approval in *Fay v. Noia*, 372 U.S. 391, 408 (1963).

LAVE!" ("Come and get them!" as the Spartan King, Leonidas, told the Persian envoy at Thermopylae). To be sure, even up to an Angstrom Unit before that point is reached, patriots should still seek relief in the courts (and, should time permit, in legislatures and voting booths), if only to prove to the world who are the aggressors. Every lawful avenue of recourse, no matter how tortuous, must be explored to its very end. But, even now, one can anticipate that, in the midst of such a crisis, the types of judges who will infest the Bench will lift not a solitary finger to assist common Americans--just as their precursors refused to help, but instead facilitated and covered up the wrongdoing, when Franklin Roosevelt seized Americans' gold in 1933-1934.[13]

The great question facing this country is whether, by reliance on something more efficacious than simply a part of the Second Amendment, "the right of the people to keep and bear Arms"--and with it all of Americans' liberties--can be protected and advanced short of a new Lexington and Concord.

a. Prompt political action makes violence unnecessary

Too many people wrongly assume that the purpose of revitalizing "the Militia of the several States" (or, for that matter, of forming the kind of private citizens "militia" that already exist in several States) is to fight new battles of Lexington and Concord. To the contrary: The goal must be, if at all possible, to deter usurpation and tyranny, so as to make actually fighting any battle here in America unnecessary. Deterrence is always the best defense. And preparedness makes deterrence credible. Besides, the ultimate purpose of revitalizing "the Militia of the several States" is to reassert We the People's control over both the General Government and the States, from the inside and under the law, by infusing with energy a very important constitutional component of those governments that has withered to a present-day impotence and insignificance. Yet nonetheless not to irrelevance--for "the Militia of the several States" remain not only part of the

13 On this horrendous episode, see Edwin Vieira, Jr., Pieces of Eight: The Monetary Powers and Disabilities of the United States Constitution (2d rev. ed. 2002), at 867-1212.

Constitution, but also, with the continuing crisis over "homeland security", more relevant and needed than ever before.

b. Critical importance of knowledge, skills, and attitude

The problem and the challenge are for Americans to develop--on their own, because no one from the Establishment will ever help them--the necessary knowledge, skills, and attitude that can develop preparedness, and thus provide deterrence.[14] Or, to put into action the principle: self-help leads to self-defense, which leads to self-government. "Knowledge" looks to discovery of what the Constitution really means. "Skills" relates to the ability to organize for effective political action in order to secure and advance the protection the Constitution offers. And "attitude" requires taking all of this seriously: recognizing that the constitutional "*right* of the people to keep and bear Arms" is also, and most importantly, the constitutional "duty of the people to keep and bear Arms", and that no constitutional rights can possibly be secure unless We the People perform their constitutional duty to take control of their governments at every level and at all times. The remainder of this commentary will focus on these issues.

5. KNOWLEDGE—constitutional 2nd Amendment protection

What is the *true* constitutional protection for "the right of the people to keep and bear Arms"?

As pointed out earlier, Alexander Hamilton argued that all of the Bill of Rights, including the Second Amendment, were unnecessary and even potentially dangerous. Hamilton, of course, was not the only Founding Father to advance such an assertion, to which Time and Experience, too, have given much credence. But if Hamilton and his co-thinkers were correct, then the original Constitution, prior to ratification of the Bill of Rights, must have delegated no power to Congress to disarm the people, and suffered no such power to remain in the States (if any had ever existed there

14 Anyone who has ever attended a firearms-training course conducted by NRA-certified instructors can appreciate why "knowledge", "skills", and "attitude" are central to everything concerning the lawful and competent use of firearms.

at all). Instead, the original Constitution must have recognized an enforceable disability (an absence of legal power and authority) in both Congress and the States to interfere with "the right of the people to keep and bear Arms"--which disability in some superfluous manner and degree the Second Amendment merely reiterated and confirmed; and which disability still exists in its full original form and force, even without consideration of the Second Amendment, because the Constitution has never been amended in that particular since the Second Amendment was ratified.

a. The Militia Clauses

So where in the original Constitution appeared (and now remain) any provisions that, in line with but more effectively than the Second Amendment, protect "the right of the people to keep and bear Arms" from infringement? The proper direction in which to look is indicated by the rule of construction that when the Framers used a word in more than one clause of the Constitution, they presumably meant it to have the same meaning in each.[15]

The key word here, of course, is "Militia", which appears in the original Constitution in:

- Article I, Section 8, Clause 15--"[Congress shall have Power] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions".
- Article I, Section 8, Clause 16--"[Congress shall have Power] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress".
- Article II, Section II, Clause 1--"The President shall be Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States".
    - And in the Second Amendment:

15 See, e.g., *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452-53 (1805).

- 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.

Self evidently, the "well regulated Militia" to which the Second Amendment refers must be "the Militia of the several States" as they existed in the period from 1787 to 1791 (and for nearly 150 years theretofore)--to be sure, after 1787 properly "organiz[ed], arm[ed], and disciplin[ed]" by Congress, "train[ed]" by the States, and led by the President as "Commander in Chief * * * when in the actual Service of the United States" for the three particular purposes the Constitution allows, but otherwise under the command of competent State authorities. For neither the Second Amendment nor the body of the Constitution mentions any other "Militia"; and Americans of that era knew of and had participated in none other than those.

Revealingly, the noun "Militia" does not appear in Article I, Section 10, Clause 3: "No State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace, * * * or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." Thus, as this Clause attests, "Troops" are not the same as "Militia". For the States may--indeed, must--maintain their "Militia" even "without the Consent of Congress", because the Constitution itself recognizes "the Militia of the several States" as permanent institutions.

For the same reason, even "without the Consent of Congress" the States retain their pre-constitutional powers over their Militia, subject only to Congress's limited supremacy as allowed in Article I, Section 8, Clauses 15 and 16. See Article VI, Clause 2. And should Congress neglect, fail, or refuse to exercise its powers properly under those Clauses, the States on their own authority may--indeed, constitutionally must--interpose whatever "organizing, arming, and disciplining", "governing", and "training" of their Militia they consider necessary to maintain "the Militia of the several States" in existence and readiness.[16]

16 See *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820).

The Second Amendment's phrase "the security of a free State" does not appear in so many words in the original Constitution. Article IV, Section 4 does provide, however, that

[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

To the Founding Fathers, the verbal formulas "a free State" and "a Republican Form of Government" must have been closely connected. Which doubtlessly is why the Second Amendment recites that "[a] well regulated Militia [is] necessary to the security of a free State"; while Article IV, Section 4 "guarantee[s] * * * every State * * * against Invasion * * * [and] domestic Violence"; and Article I, Section 8, Clause 15 empowers Congress "[t]o call forth the Militia to execute the Laws of the Union" (including Article IV, Section 4), and to "suppress Insurrections and repel Invasions". The unity of thought throughout these provisions could not possibly be just accidental.

So, the provisions in the original Constitution that deal, directly or indirectly, with "the Militia of the several States" and their purposes when "in[ ] the actual service of the United States"

- recognize the prior and present existence of, and make permanent, "[a] well regulated Militia" in every State;
- guarantee "the security of a free State" for every State--and, collectively, for the United States--through "calling forth the[se] Militia" whenever necessary to secure "a Republican Form of Government" for each State and "to execute the Laws of the Union, suppress Insurrections, and repel Invasions" throughout the country; thus,
- empower "the Militia of the several States" and their members as the ultimate providers of "homeland security" against all "Insurrections", "Invasions", "domestic Violence", and violations of "the Laws of the Union"; and, overall,

- treat "the Militia of the several States" as parts of both the General Government and the States, with vitally important public functions to perform.

All of this became part of "the supreme Law of the Land" well before the Second Amendment was ever debated in Congress, let alone ratified by the States. And it would continue to be "supreme Law" were the Second Amendment grossly misconstrued in the courts or even repealed altogether.

Perhaps most importantly, "the Militia of the several States" rank among only six institutions that the Constitution names and treats as permanent: to wit, We the People (in their capacity as earthly sovereign), the Militia, the States, the United States, Congress, the President, and the Supreme Court. True, Congress is empowered "[t]o raise and support Armies", "[t]o provide and maintain a Navy", and to "ordain and establish" "inferior Courts", if it finds them "necessary and proper". Article I, Section 8, Clauses 12, 13, and 18; and Article III, Section 1. But neither an "Arm[y]", nor "a Navy", nor any "inferior Court[]" has or can claim any constitutionally mandated and protected existence at all, absent affirmative Congressional action. Whereas, the Militia, the States, the United States, the President, and the Supreme Court exist perforce of the Constitution itself, notwithstanding anything that Congress may do or not do. And of these six constitutional institutions, "the Militia of the several States" are surely the oldest, because they existed in every one of the Colonies, even before the Colonies became independent States and formed the United States.

Also, with respect to the importance of their function, "the Militia of the several States" rank alongside the President himself. For they may be "call[ed] forth * * * to execute the Laws of the Union", under the President as their "Commander in Chief", to assist the President in performing his duty to "take Care that the Laws be faithfully executed". Article I, Section 8, Clause 15; Article II, Section 2, Clause 1, and Section 3.

Interestingly, "the Militia of the several States" rank ahead of the Supreme Court, because to function at all the Court needs the President to appoint, and the Senate to confirm, its Justices;

whereas, being composed of the body of the people of each State (as discussed below), the Militia exist as long as any of the people do.

Arguably, too, the Militia rank ahead of even the States and the United States, because whether a State retains "a Republican Form of Government" at all the Constitution itself foresees as possibly depending upon her "protect[ion] against Invasion * * * [and] domestic Violence" by the Militia; and whether the United States can "execute the Laws of the Union, suppress Insurrections, and repel Invasions" may depend upon the Militia as well. Article IV, Section 4; Article I, Section 8, Clause 15.

Finally, "*The Militia of the several States*" rank alongside We the People themselves, because the Militia are composed of the people, and, in the final analysis, We the People's sovereignty depends on their control of the Power of the Sword through their Militia.

b. "The Militia of the several States"

The Constitution employs the noun "Militia" only in the plural: It designates the President as "Commander in Chief * * * of the Militia of the several States", not of some single, unified militia; and it empowers Congress "[t]o provide * * * for governing such Part of them as may be employed in the Service of the United States", not "for governing" some single, unified entity. Article II, Section 2, Clause 1; Article I, Section 8, Clause 16.

Moreover, the Constitution did not create from whole cloth "the Militia of the several States". Instead, it

- recognized "the Militia of the several States" as institutions that already existed (and, indeed, had existed for some 150 years in every one of the Colonies and independent States);
- incorporated them all into the plan for a federal government;
- made them all a permanent part of that plan (subject only to constitutional amendment); and
- empowered them all to perform certain vital governmental functions, all according to the Militia's historic purposes, principles, structures, functions, and operations.

