ARGUMENT

> It is not my design to shew what is law here and there; but, what is law, as Plato, Aristotle, Cicero and divers others have done without taking upon them[selves] the profession of the study of law.
> —Thomas Hobbes, *Leviathan*, Ch. 26 (1653)

> We must never forget that it is a constitution we are expounding.
> —*McCulloch v. Maryland* (1819)

I. The Constitution is a Frame of Government Not a Treaty Among Sovereign Individuals.

A. Fourteenth Amendment Incorporation.

The issue before the court is 14th Amendment incorporation of the Second Amendment. The Supreme Court of the United States does not belong here. It has already decided all it needs to decide with regard to Second Amendment individual rights and accountability to a governing authority.

Whatever rights are enumerated and secured in a constitution have to be consistent with what a constitution is. This court has affirmed the Parker court conclusions and opened the path for national policy:

> Reasonable restrictions also might be thought consistent with a "well regulated Militia." The registration of firearms gives the government information as to how many people would be armed for militia service if called up. Reasonable firearm proficiency testing would both promote public safety and produce better candidates for military service. Personal characteristics, such as insanity or felonious conduct, that v make gun ownership dangerous to society also make someone unsuitable for service in the militia.

There are millions of dollars and thousands of litigants poised to overburden the courts with gun rights cases under incorporation, but the court has not and will not foreclosed the policy option that awaits public knowledge and political leadership.

The constitutional protection that has been reasoned is for private,

individual self-defense. This purpose competes with the civic purpose: "Registration...for militia service when called up." There is no conflict in principle between gun ownership for self-defense and accountability to a governing authority. The way we defend ourselves as citizens under law and government is to create legal categories of gun ownership that can be applied against the lawless. Legal categories of gun ownership can only be enforced through some system of accountability through registration and licensing which the courts in Parker/Heller have found acceptable in principle. The civic purpose this court has affirmed demands accountability. The only reason there is a claim for an individual right to be privately armed for self-defense is that gun rights militants, led by the NRA, work very hard and very successfully to defeat any laws that would apply against the lawless because the same laws would apply against the NRA's "armed citizen guerrillas"*
(* http://www.potowmack.org/emerappd.hmtl#ak47, .../parkappe.pdf) and others with insurrectionist fantasies regardless that one constitutional function of the militia is to "suppress insurrections" not make them.

B. Concepts and Values

What a constitutions is starts with fundamental political concepts and civic values not legal and linguistic technicalities and certainly not misconstrued from historical references (infra, p. ____). The Founding generation took much of its instruction from John Locke's *The Second Treatise of Government*. Locke wrote:

> § 88:[On entering political society the individual] has given up a right to the commonwealth to imploy his force for the execution of the judgments of the commonwealth whenever he shall be called to it...
>
> § 89. Wherever, therefore, any number of men so unite into one society as to quit every one his executive power of the law of Nature, and to resign it to the public, there and there only is a political or civil society...For hereby he authorises the society, or which is all one, the legislative thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due. And this puts men out of a state of Nature into that of a commonwealth,...And wherever there are any number of men, however associated, that have no such decisive power to appeal to, there they are still in the state of Nature.

> § 94. No man in civil society can be exempted from the laws of it. For if any man may do what he thinks fit and there be no appeal on earth for redress or security against any harm he shall do, I ask whether he be not perfectly still in the state of Nature, and so can be no part or member of that civil society, unless any one will say the state of Nature and civil society are one and the same thing, which I have never yet found any one so great a patron of anarchy as to affirm.
>
> See also §§123-130.

Alexander Hamilton wrote in Federalist Paper No. 33:

> If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY.

The Founding generation had clear ideas about containing political power through legal, constitutional structures and balances:

> The science of politics, however, like most other sciences, has received great improvement. ... The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress towards perfection in modern times.
> —Hamilton, FP No. 9

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control of the government; but experience has taught mankind the necessity of auxiliary precautions.
> —Madison, FP 52

The governed who were armed were controlled in the militia. Their private

weapons were controlled on the militia inventory for civic purposes. They, as individuals, and their private weapons were not auxiliary precautions against a government out of control.

Neither were they for LINCOLN:

> A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinion and sentiments, is the only true sovereign of a free people. Who ever rejects it does, of necessity, fly to anarchy or to despotism.

Also:

> The central idea of secession is the essence of anarchy.

Will this court protect a right of "armed citizen guerrillas" to secede.

II. THE FORMATION OF POLITICAL COMMUNITY

Judge O'Scannlain (revisited *Nordyke*, fn. 15) disparages the appellees' "idiosyncratic perorations" that say nothing about the "absolute and natural right of self-defense". Maybe so, but the Constitution does. The Constitution defines treason as the waging of war against the United States. Treason is the ultimate exercise of a natural and absolute right of self-defense. The Declaration of Independence was an assertion of a natural, absolute right of self-defense against the Crown. The Crown rightfully cried treason.