The last-mentioned point is of fundamental importance. When the Constitution incorporated "the Militia of the several States" into its federal system, it did so without defining them in any of those particulars. This was because--as with many constitutional terms perfectly familiar to the Founding Fathers and We the People at the time--no definitions were necessary. In the late 1700s, everyone knew what the attributes of "the Militia of the several States" were. And because no definitions were then considered necessary, the conclusion is inescapable that the Constitution must intend "the Militia of the several States" permanently to have and exercise their well-documented historic purposes, principles, structures, functions, and operations.

This is apparent with respect to the three specific purposes for which the Constitution empowers Congress "[t]o provide for calling forth the Militia": namely, "to execute the Laws of the Union, suppress Insurrections and repel Invasions". Article I, Section 8, Clause 15. The Constitution needed to enumerate these purposes in order to define (and thereby limit) the authority of Congress to "employ[the Militia] in the Service of the United States". Article I, Section 8, Clause 16. Historically, though, these were among the primary functions of all the Colonial and State Militia from the beginning. Had the Constitution empowered Congress simply "[t]o provide for calling forth the Militia", these three purposes would have been authorized by reference to the historic definition of the term "Militia". The Framers explicitly listed them because they intended that only these purposes (and not any of the others the Militia may have served in pre-constitutional times) would justify Congress in "calling forth the Militia" "in the Service of the United States."

c. Government with respect to "the Militia of the several States"

By incorporating "the Militia of the several States" as they existed and operated prior to its ratification, the Constitution makes several matters perfectly clear:

i. The States

The Constitution recognizes and permanently includes as part of its federal system only "the Militia *of the several States*". It neither recognizes nor creates any "Militia of the United States" at all--because no such militia ever existed, and the Founding Fathers evidently desired that no such militia be formed. True, "the Militia of the several States" may be "call[ed] forth" by Congress "to execute the Laws of the Union, suppress Insurrections and repel Invasions"; "such Part of them as may be employed in the Service of the United States" for those purposes may be "govern[ed]" as Congress directs; and "[t]he President shall be Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States". Article I, Section 8, Clauses 15 and 16; and Article II, Section 2, Clause 1. But even when temporarily "call[ed] forth", "govern[ed]", and subjected to the President's command "in[ ] the actual Service of the United States", "the Militia of the several States" nevertheless retain their identities and natures as permanent State institutions. The Constitution authorizes neither Congress nor the President to do anything that detracts from, let alone contradicts, these identities and natures.

For that reason, the Constitution authorizes neither Congress nor the President to employ the Militia so as to attack, subvert, or in any other way undermine any State's existence, powers and authority, or her "Republican Form of Government"--or to refuse to employ the Militia to protect those attributes. None of "the Militia of the several States" can be used, actively or passively, *against* any of "the several States".

Although the Constitution recognizes "the Militia of the several States" as State institutions, the States themselves cannot dispense with the Militia, in whole or material part, because the Constitution presupposes the permanence of the Militia, and the Constitution is "the supreme Law of the Land", which all State officials "shall be bound by Oath or Affirmation, to support". Article VI, Clauses 2 and 3. If the States could dissolve their Militia or allow them to fall into decrepitude, could disregard the Militia's historic principles, could deprive the Militia of their historic purposes and functions, or could deny the Militia the means

necessary to perform those purposes and functions, the States could thereby

- destroy a component of the Constitution's federal structure no less important than the States themselves;
- nullify Congress's power to "call[ ] forth the Militia" for constitutional purposes;
- deprive the President of an important means to fulfill his duty to "take Care that the Laws be faithfully executed";
- render unfulfillable the duty of the United States to "guarantee to every State in this Union a Republican Form of Government" and to "protect each of them against Invasion; and * * * against domestic Violence"; and even
- disarm themselves from "engag[ing] in War" when "actually invaded, or in such imminent Danger as will not admit of delay", because (absent dispensation from Congress) they would have no other armed forces to deploy in their own defense.

See Article I, Section 8, Clause 15; Article II, Section 3; Article IV, Section 4; and Article I, Section 10, Clause 3. These dire consequences disprove even the arguable existence of any license in the States to disestablish their Militia.

Thus, because the Constitution guarantees the permanent existence of "the Militia of the several States" in the plenitude of their historic principles, with all the means necessary to perform their purposes and functions, the States cannot disarm the Militia. For disarmed Militia are no Militia at all. On the other hand, if Congress fails, neglects, refuses, or is simply unable to exercise its own constitutional power and duty "[t]o provide for * * * arming * * * the Militia", or attempts to usurp a power to disarm the Militia (through some National "gun-control" statute), the States must themselves arm their Militia, and take whatever other actions may be necessary to thwart the enforcement of such an unconstitutional statute.

Because the Militia are State institutions, the Constitution reserves to the States an exclusive power and duty to "govern[ ] such Part of them as may [not] be employed in the Service of the

United States", and a concurrent power and duty to provide for "organizing, arming, and disciplining" their Militia if Congress fails, neglects, refuses, or is unable to do so, in whole or in part. See Article I, Section 8, Clause 16; Amendment X; Amendment XIV, Section 1; and *Houston v. Moore*.[17] Indeed, if negligent or criminal Congressmen, by shirking their duties or conspiring to defeat the Constitution, could by nonfeasance, misfeasance, or malfeasance render the Militia impotent and thereby put the Nation and States in peril, and the States nevertheless were powerless to correct the situation, "the Militia of the several States" would be nothing but a verbal shadow without substance.

The Constitution reserves to the States "the Authority of training the Militia according to the discipline prescribed by Congress". Article I, Section 8, Clause 16. If Congress fails to "prescribe[ ]" such "discipline", and in all cases where any Congressionally mandated "discipline" does not apply, the States do not need Congress's permission to administer their Militia as they may judge to be necessary and proper. Prior to ratification of the Constitution, the States' powers over their Militia were plenary. The Constitution delegated to Congress certain limited powers with respect to the Militia--which powers, if Congress properly exercises them, are "the supreme Law of the Land" that supersede conflicting State laws. Article VI, Clause 2. Otherwise, the States retain a concurrent power to enact laws to govern their Militia. Amendment X.

The Constitution does provide that "[n]o State shall, without the Consent of Congress, * * * keep Troops, or Ships of War, in time of Peace". Article I, Section 10, Clause 3. But "Militia" are not "Troops". For the Constitution delegates to Congress a power "[t]o provide * * * for governing such Part [of the Militia] as may be employed in the Service of the United States", and only "such Part"--necessarily reserving to the States the governance of all of their Militia not "employed in the Service of the United States", with no suggestion that the States may exercise such governance only with "the Consent of Congress".

17 *Houston v. Moore*, 18 U.S. (5 Wheaton) 1 (1820).

Just as the States require no prior permission from Congress to exercise their concurrent powers over their Militia, they are not subject to Congress's disapproval of any such exercise, except through Congress's proper exercise of one of its own Militia Powers. The key element here is that Congress must properly exercise one of those powers. Thus, if a State were to prescribe that her Militiamen must be armed with rifles of .223 caliber, but Congress ordained that all Militiamen nationwide must be armed with rifles of .308 caliber, Congress's mandate would have to prevail, to the extent that no Militiaman could exempt himself from the Congressional requirement by pleading that he was in compliance with the State requirement. For the Constitution delegates to Congress a power "[t]o provide for * * * arming * * * the Militia"; a statute specifying the minimum caliber for Militia "arm[s]" is plainly constitutional; and "the Laws of the United States which shall be made in Pursuance [of the Constitution] * * * shall be the supreme Law of the Land". Article I, Section 8, Clause 16; Article VI, Clause 2. (Of course, Congress could not prevent the State from requiring each of her Militiamen to possess a rifle of .223 caliber in addition to the rifle of .308 caliber that Congress specified.)

On the other hand, if Congressmen steeped in usurpation and tyranny were to enact a general "gun-control" statute banning the private possession by all Americans of all rifles--thereby effectively destroying "the Militia of the several States" by depriving them of the necessary means to perform their functions--any State could exercise her reserved power to maintain her Militia by enacting a statute that required all State citizens to possess one or more rifles suitable for Militia service. Indeed, it would be each State's absolute constitutional right and duty to do so. The purported Congressional statute could not supersede such a State law, because it would not have been "made in Pursuance of [the Constitution]", but in derogation and attempted destruction thereof. And "[a]n unconstitutional act is not a law; * * * it imposes no duties; it is, in legal contemplation, as inoperative as though it had never been passed".[18]

18 *Norton v. Shelby* County, 118 U.S. 425, 442 (1886).

Even if such a "gun-control" statute might be valid in a territory not subject to any State's jurisdiction, such as the benighted District of Columbia, it could never be valid within any State, because

- maintenance of "the Militia of the several States" is one of the attributes of State sovereignty--indeed, an essential function of every State government necessary for the existence of the States and through them of the United States--which the Constitution explicitly recognizes;
- the Colonies and independent States exercised the power and duty to maintain Militia before the Constitution was ratified, and retain under the Constitution a concurrent power and duty of scope greater than the similar power and duty delegated to Congress (which appertain to three specific purposes only); and
- Congress may exercise none of its powers in such wise as to abridge any attribute of State sovereignty.

Contrast Article I, Section 8, Clause 17 with *Lane County v. Oregon.*[19] Importantly, in Lane County the question was whether a Congressional power the Supreme Court recognized as valid (the power to emit legal-tender paper currency) could override a State's sovereign power to determine the medium in which to collect her taxes (gold and silver coin), which sovereign power is only implicit in the Constitution. In the case of general "gun control", however, the question would be whether a plainly invalid Congressional power could override a State's sovereign power that the Constitution explicitly recognizes and incorporates as part of its federal system. For any purported Congressional power to disarm common Americans directly contradicts the actual constitutional power, and duty, of Congress "[t]o provide for * * * arming * * * the Militia", and (to the extent it is exercised and enforced) destroys the efficacy if not the very existence of "the Militia of the several States".

Thus, all general "gun-control" legislation emanating from the General Government is subject to effective nullification by the

19 *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76-78 (1869).

States on the basis of the Militia Clauses of the original Constitution alone, without reference to the Second Amendment.

ii. Congress

Because the Constitution itself recognizes "the Militia of the several States" as part of its federal structure, and empowers them for certain important National purposes, the Militia are not optional, discretionary, or disposable for Congress. Because the Militia are "the Militia *of the several States*", not of the United States, Congress lacks all authority either to create or to dissolve them--just as it lacks authority to create or dissolve a State's legislature, executive, or judiciary. Congress also lacks authority to disregard, neglect, or impede the Militia, with respect either to the performance of their constitutionally mandated services to the Nation, or to their practical ability to perform those services. Instead, Congress's powers and duties are "[t]o provide for calling forth the Militia" for particular National purposes, and to make them fully effective for those purposes by "*provid[ing] for*organizing, arming, and disciplining" them. Article I, Section 8, Clauses 15 and 16.