A. From Divine Right to Secular Sovereignty to the Nation State.

In Christian Europe at the advent of the modern era, political authority was sanctioned by scripture (ROMANS 13:1-2). Subjects obey the law because law is given by divine right. Disobedience was not just treason but sacrilege. The transformation to secular, popular sovereignty—the "consent of the governed"—was centuries long. It was exquisitely described by historian Tawney in comparison to China:

> The first problem, which lies behind all questions of particular reforms, is vast and fundamental. It is not who shall govern the State, but whether there shall be a State at all. It is whether public power shall exist. China has known no Roman Empire. The idea of a sovereign, of an even pressure of law, of the impersonal majesty of an authority to which, and not to his family and his

> friends, the individual owes allegiance, of the Res publica, which in Europe men remembered dimly when all had slipped and struggled back to as to a rock—that idea is not an ancient part of the nation's mental furniture...

President Lincoln in his First Inaugural gave another perspective:

The problem before any issue of particular refore

The US Constitution was an important stage in the evolution of modern concepts of sovereignty and the state that had begun centuries before with Machiavelli, Bodin, Hobbes, Locke and others (DALY, chapter 2, fn 1; CARNOY, chapter 1).
The vessel of sovereign public authority by the nineteenth century became the nation-state culminating in Max Weber's famous characterization: the state maintains the monopoly on violence (Appendix A). It was an observation of reality not a moral imperative. The concepts were already anticipated in Locke and the Framers.

When sovereign individuals enter into political community, the one right they give up is the right to exercise force except as authorized or permitted by law (HEYMAN):

> Men uniting into politick societies, have resigned up to the public the disposing of all their Force, so that they cannot employ it against any Fellow-Citizen, any farther than the Law of the Country directs. (2LOCKE, p. 203).

Politics is the substitute for violence. The rule of law, the state's monopoly on violence, the state's internal sovereignty all mean the same thing. When parliaments were created, they for were for talk (parlez) not fighting.

Whatever right there is in the Second Amendment has to be consistent with what a constitution is, consistent with the difference between "Civil Society" and the "State of Nature". In affirming the Parker conclusions , this court has decided all it needs to decide. The rest is policy making. (infra, p. ___)

B. From the British Constitution to the US Constitution.

The context for gun rights is not in the eighteenth century but in the political struggles of the twentieth century which are struggles over the

modern state and the regulation of capitalism. The Libertarian Right will return us to robber baron capitalism's golden age of political liberty pre-1910 when we lived in company towns and worked 70 hours per week in coal mines and sweatshops. The central constitutional issue is the expansion of the powers of the Federal Government under the Commerce Clause. See "The Courts and the New Deal" (The Second Amendment gets its due mention). We can argue about whether the Commerce Clause is always appropriate or less than awkwardly applied, but the objection is on the sweeping ideological principles that any powers of a central government are creeping Stalinism. The ruling value is political cynicism. We cannot be a national community— a modern nation state— that functions collectively to address national issues with national authority.

In the eighteenth century, the British Constitution was regarded as a model of political perfection. It combined the three forms of government identified by ARISTOTLE—democracy, aristocracy and monarchy, manifest in the estates of the realm—in one government thereby maintaining the virtues of each and avoiding the vices. The American Revolutionaries made revolution initially to save the British Constitution from imperial corruption but succeeded in transforming the concepts. The 1689 English Bill of Rights was a contract between rulers and ruled (ROSSITER, p. 512). WOOD describes the transformation from the concepts of the British Constitution to the US Constitution, where, under representative self-government, rulers and ruled became one and the same.

The Founders grew up under the British Constitution. The Anti-Federalists insisted on the Second Amendment because they projected their understanding of the “corporatist” (UVILLER/MERKEL, p. 556) political concepts from the British Constitution onto the US Constitution. In Anti-Federalist consciousness, the states were the people, the ruled, analogous to the people in the House of Commons (at the time elected by less than 10 percent of the people) and in the local militias; and the rulers, analogous to the monarchy, its magistrates, and standing army, were the Federal Government. They wanted to preserve a vestige of state sovereignty through control of the state militias which would preserve the constitutional balance of the British Constitution (CRESS, UVILLER/MERKEL). However, the concepts had changed. The Second Amendment was an anachronism when ratified.