The Constitution does delegate to Congress the power "[t]o provide for organizing * * * the Militia". Article I, Section 8, Clause 16. "To provide for organizing" does not, however, entail a power to create "the Militia of the several States" from whole cloth, according to some eccentric definition that politicians might devise in the Capitol. For the Founding Fathers knew that "the Militia of the several States" had existed for nearly 150 years prior to ratification of the Constitution; yet they did not provide in the Constitution for disbanding these pre-existing Militia in order to clear the ground for erecting some entirely novel establishment under the rubric "Militia". Doubtlessly, this was because the Founders understood the term "Militia" as it had been understood for nearly 150 years theretofore: namely, to mean nothing less than almost the whole body of the people of each State, properly armed and accoutred for military service. And they constitutionalized this historic definition precisely so that Congress alone could never change it. Whereas they employed the verb "organiz[e]" in a general sense, in order to provide Congress with some latitude to

structure the body of the armed people in whatever manners might prove most effective from era to era. Thus, "[t]o provide for organizing * * * the Militia" means putting the pre-existing and permanent "Militia of the several States"--the whole body of the armed people in each State--into the form best suited to their purposes and functions as circumstances counsel.

This power should be contrasted with Congress's powers "[t]o raise * * * Armies" and "[t]o provide and maintain a Navy". Article I, Section 8, Clauses 12 and 13. "To raise" and "[t]o provide" these things themselves both imply that, prior to Congress's action, no "Armies" or "Navy" exist. Distinguishably, Congress is not empowered to "raise" or "provide" the Militia, but only "[t]o provide for" taking certain other actions with respect to the Militia, which the Constitution presumes are already in existence.

Furthermore, nothing in the Constitution suggests that Congress must "raise and support * * * Armies", or "provide and maintain a Navy", should it conclude that neither is "necessary and proper". See Article I, Section 8, Clause 18. To the contrary: the Constitution requires that, even when Congress does "raise" an army, "no Appropriation of Money to that Use shall be for a longer Term than two Years". Article I, Section 8, Clause 12. This enables the House of Representatives--the House of Congress electorally closest to the people and (in political theory, at least) most concerned with protecting their lives, liberties, and property--to prevent an army from continuing in existence when it serves no purpose that justifies its expense, or when it threatens Americans' freedoms. Similarly, had the Founding Fathers contemplated a navy as a permanent establishment, they would not have bothered to empower Congress "[t]o * * * maintain" one. So, Congress can "raise Armies" and "provide a Navy" if it deems that course prudent; but it can also refuse to do so, or refuse to continue to "support Armies" or "maintain a Navy". Distinguishably, though, the Constitution plainly presumes that "the Militia of the several States" existed as of its ratification, and will continue to exist thereafter, whatever Congress may do or not do. Which, of course, follows from the historic definition of the "Militia" as the whole body of the people of each State, armed and accoutred for military

service with appropriate firearms and ammunition always maintained in their personal possession.

Moreover, "[t]o provide for organizing * * * the Militia", or for "arming, and disciplining" them, cannot license Congress to proceed in whatever whimsical manner its Members may choose. First, in light of the critical purposes the Militia may be called upon to serve--"to execute the Laws of the Union, suppress Insurrections and repel Invasions"--the Constitution cannot possibly contemplate, or tolerate, complete Congressional inaction on this score. See Article I, Section 8, Clause 15. Nonfeasance is not an option. For with the delegation of any constitutional power comes the imposition of a corresponding constitutional duty to exercise that power whenever necessary and proper. Compare *United States v. Marigold*[20] with the Preamble ("insure domestic Tranquility" and "provide for the common defence"); Article I, Section 8, Clause 18; and Article VI, Clause 3 ("Oath or Affirmation, to support this Constitution"). Surely, Congress cannot have exercised its constitutional power, and fulfilled its constitutional duty, "[t]o provide for organizing, arming, and disciplining, the Militia" if they remain unorganized, unarmed, and undisciplined, whether in whole or in large part.

Second, the Constitution cannot possibly contemplate, or tolerate, Congressional negligence or error, either. Misfeasance, too, is not a option. The Constitution does not define the verbs "organizing, arming, and disciplining, the Militia". But, that does not leave Congress wholly at sea. In the Founding Fathers' minds, the proper definitions naturally arose from the Colonial and State history with which all Americans of their era were intimately familiar. So, "organizing, arming, and disciplining, the Militia" constitutionally means proceeding according to the historic pattern of American experience: the whole body of the people, armed and trained along contemporary military lines with appropriate firearms and ammunition always maintained in their personal possession. Because if the whole people--or any significant subset of them, for that matter--are not "organiz[ed], arm[ed], and disciplin[ed]"

20 *United States v. Marigold*, 50 U.S. (9 Howard) 560, 567 (1850).

according to that pattern, they do not constitute "Militia" in the American sense of that term at all.

Third, under no circumstances can the Constitution possibly contemplate, or tolerate, Congress's refusal to follow the law. Malfeasance is beyond the pale. Inasmuch as the power "[t]o provide for organizing, arming, and disciplining, the Militia" does not allow Congress to leave the Militia unorganized, unarmed, and undisciplined through sloth or incompetence, it most assuredly precludes Congress from actually disorganizing, disarming, or disarraying the Militia--whether this results from intentional malevolence or from willful blindness to or reckless disregard of the consequences of its actions. "To provide for organizing, arming, and disciplining, the Militia" are affirmative verbs. And "[a]ffirmative words are often, in their operation, negative of other objects than those affirmed".[21] Thus, those words not only delegate a power, and impose a duty, but also create an absolute disability. Under no circumstances may Congress leave the Militia unorganized, unarmed, or undisciplined--let alone knowingly and intentionally impose such conditions.

Of the three requirements for the Militia--organization, arms, and discipline--arms are the most important. Organization and discipline are next to useless without arms. Even a rabble in arms can give some good account of itself, and can slowly organize and develop discipline while it maintains an minimally adequate posture of self-defense. But unarmed people are almost always helpless, hapless, and hopeless.

Although Congress has a constitutionally duty to "arm[ ]" the Militia, and a constitutional disability to disarm them, it need not act directly. "To provide for * * * arming * * * the Militia" does not necessarily require actual "arming" of individuals by the government itself from public arsenals. (Perhaps the necessary involvement of the government is why Congress's power as to an army or navy is "[t]o raise" or "[t]o provide" *simpliciter*, rather than "[t]o provide for raising".) Indeed, for the government to arm the Militia is probably the politically least prudent way for Congress

21 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

and the States to fulfill their responsibilities on that score, as well as being the course least in keeping with historic practices. Instead, Congress and the States can and ought to "provide for * * * arming * * * the Militia" by relying on the method universally used in the pre-constitutional Colonial and State Militia Acts: individual self-help through resort to private commerce in arms and ammunition in the free market.

Requiring members of the Militia to arm themselves largely shifts the economic burden from taxpayers to those individuals who have the ability to pay. More importantly, though, it protects all individuals from the sudden imposition of usurpation and tyranny that would be possible were the provision of arms a governmental monopoly. After all, for individuals throughout the Nation to arm themselves for Militia purposes demands

- a large number of private manufacturers, distributors, and retailers of arms and ammunition;
- a nationwide free market for commerce in arms, ammunition, and accoutrements;
- no general "gun-control" statutes at the National, State, or local levels; and
- a judicial system that does not hold the production, sale, possession, and use of firearms and ammunition hostage to predatory trial lawyers.

Unfortunately, one important condition for constitutionally "arming * * * the Militia" is almost totally absent in contemporary America: namely, the legal requirement found in every pre-constitutional Militia Act, that common Americans purchase (or otherwise acquire), possess in their homes, and regularly train with their personal firearms, or be subject to fines or other penalties. But an anti-constitutional condition is all too prevalent: namely, general "gun-control" statutes that deny to almost everyone the right to possess or use certain types of firearms (such as "assault weapons"), kinds of ammunition, or accoutrements (such as "high-capacity magazines") within some jurisdictions, or that totally disarm large segments of the population on the basis of some

geographical criteria (such as "gun-free zones") or legal disabilities attaching to the person.

The present plethora of general "gun-control" statutes at the National, State, and local levels arises from politicians' and judges' disregard of the precept that "the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."[22] For example, at the National level most "gun-control" statutes have been enacted under color of Congress's powers "[t]o lay and collect Taxes" or "[t]o regulate Commerce". Article I, Section 8, Clauses 1 and 3. In effect, this sets aside the explicit power and duty to "arm[ ] * * * the Militia" in Article I, Section 8, Clause 16 in favor of a contradictory power to "disarm[ ]" everyone hidden in Clauses 1 and 3. Apparently, no one among Washington's power elite has noticed (or cares to take into account) that "[t]he fundamental [constitutional] principles" in Clauses 1, 3, and 16 "are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other".[23] Or, that no rational constitutional jurisprudence can employ Clauses 1 and 3 so as to transmogrify the affirmative duty of Clause 16 into a negative power. Modern legislators, judges, and law professors may be that illogical or dishonest. But to impute such stupidity or duplicity to the Founding Fathers is defamatory in the extreme.

States and localities cannot enact general "gun-control" statutes either, because such statutes directly interfere with Congress's fulfillment of its duty "[t]o provide for * * * arming * * * the Militia"--indeed, undermine the very existence of the Militia as the armed body of the people--which the Constitution mandates and requires the States and their subdivisions to treat as "the supreme Law of the Land". Article VI, Clause 2. Moreover, the permanent incorporation of "the Militia of the several States" into the Constitution requires the States to keep up their Militia, whatever Congress may do or not do. Because, in American historical

22 *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).
23 *Dick v. United States*, 208 U.S. 340, 352 (1908).

experience, the whole population of free males comprised "the Militia of the several States", and was always armed to almost the last man with the latest firearms suitable for military service, the States must maintain at least that level and quality of armament throughout their citizenry--which result, of course, general "gun-control" statutes are intended to prevent. That is, the existence of "the Militia of the several States" as a permanent part of the Constitution's federal structure renders all general "gun-control" statutes unconstitutional.

Congress has a further constitutional power and duty, when "necessary and proper", "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions". Article I, Section 8, Clauses 15 and 18. Self-evidently, it would be next to useless to "call[ ] forth the Militia" for these purposes of "homeland security", were the Militia not properly "organiz[ed], arm[ed], and disciplin[ed]". So the constitutional mission of the Militia underlines the absolute necessity for Congress to secure "the right of the people to keep and bear Arms", by "provid[ing] for * * * arming * * * the Militia".

iii. The President

The President cannot participate in--or even passively tolerate--any program aimed at disarming common Americans because, by historic definition, "the Militia of the several States" consist of the body of the American people, armed and trained along contemporary military lines with appropriate firearms and ammunition always maintained in their personal possession. "The President shall be Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States". Article II, Section 2, Clause 1. So, for the President to cooperate in disarming, or to stand idly by while others disarm, the people would be for him to help destroy the Militia, and thereby eliminate his own position as "Commander in Chief" thereof, in direct defiance of his own constitutional appointment. It would hardly overstate the case to label such constitutionally self-contradictory behavior "legally psychotic".

Moreover, the President also labors under a duty to "take Care that the Laws be faithfully executed". Article II, Section 3. Performance of this duty may require that the Militia be "call[ed] forth * * * to execute the Laws of the Union". Article I, Section 8, Clause 15. The efficacy of the Militia in this service will require that they be properly "organiz[ed], arm[ed], and disciplin[ed]". Clause 16. Therefore, the President cannot enforce, or allow others to enforce, any general "gun-control" statute (National, State, or local) that results in disarming all or a large part of the people who comprise the Militia. For any such statute must be unconstitutional. And "[a]n unconstitutional act is not a law; * * * it imposes no duties; it is, in legal contemplation, as inoperative as though it had never been passed".[24] If "not a law" at all, then such a "gun-control" statute cannot possibly be among "the Laws [to] be faithfully executed" by the President. Rather, the President must "execute[ ]" "the supreme Law" of the Constitution to set such a inherently invalid statute aside entirely and permanently, and to prevent its enforcement in any particular against anyone.

iv. The Courts

Perhaps the less said about the contemporary courts the better. To expect them to recognize and protect, let alone to advance, "the right of the people to keep and bear Arms" plumbs the depths of blindness and folly. Modern judges are drawn from the legal *intelligentsia*, the vast majority of whom are corrupted and compromised by anti-constitutionalist ideology, the lust for power, outright personal greed heedless of its anti-social consequences (especially the so-called "plaintiffs' bar" of personal-injury trial lawyers), and a thoroughgoing contempt for common Americans and this country's traditions. Moreover, in the main they wallow on the Bench in grandiose self-importance and narcissistic self-absorption that rivals the rank self-adulation characteristic of talentless movie stars and tone-deaf pop vocalists. Worst of all, most of them utterly belie their titles of "Your Honor" by practicing continual, cynically calculated intellectual dishonesty--a vice for which vanishingly few are ever held accountable, as the errors or lies of one rotten judge are appealed to some other equally

24 *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).

unscrupulous jurists, in most cases simply to be covered over with a whitewash compounded of different errors or lies.

Assuming for the sake of argument, though, that one could successfully appeal to rationality and fairness in the courts, four conclusions would be undeniable:

- "The right of the people to keep and bear Arms" cannot be subjected to any "compelling governmental interest test", because neither the General Government nor any State can possibly put forward any "interest"--and certainly no "compelling interest"--for destroying or debilitating "the Militia of the several States" that the Constitution incorporates in its federal system as a governmental institution or entity. If We the People ever deceive themselves into believing that they have a "compelling interest" in abolishing or emasculating their own Militia, they must amend the Constitution to that effect. Article V.
- No firearms, ammunition, or accoutrements can be banned, confiscated, punitively taxed, or subjected to licensing or registration simply on the basis of whatever "bad names" "gun-control" wordsmiths may fashion to demonize them. For essentially any firearm, ammunition, or accoutrement could be used by "the Militia of the several States" in one of their many roles--particularly as guerrillas, partisans, or resistance fighters opposing usurpation and tyranny--and therefore must be freely available to members of the Militia, in their personal possession, at all times.
- No warrant exists for the establishment of almost all "gun-free zones", there being no place in this country where the laws need not be enforced (especially against violent criminals and psychopaths), where it might not be necessary to suppress sudden insurrections, or especially where Americans must not be ready at all times to repel invasions in the persons of agents of global terrorism.
- Finally, the constitutional reasoning of Lane County v. Oregon[25], absolutely prohibits Congress from enacting general "gun-control" statutes that destroy or debilitate "the Militia of the several States". Lane County teaches that Congress

25 Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76-78 (1869),

> cannot exercise its monetary power so as to require the States to employ Congressional legal-tender paper currency, in preference to some other media of exchange they desire to use in the performance of their sovereign functions--even when the Supreme Court holds that Congress enjoys a power to emit such currency, and the Constitution explicitly withdraws from the States all power to create any form of money on their own. Article I, Section 10, Clause 1. If so, then Congress cannot require the States to suffer their Militia to be disarmed, either, when Congress itself has no power whatsoever to "[dis]arm[ ]" the Militia, but only a power to "arm[ ]" them; when the Constitution explicitly recognizes the Militia as "the Militia of the several States", not "of the United States"; when no provision of the Constitution disables the States from maintaining their Militia with proper armaments; and when the Militia comprise one of the two great sovereign powers of any government: the Power of the Sword, and the Power of the Purse. Indeed, inasmuch as Lane County holds that Congress cannot interfere with any State's exercise of her sovereign Power of the Purse, how Congress could interfere with any State's exercise of her even more important sovereign Power of the Sword passes understanding.

d. The unique role of "the Militia of the several States" in "homeland security"

Congress has a constitutional power and duty, when "necessary and proper," "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Article I, Section 8, Clauses 15 and 18. The Preamble shows this to be a grave responsibility. For among the six overarching purposes of the Constitution set out there, no less than three parallel the mission of the Militia to provide "homeland security": namely, to "establish Justice" ("execute the Laws of the Union"), "insure domestic Tranquility" ("suppress Insurrections,") and "provide for the common defence" ("repel Invasions.") Doubtlessly, the Founding Fathers foresaw that "the Militia of the several States" would provide the primary forces to serve the Preamble's purposes, and for that reason specifically empowered Congress to "call[them] forth" for those ends. The perfect

juxtaposition of purposes and powers can have no other plausible explanation.

Similarly, the Constitution requires the President to "take Care that the Laws be faithfully executed." Article II, Section 3.

And it appoints him the "Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States." Article II, Section 2, Clause 1. Again in perfect parallel, the Constitution empowers Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"--in the performance of each of which functions the Militia must inevitably be involved in "faithfully execut[ing]" "the Laws," under the President's command. That the Constitution not only imposes on the President the duty to "take Care that the Laws be faithfully executed," but also requires Congress to make available to his own command a most potent means to perform that duty, in terms explicitly echoing it, cannot possibly be just accidental.

Moreover, the Constitution imposes on "[t]he United States" the duty to "guarantee to every State in this Union a Republican Form of Government" and to "protect each of them against Invasion; and * * * against domestic Violence." Article IV, Section 4. That "the Militia of the several States" would likely be "call[ed] forth" to satisfy this "guarantee" none of the Founding Fathers could possibly have doubted. For they also empowered Congress in Article I, Section 8, Clause 15 "[t]o provide for calling forth the Militia" for three purposes highly pertinent to Article IV, Section 4: namely, "to execute the Laws of the Union"--in this case, to "guarantee to every State in this Union a Republican Form of Government"; "to * * * suppress Insurrections"--in this case, to

- "Protect each of them * * * against domestic Violence"; and "to * * * repel Invasions"--in this case, to "protect each of them against Invasion." Thus, hardly surprising is that the Framers of the Second Amendment, many of whom had been among the delegates to the Constitutional Convention that drafted or the State Conventions that ratified the Constitution, asserted that "[a] well regulated Militia" is "necessary to the security of a free State." For Articles I and IV had earlier made

> abundantly clear that "the Militia of the several States"--considered on the basis of 150 years of experience to be "well regulated," if any Militia could be--were empowered to provide that security to every State through the "guarantee" of "a Republican Form of Government."

Furthermore, the Constitution presumes that, in the direst extreme, when "actually invaded, or in such imminent Danger as will not admit of delay," the States will be able to "engage in War" through their Militia, which, unlike "Troops," the Constitution allows them to keep and govern "without the Consent of Congress." See Article I, Section 10, Clause 3.

Perhaps most notable, however, is that, because "the Militia of the several States" may be "call[ed] forth * * * to execute the Laws of the Union," and because the Constitution is "the supreme Law of the Land," the Militia may be "call[ed] forth" to "execute the [Constitution]" itself. See Article I, Section 8, Clause 15, and Article VI, Clause 2. In a normal situation, this would occur pursuant to such "provi[sions]" as Congress had made, and under direction of the President as Commander in Chief. Article II, Section 2, Clause 1. But the Constitution protects America in abnormal situations, too--especially inasmuch as abnormal situations doubtlessly will confront this country with the most immediate and gravest dangers.

Now, usurpation and tyranny by individuals holding, but misusing, the highest public offices are bound to be abnormal situations. And beyond question such usurpation and tyranny will necessarily constitute the most serious possible violations of the Constitution, because they attack, and threaten to overthrow, the very rule of law from the top down. Therefore, the Constitution must fully empower "the Militia of the several States" to suppress them--and, *in extremis*, must even justify the Militia in "calling [themselves] forth" for that purpose, just as they did at Lexington and Concord in 1775. For, as a *constitutional* institution, "the Militia of the several States" are themselves a *governmental* institution--to which, in the absence of other governmental institutions willing or able to act, the responsibility and discretion to take charge must devolve. SALVS POPVLI SVPREMA LEX.

So, if (for example) the man holding the office of President, and a majority of men holding the offices of Representatives and Senators in Congress, and a majority of men holding the offices of Justices of the Supreme Court should all league together in a conspiracy of usurpation and tyranny, they would be breaking the law. Indeed, their acts of usurpation and tyranny could not be imputed to their offices or to the government at all, but would amount to nothing but the depredations of mere private criminals.[26] Under these circumstances, the Constitution would ex necessitate empower and require "the Militia of the several States" "to execute the Laws of the Union" against the conspirators and their henchmen and hangers-on, according to whatever valid statutes were in existence--because obviously a criminal gang controlling Congress would not

- "call[ ] forth" the Militia to suppress its own illegal activities; a gangster perverting the office of President would not command the Militia to arrest himself; and the gang's co-conspirators on the Supreme Court would always falsely rule "unconstitutional" whatever the Militia did to rectify the situation. Just as obviously, any purported statutes to further their usurpation and tyranny that such gangsters claimed to enact in the guise of Members of Congress, or tried to execute in the guise of the President, or attempted to enforce in the guise of Justices of the Supreme Court would be null and void from the beginning. For "[a]n unconstitutional act is not a law; * * * it imposes no duties; it is, in legal contemplation, as inoperative as though it had never been passed."[27]

Although extreme in nature, this scenario is not impossible. And its very possibility proves that "the Militia of the several States" must constitute a governmental institution potentially independent of and superior to all others, when the highest of those others are taken charge of, coopted, or corrupted by usurpers or tyrants. True "homeland security"--the purposes for which the Constitution says the Militia may be "call[ed] forth"--does not, can not, mean the security of some individuals who happen temporarily

26 See, *e.g., Ex parte Young*, 209 U.S. 123, 158-60 (1908); *Poindexter v. Greenhow*, 114 U.S. 270, 290-91 (1885).

27 *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).

to hold public office, some regime, or some political party. And it does not, can not, mean the security of the greedy, unscrupulous special-interest groups--or "factions", as the Founding Fathers called them--that use officeholders, regimes, and parties to feather their own nests at the expense of common Americans, as they do today by prating about "democracy" while they rig elections, prostitute public offices, loot the public treasury, and dispatch America's youth as soldiers to kill and die in foreign lands in service of policies designed to line their own pockets. No. "Homeland security" means the security of "a Republican Form of Government" and of "a free State" right here in America--"a free State" composed of We the People, administered for the benefit of We the People, and in the final analysis guaranteed by We the People with their own arms in their own hands.

So, to be constitutionally legitimate, any contemporary program of "homeland security" must be fashioned, first and foremost, around "the Militia of the several States." Not the Armed Forces--not the National intelligence agencies--not some Cabinet Department in Washington, D.C., constructed according to the blueprints of a Ministry of the Interior of an East-European Stalinist satellite of the 1950s--and most assuredly not para-militarized National, State, and local police departments and agencies that answer to such a Beria-ized bureaucracy.

Today, however, notwithstanding the torrent of near-paranoiac propaganda pouring from Washington about the desperate need to

- achieve "homeland security," even (or is it especially?) at the cost of sacrificing what the Preamble calls "the Blessings of Liberty to ourselves and our Posterity," neither Congress, nor the President, nor any State has thought to require, to request, or even to propose that the vast majority of Americans participate in some minimal program of "homeland security," as every pre-constitutional Militia Act teaches that every constitutional Militiaman should. Has everyone among Washington's power elite simply forgotten that the Militia Clauses of the Constitution exist? Or do they want We the People to forget? In either event, does this situation not

represent exactly the kind of danger that the Constitution empowers "the Militia of the several States" to address?

e. The basic principles of "the Militia of the several States"

The foregoing has largely taken for granted the true constitutional meaning of "the Militia of the several States." The Constitution, of course, contains no glossary in which a definition of that term can be found. So how can one be sure of precisely what definition the Constitution adopts?

To ascertain what the phrase "the Militia of the several States" meant to the Framers in 1787 when the Constitution was drafted, and to We the People in 1789 when the Constitution was ratified, one must determine what it meant in the common parlance of the times and theretofore--because the Constitution did not create "the Militia of the several States" out of whole cloth, or leave them to be newly invented by Congress or the States.

A procedure popular among defenders of the Second Amendment who are attempting to define "the right of the people to keep and bear Arms" is to assemble a mass of quotations on the subject from various Founding Fathers. This, however, is a somewhat unreliable method, because it begs the question. Without an independent, objective definition, how can one know whether any particular Founding Father's statement is correct?

True, people often talk loosely about "the Founding Fathers' intent" as expressed in *the Constitution*. But what they really mean (or should mean), is the Constitution's intent, as expressed in its language. This language is definitive, because it constitutes the most formal and objective statement of the Framers' and We the People's intent: namely, "the supreme Law of the Land." Thus, rather than relying on merely anecdotal evidence and perhaps fallible personal opinions to determine what "the Militia of the several States" means, one must look to the relevant laws: the Militia Acts of the Colonies and independent States during the pre-constitutional period, from the mid-1600s to the late 1700s. These Acts provide the best historical--and, more importantly, legal--evidence of the principles on which the Militia were formed and

operated. Not only that. The Militia Acts display a remarkable consistency--even unanimity--in these principles, from New Hampshire in the North to Georgia in the South, proving that the definition of "the Militia of the several States" is not some vague or plastic verbal formula that was and now can be manipulated for political purposes, but a concept with as much surety and fixity of meaning as any to be found in the Constitution.[28]

Quite the opposite: Some students of criminal politics would contend that such a situation actually existed in the 1930s, with Franklin Roosevelt's hammerlock on both the Presidency and Congress, against which the Supreme Court struggled on only a few occasions, until Roosevelt succeeded in changing its composition after 1937.

To describe all the principles of "the Militia of the several States" that have constitutional significance would require a lengthy book (on which, in fact, I am now working). A few salient points, though, are easily summarized:

- The Militia were always governmental, not private, organizations. Regular Militia units typically chose their own officers, and so-called "independent companies" even organized themselves--but always subject to governmental approval, supervision, and command as mandated by statute or other legislative action.

Therefore, no matter how patriotically motivated, organized, and well trained, groups of men equipped with firearms do not constitute constitutional "Militia" unless they are acting under governmental auspices, or assuming governmental authority because of the exigencies of the situation confronting them.

- The pre-constitutional Militia were based on a legal duty of universal, compulsory service, excused only by special exemption.

In the earliest days, when the Colonies were sparsely populated and the dangers from hostile Indians and other enemies acute, every free man was subject to service--the fullest extent of the duty being compelled by the necessities of the situation. Later,

28 E.g., Title 18, United States Code, Sections 241 and 242.

as inhabitants increased and threats to their security decreased, specific groups composed of those considered physically and psychologically best able to serve were designated, typically able-bodied men from 15 or 16 to 50 or 60 years of age. Inasmuch as no exemption was ever treated as a "right," but only as a matter of legislative grace, discretion, and policy, age limits were no denial of the universal duty of Militia service, but merely a general exception, based on a Colonial or State legislature's determination that no immediate or regular need existed to call upon those not within the specified groups.

The key element in the designation (or exemption) was whether a man was "able bodied." The Militia Acts presumed that everyone within their specified age limits was "able bodied." If a man proved otherwise, he was not required to serve, because he could contribute little or nothing. What constituted being "able bodied," however, depended on the task as well as a man's native ability. (A stationary sniper or lookout would not need as much ability as a ranger or guerrilla.) And no Militia Act ever disarmed any free man simply because he was not "able bodied." Not being subject to serve did not disqualify a free man from ownership or possession of arms independent of the Militia.

The only individuals generally excused from appearing at regular Militia musters and training were some public officers--such as legislators, executive officials, justices of the peace, and sheriffs; a few private parties in necessary occupations--such as physicians, school masters, ministers, ferrymen, and millers; and those individuals totally disqualified for the Militia by reason of their race or condition of servitude--such as Indians, free Negroes, people of mixed race, and slaves.

Other than those who were totally disqualified, most of the individuals exempted from some or all Militia musters or training were nonetheless required to fulfill the duty to provide themselves with firearms and ammunition. And many were included on an "alarm list," subject to being called forth for service in the field when a Colony or State needed to muster her entire military strength (as, for example, in cases of insurrection or invasion). In Rhode Island, for example, men otherwise exempted because of

their occupations were listed in the so-called "Senior Class," subject to mobilization in emergencies.

Conscientious objectors were sometimes exempted from Militia service, sometimes not. Even when exempted, though, they were generally required to perform non-military duties, or to pay fines or special taxes. Among the duties imposed on them were the dangerous functions of scouts and spies.

- Every Militiaman was required to possess one or more firearms suitable for infantry or cavalry, along with a supply of ammunition and necessary accoutrements, or be fined or visited with some other penalty for his failure to do so.

The Militia Acts required each and every man financially able to do so to purchase his own firearm, ammunition, and accoutrements in the free market, and to maintain these things, in good working condition, in his personal possession at home, ready for use at any time. Parents, guardians, masters, and employers were required to provide firearms, ammunition, and accoutrements for all their minor male children, apprentices, and servants old enough to serve in the Militia. For the working poor, local governments would advance moneys on deposits of merchantable goods, or arrange for employment in order to raise sufficient funds for the men to buy the necessary Militia equipment. And in some cases, men exempted from regular Militia service had to purchase arms to be supplied to others.

Because all but the very poorest men bought their own arms in the free market, they were owners as well as simply possessors. Thus, the individual duty (and concomitant right) to possess a firearm required by statute encompassed an individual duty (and concomitant right) to own that firearm as private property. Moreover, these duties and rights were plainly individual or personal in nature, because the Militia (or local governments) enforced the duties with fines or other personal penalties specifically against individuals, not against Militia units or other groups as collective entities.

For the poorest of the poor, the Militia themselves or local governments supplied firearms, ammunition, and accoutrements.

Although these remained public property as to ownership, the Militiamen kept the arms at all times in their personal possession, subject to accounting for their stewardship thereof.

The only individuals who could choose to disarm themselves were those conscientious objectors whose exemptions from the Militia were sometimes allowed by statute. (Individuals disqualified for the Militia by dint of race or servitude were disarmed as a matter of law, whether they wanted to be or not. As were disloyal individuals in times of war.)

Interestingly, in principle the Militia themselves could have completely supplied their members with all the firearms and ammunition they needed, in at least three ways: (i) by normal purchases in the free market by Militiamen with the ability to pay, (ii) by assisting poor Militiamen to sell merchantable goods or obtain employment, and (iii) by subsidizing purchases for the very poorest Militiamen with fines collected from other Militiamen for various delinquencies and defaults (the fines being adjusted to generate funds sufficient to purchase the necessary quantities of arms). Thus, properly managed, the Militia could have been totally free of dependence on any other branch of government.

- The duty (and right) to keep and bear arms did not apply only when a man actually appeared for Militia musters, training, or service in the field, but at all times.

Every able-bodied free man was always "on duty" in the Militia, at least to the extent of maintaining a firearm, ammunition, and accoutrements always ready at home should he be called forth for service. This duty applied both to individuals who were not required to appear for musters and training at all, as well as to individuals who were required to appear, when they were not at musters, in training, or in actual service. Indeed, the duty to appear for musters, training, and service was instrumentally subsidiary to the duty to keep and bear arms, because without the arms in their hands, Militiamen would have been ineffective, if not utterly useless, at musters, training, or in the field.

That Militiamen kept their own firearms in their own possession in their homes at all times not only made musters and

training more efficient than if the arms had been stored in a few governmental arsenals, but also made the men particularly effective for service in the field in times of sudden emergencies, because they could be immediately mobilized already fully armed and equipped. Moreover, this was the only way to guarantee the effectiveness of the Militia against usurpation and tyranny, because, had usurpers and tyrants controlled all the firearms, the Militia would have been rendered impotent.

- The pre-constitutional Militia Acts generally immunized Militia firearms from seizure for private debts or taxes. Any and all of a Militiaman's other private goods and chattels, though, were subject to seizure and sale to compel him to pay his fines for failing to obtain and maintain the firearm, ammunition, and accoutrements the Acts required, to appear at musters or training, or to perform other Militia duties. Thus, the Militia Acts treated firearms and ammunition as highly preferred and protected types of private property.
- Whether privately owned (most of them) or public property (a few of them), the vast preponderance of Militia firearms always remained in private possession, available to common citizens in their homes at all times, rather than stored away in governmental arsenals to be handed out only when some public officials might deem it necessary. Plentiful amounts of ammunition, too, were always at hand in private dwellings, ready to use. As everyone was aware of the great dispersion of arms throughout the community, these arrangements maximized both readiness and deterrence: Everyone in the community could expect armed support from everyone else in resisting criminals, invaders, rebels, usurpers, and tyrants; and every potential criminal, invader, rebel, usurper, or tyrant knew that almost everyone else in the community could be expected to oppose him with arms at a moment's notice.
- The firearms with which the pre-constitutional Militia Acts required almost every able-bodied free male to supply himself were the standard military-grade muskets, or sometimes rifles, of that day, either fitted with bayonets (if muskets were borne) or accompanied by tomahawks or hatchets (if rifles were carried). Thus, the firearms that fulfilled the Militia duty to keep and bear arms had no necessary connection with

hunting or sport shooting (although they were suitable for those activities, too, and probably often used for such by their owners).

- The universal requirement of the Militia Acts that almost all of the men supply themselves with firearms, ammunition, and accoutrements through private purchases presupposed--and as matters of both law and economics promoted and guaranteed--a well-functioning free market in those commodities throughout the Colonies and independent States. Also, in requiring all Militiamen always to maintain their arms in good working order, and private gunsmiths to repair defective arms in a timely fashion for reasonable compensation, the Acts presupposed and promoted the wide availability of these and other artisans with similar skills.
- The pre-constitutional Militia Acts required men between 16 and 50 or 60 years of age to attend regular musters and training, generally four to six times a year. Often, this group was known as the "Trained Band." "Independent companies" undertook to train on their own, but if called to service in the field were attached to some regular Militia units. The purpose of these musters and training was to prepare Militiamen to provide whatever "homeland security" proved to be necessary--from outright military resistance to invasions, to suppression of insurrections, to the regular police functions of "watch" (by night) and "ward" (by day) throughout the Colonies and States, and of "patrols" of plantations in order to maintain control over unruly slaves in the South.
- The pre-constitutional Militia Acts aimed primarily at a general proliferation and dispersion of firearms and ammunition throughout the community. Two ideas were at work here: (i) that the level of public safety is proportional to the quantity and quality of armaments actually in the people's possession; and (ii) that the people should control most of the guns in their own hands, rather than suffer a few guns in a few individuals' hands to control the rest of the people. So, almost every able-bodied man was required, not only to obtain and possess a suitable firearm, ammunition, and accoutrements, but also to maintain them all in good working order at all times, ready for immediate use. Not surprisingly,

> then, arms and ammunition brought into the field for regular musters and training were subject to inspection, down to the last cartridge of black powder and lead ball. More interestingly, Militia officers also conducted regular "sights" of the firearms and ammunition men kept in their homes. Defaults in the quantity or quality of arms in either case resulted in fines, seizure and sale of other goods to pay the fines, or even imprisonment if the fines remained unpaid.

Hostile Indians, slaves, and individuals of proven disloyalty were usually not allowed to possess arms, except under strict supervision. And traffic in arms with unfriendly Indians was sometimes suppressed. Otherwise, the only general controls on arms usually consisted of ordinances requiring that large supplies of gunpowder, both public and private, be stored in public powderhouses, magazines, or arsenals, in order to reduce the threat of explosions and fires in towns largely built of combustible materials, and in which open fires, burning candles, and other exposed flames were almost always present.

f. The principles of "the Militia of the several States" compared with today's "gun control"

The contrasts between the proliferation and dispersion of firearms and ammunition among the vast mass of the people in pre-constitutional times, and the contemporary political campaign to restrict to the point of total prohibition the private possession of firearms by common Americans, are stark, striking, and to any constitutionalist sickening. For example--

THEN: The armed people constituted, and understood themselves to be, an important component of the government; their possession of firearms was a governmental as well as a personal duty and right; and their arms were the very symbols and instruments of their legal authority.

NOW: The severe limitations on, or even prohibition of, private possession of firearms proposed by "gun controllers" separate "the government" (and its armed minions) from everyone else, creating a dangerous dichotomy between "the rulers" and "the ruled" that

must inevitably widen into an antagonistic rift between "us" and "them."

THEN: Possession (and usually ownership) of firearms was near-universal and compulsory among free men. Almost every able-bodied free man was required to be armed. Only a few exemptions excused men from mustering and training, and only the claim of conscientious objection excused any free man from possessing firearms.

NOW: The goal of "gun controllers" is to render possession of firearms minimal and highly selective--confined to the armed forces, the police, and the specially privileged among the political elite. Only a vanishingly few, if any, exemptions will allow common Americans to possess firearms for any reason.

THEN: The government supplied firearms to the poor, or assisted them in procuring firearms for themselves in the free market.

NOW: "Gun controllers" demand that the government disarm as many people as possible, and seek to make commerce in firearms prohibitively expensive and cumbersome for common Americans, thereby disproportionately burdening the poor. (The rich and powerful will always have ready access to firearms, if not in their own hands then in the hands of private security personnel.)

THEN: Disarmament by force of law was limited to actual or potential enemies--hostile Indians, unruly slaves, or disloyal citizens--or to conscientious objectors, who disarmed themselves for their own reasons of conscience. Individuals exempted by age, disability, office, profession, or trade from active service in the Militia were never disarmed. The purpose of laws pertaining to firearms was to promote the widespread possession of firearms.

NOW: The ultimate goal of "gun controllers" is to disarm everyone under color of law, except the armed forces, the police, and the politically privileged. The purpose of "gun laws" is to limit or prohibit common Americans' possession of firearms to the maximum degree politically possible.

THEN: Licensing and registration of firearms were superfluous. Because the Militia Acts required almost every able-bodied free man to be armed, everyone knew that most everyone else possessed one or more firearms. Nevertheless, regular inspections were conducted in order to insure that everyone actually possessed the firearms and ammunition the laws required. But no Militia Act ever required licensing, registration, or even inspection of firearms other than Militia firearms.

NOW: "Gun controllers" propose registration of every kind of firearm (including even air rifles) as the step preliminary or corollary to licensing, which is the step preliminary to prohibition. Searches and seizures will be conducted to ferret out people who are not licensed, and to discover firearms slated for confiscation and destruction.

THEN: Almost every able-bodied free man was required to possess firearms and ammunition of the same type and effectiveness as the regular army fielded. Moreover, because everyone was armed, and knew how to use his firearms, the Militia vastly "outgunned" the army, and even more so the sheriffs, constables, and all other public officials who performed duties of a police nature.

NOW: "Gun controllers" seek to deny common Americans firearms of most modern military types, as well as all other firearms that could be employed effectively to oppose armed forces or police in the service of usurpers and tyrants. On the plea that the people must not be permitted to "outgun" the police (let alone the armed forces), "gun controllers" demand prohibition of private possession of semiautomatic "assault rifles" (full automatics being already regulated to near extinction), semiautomatic rifles of any configuration, .50 BMG caliber rifles, "sniper rifles" (that is, accurate rifles with optical sights)--and some day soon even the lever-action carbines that John Wayne made famous in his Westerns, when they discover how effective those guns can be in the hands of well-trained men.

THEN: No Militia Act or other law prohibited private ownership or possession of firearms other than Militia firearms.

Even muskets or rifles possessed, and useful, solely for hunting or sport were within every free man's right.

NOW: "Gun controllers" contend that "the right to keep and bear Arms" includes only firearms with a provable "sporting" or "recreational" purpose, but not firearms of military types. They also assert that, "right" or no "right," even "sporting" firearms ought to be licensed, registered, prohibited, and confiscated (doubtlessly because they realize that any "sporting" firearm can be used for a military purpose in the hands of a guerrilla, partisan, or resistance fighter).

THEN: No Colony or independent State employed exorbitant taxes to impose financial disincentives on the private possession of firearms. To the contrary: many Militia Acts exempted firearms from seizure and sale for the payment of private debts or taxes.

NOW: The first major Congressional "gun law" (still on the books after some 70 years) uses taxes to burden and inhibit private commerce in fully automatic and other types of firearms.

THEN: No Militia Act prohibited any free man from purchasing or possessing "too many" firearms, or "too much" ammunition. To the contrary: almost every free man was required to have at least one firearm and some minimum quantity of ammunition in his possession at all times.

NOW: "Gun controllers" promote statutes restricting private purchases to "one gun a month" (or some other such formula), as well as so-called "private-arsenal laws" that limit, or impose punitive taxes based on, the number of firearms or amounts of ammunition an individual possesses.

THEN: No Militia Act ever required that firearms and ammunition be kept away from all Militiamen in governmental arsenals until distributed by public officials for musters or training, and later collected again for storage.

NOW: "Gun controllers" seek to prohibit the private possession of firearms, except when handed out from government arsenals to licensed individuals for "sporting" purposes, then to be taken back and secured under lock and key.

THEN: Almost every able-bodied free man from 16 to 50 or 60 mustered and trained with firearms on a regular basis.

NOW: "Gun-free schools" instill a fear and hatred of firearms in children from the earliest age. Rather than being educated as to the social and political necessity for citizens to keep and bear arms, and trained to use firearms safely and effectively, children are being conditioned to react to all firearms in private hands as a threat.

THEN: No Militia Act specified that Militia firearms were not to be borne at times and places other than musters and training, or that firearms other than Militia firearms were not to be borne in any particular places or at any particular times.

NOW: Public and private "gun-free zones" are metastasizing across America like melanoma.

THEN: No Militia Act prohibited or penalized self-defense with Militia firearms, or with firearms other than Militia firearms.

NOW: A homicide committed with a firearm in self-defense often results in an indictment for murder, massive fees and costs for legal defense, notoriety in the media, and psychic trauma, even if the charges are proven specious and the defendant is acquitted. The "gun controllers'" goal is to outlaw armed self-defense entirely (as has been tried in England), as another reason for a complete confiscation of privately owned firearms--because who needs the means if the end is prohibited?

THEN: The near-universal private possession of firearms was recognized as the precondition for freedom--as the Second Amendment says, "[a] well regulated Militia, being necessary to the security of a free State."

NOW: The near-universal private prohibition of firearms must inevitably result in exposing most Americans to the "due Subjection and Obedience" of slavery. Is it possible that the proponents of such a prohibition do not understand this? And if they understand it, that they do not desire it?

Given that the principles of the pre-constitutional Colonial and State Militia, as found in every Militia Act from the mid-1600s to the late 1700s, define "the Militia of the several States" and their legal characteristics for all constitutional purposes--and given that, with respect to "the right of the people to keep and bear Arms," the Constitution has not been amended since the Second Amendment was ratified to guarantee that that right "shall not be infringed"--and given the plain contradictions between the principles of "the Militia of the several States" and the goals of contemporary "gun controllers" just illustrated--and given that the success of "gun control" will hasten the end of a free America--how then can contemporary "gun control" be rationally defensible, let alone the subject of legislation that the judiciary all too often sustains?! How, indeed, is the promotion of contemporary "gun control" not a criminal activity, and the people who promote it not participants in a criminal enterprise?

g. The relation of the Second Amendment to the Militia Clauses of the Constitution

Whether or not Alexander Hamilton and his co-thinkers were correct to dismiss the Bill of Rights as unnecessary and superfluous, the foregoing discussion proves that the Second Amendment must be interpreted in light of and consistent with--even simply as a restatement, amplification, or emphasis of--the original Militia Clauses of the Constitution.

The skeptic may object that, whereas the Second Amendment speaks of "the right of the people to keep and bear Arms," the Militia Clauses do not speak of any such right at all. So that, if "the right of the people to keep and bear Arms" has any explicit constitutional protection, the Amendment must be its locus. That contention forgets, though, that if the Constitution delegates no power to the General Government to interfere with "the right of the people to keep and bear Arms," or delegates a power solely to promote that "right" under some other terminology, then no explicit guarantee is necessary, in the Bill of Rights or anywhere else.

True enough, the Second Amendment does refer specifically to "the right of the people to keep and bear Arms." But what "right"

does it mean? The Amendment itself does not create that "right" out of whole cloth, specifying its particulars. So what is the source of "the right of the people to keep and bear Arms"? What is its content? And who may exercise it? The Amendment contains neither derivation, nor definition, nor explanation. To comprehend the nature and scope of the Amendment therefore requires recourse to more than simply its words. That, however, poses no insuperable problem. "That the Constitution contains no express provision on the subject is not in itself controlling; for with the Constitution * * * what is reasonably implied is as much a part of it as what is expressed."[29]

The implicit reference, of course, must be to "the right of the people to keep and bear Arms" that preexisted the Second Amendment--not just "a right," or "some right," with but vague contours--but "THE right" with which every American of that era was perfectly familiar, which most of them personally exercised, and which all of them would then have understood as the Amendment's subject. And because the Constitution, too, contains no definition of that "right," "the right" to which the Second Amendment refers must be the selfsame "right of the people to keep and bear Arms" that preexisted the Constitution.

What was (and still is) this "right"? To answer that question requires application of the principle that the language of the Constitution "has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used."[30] "[W]e must * * * place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of [its provisions]."[31]

The only "right of the people to keep and bear Arms" that appears throughout 150 years of pre-constitutional Colonial and State history in the statutes of the times--the highest form of legal evidence--is the right (and correlatively the duty) of the people to

29 *Dillon v. Gloss*, 256 U.S. 368, 373 (1921).
30 *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930).
31 *South Carolina v. United States*, 199 U.S. 437, 450 (1905). Accord, *Ex parte Bain*, 121 U.S. 1, 12 (1887).

keep and bear arms that constituted one of the main principles and practices of the Militia. This right and duty are necessarily implicit in the Constitution's recognition of "the Militia of the several States," because self-evidently the Militia cannot exist without them. And the Second Amendment confirms this link in unmistakable terms, when it ties "the right of the people to keep and bear Arms" with "[a] well regulated Militia." For no one can doubt that "well regulated Militia" were what every Colonial and State Militia Act mandated for almost 150 years prior to ratification of the Constitution.

i. The natural, inherent, legal right and duty to keep and bear arms

The skeptic, however, may object that the Militia Acts recognized only a duty to keep and bear arms, not a right, and that even this duty was merely statutory in nature, not natural or inherent. On analysis, this criticism collapses.

First, the duty the Militia Acts imposed on almost every able-bodied free man to be armed necessarily encompassed every man's right to be armed. Self-evidently, if an individual has a legal duty to be armed, then no public official (or private citizen, for that matter) can have a legal power and privilege to interfere with the individual's performance of his duty. Which means that, as against all public officials, each such individual has a legal right to be armed as the statute provides. And if that statutory duty actually derives from some higher law, as a consequence of its being a natural and inherent duty, then so does the concomitant right.

The highest source of the law on this subject is the injunction: "Thou shalt love the Lord thy God, and thy neighbor as thyself." The right of the individual to defend himself becomes, upon his assumption of familial responsibilities, the duty to defend the members of his own family. His justifiable love of self that compels him to protect his own existence must extend to them, too. In like wise, in any organized community that recognizes a mutual self-interest among its members, if any citizen may claim a right to expect defense from all, in fair compensation he must fulfill a concomitant duty to assist in the defense of everyone else. Given

their source, to contend that this reciprocal right of self-preservation and duty of mutual protection are not natural and inherent within society--as a consequence of its being "society," rightly understood--lacks cogency.

The Founding Fathers' legal mentor, Sir William Blackstone, made the same point in terms of the specific laws of England. After identifying "the principal absolute rights which appertain to every Englishman"--namely, "the rights of personal security, personal liberty, and private property"--he explained that in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the [English] constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three great and primary rights * * * .[32]

Among these "auxiliary rights" of Englishmen, Blackstone explained, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which * * * is indeed a public allowance, under due restrictions, 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. In these * * * consist the rights, or, as they are frequently termed, the liberties of Englishmen; liberties more generally talked of, than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man * * * lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. * * * And * * * to vindicate these rights, when actually violated or attacked, the subjects of England are entitled * * * to the right of having and using arms for self-preservation and defence.[33]

The pre-constitutional Colonial and State Militia Acts put into practical form "the [English] right of having and using arms for self-preservation and defence"--while showing how different from its practice in England the "public allowance, under due restrictions"

32 *Commentaries on the Laws of England* (American edition, 1771), Volume 1, at 140-41.
33 Ibid. at 143-44.

was in America. Unlike the situation in England, in America firearms were not only "suitable" for all men (excepting slaves), no matter their "condition and degree," but also requisite. And "such [firearms] as were allowed by law" included the most modern military-type arms then available in the free market. Thus, in America "the natural right of resistance and self-preservation" not only existed but also suffered no "due restrictions" in positive law. Rather, the Militia Acts extended it into a nearly universal duty. Such an extension of "the natural right of resistance and self-preservation" could not change its innate character, however, only transmit that character to its correlative duty.

That "the right to keep and bear Arms" is a natural right and duty the Declaration of Independence confirms. Through that document, the States "assume[d] among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle[d] them." That this could be accomplished, according to the principles of "the Laws of Nature and of Nature's God," in no way except through exercise of "the natural right of resistance and self-preservation" the Declaration makes clear: "[W]hen a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce the[people] under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security." That the Declaration couples "it is their right" with "it is their duty" cannot be nothing more than a slip of the pen.

Moreover, if the States' independence--and, as a consequence of that, their power to enact their own constitutions, statutes, and other laws, binding on their own people--derived from "the Laws of Nature and of Nature's God," then, as a condition of their legitimacy, those constitutions, statutes, and other laws themselves must conform to "the Laws of Nature and of Nature's God." Which means *inter alia* that they must recognize, embody, protect, and empower "the natural right of resistance and self-preservation," and its corresponding duty.

Even if one humors the skeptic by imagining that, all this legal theory and history notwithstanding, pre-constitutional Colonial or State legislatures might have denied the individual right and duty

to keep and bear arms in part or in whole, nothing changes. Because in fact those legislatures never did, or even attempted to, deny that right and duty. A failure ever to exercise a supposed power is convincing evidence that no one in authority ever believed that such a power existed.[34] Similarly, whether or not the Constitution might not have recognized the individual right and duty to keep and bear arms, in fact the Constitution does recognize them, because it recognizes "the Militia of the several States," all of which for 150 years were based on the principle of near-universal possession of firearms by private individuals.

ii. Militia are the natural and legal extension of the right and duty to keep and bear arms

By recognizing "the Militia of the several States," the Constitution imposes a permanent duty on nearly all Americans to serve therein, according to the principles the pre-constitutional Militia actually put into practice. One part of that essentially governmental duty is to be armed, a responsibility emphasized and effectuated by the power (and duty) of Congress "[t]o provide for * * * arming * * * the Militia." Article I, Section 8, Clause 16. Every individual subject to the constitutional duty to be armed in "the Militia of the several States" necessarily enjoys a constitutional right as against every public official not to be hindered, and (through Clause 16) a constitutional right to be assisted, in the performance of that duty. No statute, executive action, or judicial decision can possibly change that. Therefore, the "right of the people to keep and bear Arms" is ABSOLUTE, because it is the consequence or corollary of a constitutional duty that applies both to the people and to every public official. Indeed, to argue that any other part of any government at any level may disarm the one branch of the government that the Constitution itself specifically requires to be armed is self-contradictory nonsense.

The absolute nature of "the right of the people to keep and bear arms" is precisely what one would expect from the Second Amendment's precept that "[a] well regulated Militia, [is] necessary to the security of a free State". As American history teaches, "[a] well regulated Militia" is composed of an armed people. That being

34 *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 & n.20 (1949).

so, "the security of a free State" requires, and for all practical purposes must be equated with, an armed people. Therefore, "a free State" is one in which everyone possesses his own firearms, knows why he is armed, opposes every attempt to disarm him, and with his arms and training fulfills his duties to provide "security" in just proportion with everyone else. As a consequence of this, in "a free State" public officials have no legal authority whatsoever to disarm the people through general "gun control." So, in "a free State," "the right of the people to keep and bear Arms" must be absolute, because anything less than an absolute right could not provide adequate "security." Anything less than an absolute right would always enable a police state to develop, because the police would inevitably end up "outgunning" common citizens (as is the obvious goal of "gun controllers" today).

From all this, several important conclusions follow--

- "[W]ell regulated Militia" are organized and operate according to the historic principles of "the Militia of the several States." That is, nearly everyone in the community is required to be armed, trained, and assigned definite duties for the provision of "homeland security" as component parts of the government. In this structure, arms are the key component, because training for the use of arms is useless without the arms, whereas armed men can often acquire training even "on the job" through the use of their arms.
- "[T]he right of the people to keep * * * Arms" is a right of private possession (and usually ownership, too) of firearms and ammunition in individuals' homes, ready and available for use at all times, rather than stored away in government arsenals to be handed out only when some public officials deem it necessary. Private possession is absolutely necessary for "the security of a free State," because only private possession can maximize both readiness and deterrence--particularly against usurpers and tyrants, who historically have proven the most dangerous threats to every "free State."
- "[T]he right of the people to * * * bear Arms" encompasses, at the minimum, the freedoms to go abroad individually, and to assemble, with arms for all Militia purposes (the first being necessary to the second). The reasons for this are obvious:

> The Militia operate through individuals with arms in their hands. In the nature of things, most Militia operations must occur outside of individuals' homes. The awareness on the part of potential criminals, terrorists, usurpers, and tyrants that untold numbers of Militiamen are or could be carrying firearms, openly or concealed, in public and private places deters anti-social action. So every single individual who might carry a firearm outside his home thereby performs part of a vital Militia function.

Furthermore, because the Constitution requires Congress "[t]o provide for * * * arming * * * the Militia," and prohibits the States and their subdivisions from interfering with the fulfillment of Congress's duties, governments at all levels must recognize, facilitate, and protect this activity--by eliminating almost all "gun-free zones," providing the widest latitude for private individuals to carry firearms both open to common observation and concealed, and so on.

- The "Arms" the people may "keep and bear" include all firearms that could serve Militia purposes--from the firearms appropriate for a regular light infantryman, to whatever arms might prove useful for someone performing the functions of a policeman or security guard, or a guerrilla, partisan, *franc-tireur*, or resistance fighter.
- "[T]he people" who enjoy "the right * * * to keep and bear Arms" includes all common Americans. No exclusion can exist on the basis of servitude (Amendment XIII), race (Amendment XIV, Section 1), sex (Amendment XIX), or any but the most serious legal disability, such as proven disloyalty or the commission of a crime for which slavery or involuntary servitude is an appropriate penalty.

Moreover, no one can be denied "the right * * * to keep and bear Arms" simply because he is not sufficiently "able bodied" to serve in the Militia. This is not only because what constitutes being "able bodied" turns upon the service to be performed, which is a matter that depends upon evaluation of person, time, place, and circumstances, rather than application of an arbitrary label; but also because no pre-constitutional Militia Act ever disarmed any free man simply because he was not "able bodied". If not being

subject to serve in the Militia because of some physical disability did not disqualify a free man from possession and ownership of firearms independent of the Militia then, it cannot do so now. To the contrary: That a physical disability never disqualified a free man in pre-constitutional times from possession and ownership of firearms proves that "the right of the people to keep and bear Arms" was not then considered solely a consequence of service in the Militia, but instead was always understood as a precondition for forming the Militia in the first place.

- "[T]he right of the people to keep and bear Arms" in and for the purposes of "[a] well regulated Militia" does not define the full extent of that right. For, plainly, firearms suitable for use in the Militia can be used--and where the Militia are properly functioning are always at hand to use--for personal protection, hunting, target shooting, or other "sporting" or "recreational" pastimes. Besides the facts that personal protection is, at base, a Militia use at the individual level, and that most other normal uses of firearms sharpen the users' skills for Militia use, no pre-constitutional Militia Act ever disallowed such uses for Militia arms.
- The Second and the Thirteenth Amendments work together to outlaw general "gun-control" legislation by both the General Government and the States. A people held in slavery live in the very opposite of "a free State." General "gun control" enforced against innocent individuals is the antithesis of "[a] well regulated Militia" because it makes the existence of such a Militia impossible. Because "[a] well regulated Militia, [is] necessary to the security of a free State," in its absence such a State cannot survive. Therefore, general "gun control" must be unconstitutional, as a means to impose or maintain slavery. And assuming for purposes of argument that some "compelling interest test" were relevant, no level of government can assert any "compelling interest" in imposing general "gun control," because the only constitutional "interest" that justifies slavery or involuntary servitude is "as a punishment for crime whereof the party shall have been duly convicted."
- The Second and the Fourteenth Amendments also work together to outlaw general "gun-control" legislation by the

> States, for two reasons. First, Section 1 of the latter Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." Among those "privileges and immunities" is "the right * * * to keep and bear Arms."[35] Another is the "immunit[y]" from slavery or involuntary servitude "except a punishment for crime." So the Privileges and Immunities Clause bans all general "gun-control" legislation.

Second, Section 1 of the Fourteenth Amendment also provides that "[n]o State * * * shall deprive any person of * * * property." A principle of the pre-constitutional Militia Acts--and therefore of "the Militia of the several States"--is each individual's actual ownership of a firearm (where within his personal financial capability), as well as his possession thereof. So no conceivable "due process of law" could justify expropriation of Militia firearms individuals own, because to do so would necessarily destroy "the Militia of the several States," the permanence of which the Constitution presumes. Self-evidently, no State or local government can assert any "compelling interest" in enacting legislation that cannot amount to "due process of law."

6. SKILLS—Militia provide unparalleled homeland security

The foregoing discussion should convince any fair-minded person that revitalized "Militia of the several States," fulfilling a crucial role in "homeland security," can provide an unique capability for preserving, protecting, and especially promoting "the right of the people to keep and bear Arms." This is vitally important to keep in mind, because Americans' ability skillfully to defend their rights depends in large measure on the tools they choose to employ.

"[T]he right of the people to keep and bear Arms" is under constant and coordinated attack, aimed at no less than its complete elimination. Advocates of radical "gun control" are particularly numerous, active, and strategically located among the *intelligentsia*, the major media, the educational establishment, and (perhaps most ominously) what Supreme Court Associate Justice

35 See *Scott v. Sandford*, 60 U.S. (19 Howard) 393, 449-50 (1857).

Antonin Scalia has called the "law-profession culture" which dominates the Judiciary throughout the country. See *Lawrence v. Texas*, 539 U.S. 558, 602-03 (2003) (dissenting opinion). To advance their agenda of political, legislative, and judicial activism, they incessantly demonize private possession of firearms as

- a major cause of violent crime;
- a danger to public safety (especially among youth); and
- a manifestation of firearms owners' pathologically anti-social and especially anti-government attitudes.

The propagandistic and political power these people wield is not overwhelming, however--as evidenced by the ability of defenders of "the right of the people to keep and bear Arms" to achieve significant legislative gains at the State and local levels.[36] Presumably, just as they have been defeated in the past, the partisans of radical "gun control" can be defeated in the future by We the People's efforts in State legislatures.

For maximum effect, though, any program of State legislation must provide *inter alia:*

- a clearly perceptible public benefit (not just a benefit to firearms owners as a special-interest group);
- an opportunity for wide-ranging public participation in the program; and
- extensive favorable public education about "the right of the people to keep and bear Arms."

Notwithstanding its other strengths, the Second Amendment is not the sharpest "sword" for promoting such legislation. The Amendment sets out neither a power nor a duty for any legislature to enact anything. Rather, it states a disability, or absence of authority, that limits exercises of all governmental powers that infringe upon "the right of the people to keep and bears Arms"--that is, the Amendment is prohibitory, not promotive. To be sure, the Amendment does not preclude legislation aimed at securing or advancing that right (and by implication encourages it). But the

36 See, e.g., Victory Report from the States, *The American Rifleman* (August 2004), at 14-16.

Amendment is not the source of authority for such legislation. No legislature--National, State, or local--is empowered to pass any legislation perforce of the Second Amendment.

Primarily, the Second Amendment functions as a "shield", promising (although not always delivering) judicial protection against legislative and executive encroachments on "the right of the people to keep and bear Arms." Its operation is basically reactive. At best, its effect is to hold the constitutional line against infringements, but not proactively to advance the right. Problematically these days, even that limited result can arise only out of complex, expensive, and protracted litigation the outcome of which is not necessarily dispositive even of the issues raised--and always depends upon judges and lawyers largely drawn from the law-profession culture, who typically harbor a distinct animus against firearms and the private citizens who possess them.

In addition, the contemporary "individual rights" theory most popular among defenders of the Second Amendment does not easily lend itself to a legislative program that ought to appeal to patriotism, civic duty, and "homeland security." Doubtlessly (as explained before), "the right of the people to keep and bear Arms" encompasses the private possession of firearms for personal protection. Individual self-defense, however, large segments of the public wrongly perceive as a purely private concern, without an overarching positive social consequence. Too many people unthinkingly accept the radical "gun controllers'" argument that police can provide sufficient protection for almost everyone, and that in any event widespread private possession of firearms is ineffective or futile against violent crime, and is actually counterproductive because it enables criminals to obtain firearms with little difficulty.

Unlike the Second Amendment, the Militia Powers of the General Government and the States constitute sharp "swords" for promoting "the right of the people to keep and bear Arms," because:

- The Militia Powers are proactive. Advocates of "the right of the people to keep and bear Arms" can design proposed

legislation to advance that right in numerous ways, thereby seizing the initiative from the "gun controllers."

- The Militia Powers authorize the passage of any legislation that is in any reasonable way consistent with the legal heritage of "the Militia of the several States."
- The Militia Powers enable government to fulfill not only a general constitutional duty to protect society, but also at the present time to address the immediate and pressing special needs of "homeland security" in a way that no other powers adequately can. And,
- The Militia Powers combine patriotism and public service with concerns for individual security--thereby encouraging people to become supporters of "the right * * * to keep and bear Arms" who would never have considered doing so on any other basis.

So, effective exercise of the Militia Powers can provide the "skills" Americans need to secure and advance "the right to keep and bear Arms."

7. ATTITUDE—determination to reclaim 2nd Amendment power

As optimistic as all this sounds, it depends in the final analysis on common Americans themselves--in great numbers--and the frame of mind with which they approach this problem, or with which they default on the job and "let George do it." To protect and advance "the right of the people to keep and bear Arms," and with it all the other rights it protects, common Americans will have to take the bit in their own teeth, and fulfill their own constitutional duties. That, however, is easier to advise than to foresee happening.

Writing of "the liberties of Englishmen" (including the "auxiliary right" "of having arms for their defence") in the mid-1700s, Blackstone warned that they were liberties more generally talked of, than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man * * * lest his ignorance of the points whereon they are founded should hurry him

into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other.[37]

Not surprisingly, nothing changed after We the People substituted their own Constitution for the laws of England. As Justice Joseph Story observed in 1833, [t]he 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 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. And yet, though this truth would seem so clear, and the importance of a well-regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of military discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by [the Second Amendment].[38]

And surely today, too, "there is no small danger" that "contempt" for arms, under the urging of demagogues, may turn to outright opposition, and then lend critical support to further "gun control."

The most hopeful sign is that at least 80 million gun owners live in this country. That, moreover, is surely an understatement of their potential influence--because, for each actual gun owner, many others in his family and among his friends and associates must also be counted as supporters of or sympathizers with "the right of the people to keep and bear Arms." Yet, if so, how can at least 80 million people allow the travesties of contemporary "gun control" to continue? Is something amiss with their "attitude"?

37 *Commentaries on the Laws of England*, Volume 1, at 144. To Blackstone, the "attitude" with which the English people approached their most important rights was all-important--but all too often the wrong one.
38 Commentaries on the Constitution of the United States (5th edition, 1891), Volume II, Section 1897, at 646 (footnote omitted).

A faulty "attitude" is more likely the culprit than a serious lack of "knowledge" or "skills." Even if these commentaries have provided the vast majority of their readers with their first in-depth survey of the place of "the Militia of the several States" in the Founding Fathers' plan, the subject is not so alien or complex that they cannot quickly master it, and pass it on to others. And most everyone to whom these commentaries appeal was probably familiar with many of the other fundamentals of "the right of the people to keep and bear Arms" already. So, for every patriot who reads these commentaries, the question should not be "So what?" but "Now what?"

What are we all going to do--NOW, while there is still time?

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About the author

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For more than thirty years he has practiced law, with emphasis on constitutional issues. In the Supreme Court of the United States he successfully argued or briefed the cases leading to the landmark decisions Abood v. Detroit Board of Education, Chicago Teachers Union v. Hudson, and Communications Workers of America v. Beck, which established constitutional and statutory limitations on the uses to which labor unions, in both the private and the public sectors, may apply fees extracted from nonunion workers as a condition of their employment.

He has written numerous monographs and articles in scholarly journals, and lectured throughout the county. His most recent work on money and banking is the two-volume : The Monetary Powers and Disabilities of the United States Constitution (2002), the most comprehensive study in existence of American monetary law and history viewed from a constitutional perspective.

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