The *conscript* militia institution died a natural death by the 1840s. No one wanted it and, unlike in the British Constitution, it served no theoretical purpose. Despite the radical republicanism of the revolutionary period, colonial society was hierarchical and communitarian. After the Revolution, American society expanded to fill

a continent. It became mobile and individualistic. Radical republicanism, most explicitly manifest in the Pennsylvania Constitution, was beaten back by the US Constitution only to reemerge, less radically, in the new transAppalachian states. Hierarchy became muted. Voting became universal, without property requirements, at least for adult white men. Property requirements persisted much longer in the original states. Wyoming Territory admitted women's suffrage as early as 1869. South Carolina, meanwhile, did not provide for popular election of the Electoral College until after 1865. A restless, propertyless industrial working class, demanding other rights and protections, was not anticipated by the Founding generation.
President Jefferson tried to emphasize reliance on the militia over the regular army (HUMMEL), but poor performance in the War of 1812 led the Monroe Administration to abandon militia for the regular army (MAHON, Chapter 5). The conscript militia, a communitarian institution, never became established as a viable system in the new states but survived into the 1840s in Connecticut and Massachusetts. The Federal Government, dispenser of large tracts of land, became a benevolent factor in Westward Expansion. The US Army did not become, as had the regular army in seventeenth century England, a feared instrument of political intrigue. One great fear of the Founding generation never materialized.

C. Civic Republicanism and Dynastic Empires.

The dominant political form in the ancient world and in early modern Europe was empire. The Egyptians, Persians, Hellenistic Greeks, and Romans (among others) maintain empires. The Greek and Roman city-states, misleadingly called republics, were the exceptions. History proved them to be politically unviable. The Founders understood the “maladies” of republics.

The struggle against dynastic empires in the early modern Europe was centuries long. An early manifestation was the Dutch Republic which freed itself from the Spanish Hapsburgs in 1572. Amsterdam had not cathedrals, monasteries, unversities (an institution of the medieval church), or monarchy. What it did have was commerce, stock markets, insurance companies, and banks. It was a free commonwealth with free citizens. The emerging civic culture required civic obligation.

III. THE INFLUENCE OF SCOTLAND AND IRELAND

Regardless of the forgoing, the American gun rights culture does not have

its roots in Anglo-American law but in the rebellious traditions of Scotland and Ireland which are not only not a part of the English legal tradition but have been constantly and ambiguously at war with it. The rebellious traditions transferred across the Atlantic. Patrick Henry, famous for "If this be treason, let's make the most of it," grew up in a Scottish household. He had no allegiance to the Crown. The Whiskey Rebels of the 1790s were mostly Scots-Irish (SLAUGHTER). See HOGELAND for political context.[1] The Scots-Irish influence became manifest as a cultural right. (*infra*, p. 9).
KONIG argues that it was the neglected Scottish militia after Union in 1707 that inspired much of Second Amendment consciousness.

IV. The Libertarian Fantasy

Does this court not understand the political arena it enters into? What the gun rights militants want is a right to individual sovereignty, a right in the State of Nature before there is law and government, the right to be armed outside of the knowledge and reach of law and government, the right to maintain "the armed populace at large", which the NRA argued for in its amicus to this court in Perpich (1990). The Constitution is reduced from a frame of government to a treaty among sovereign individuals. They give no more than their good faith. Law is based on more than good faith. The fantasy is that it is a viable concept.

A sovereign gives and enforces law. It does not accommodate to a law giving authority. The gun rights militants, led by the NRA, will fight viciously—*viciously*, ***VICIOUSLY***—to defeat any further legislative attempts, particularly national, to implement the conclusions of the Parker/Heller courts. Fourteenth Amendment incorporation will open the possibility of arguing for dismantling existing regulatory schemes bases on accountability. This court has become politicized to pander to an anarchic political constituency with a malignant vision of economic, social and political life.

We can see this manifest in the NRA's lobbying Florida for a law that would make it a crime for any government official or agency to maintain a list of gun owners (Parker App. D), regardless that the Militia Act of 1792, enacted by the same people who framed and ratified the Constitution and the Bill of Rights, required exactly that. The next step in the gun rights agenda is to remove the accountability requirement

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[1]US Attorney RAWLE, a favorite gun rights citation, prosecuted the Whiskey Rebels. Tench Coxe, another favorite, was Hamilton's chief deputy at Treasury (HOGELAND).

entirely.
Fourteenth Amendment incorporation of the Second Amendment will not change the Parker/Heller conclusions which were a devastating defeat for the gun rights militants' core doctrine that the purpose of all those gun in private hands outside of the knowledge and reach of law and government is to maintain an anarchic balance of power between a privately armed populace and any and all government. There is a reason the NRA worked very hard to control and defeat the Parker case in 2003. It does not want gun rights cases in court. The right the gun rights militants want cannot be had under any viable concept of constitutional government. Fourteenth Amendment incorporation, protecting a right while leaving wide open the policy option. This court takes the gun rights militants half the way there. Incorporation will only breed more of the same political cynicism that motivates the gun rights claims to begin with. This courts highest responsibility is to maintain the sovereignty of the legal institutions of government against enemy of political cynicism and tendency toward the dissolution of government. (John Adams, infra, p. ___)

When the right is to individual sovereignty there are no "reasonable restrictions". What is reasonable to those who consent to be governed is a police state to those who do not. Will this court by incorporation, stress the courts to decide the difference in hundreds of cases over the next decades.

V. Historic Precedents

There are glaring examples in recent historical memory of failed state and failed doctrines.

A. The Weimar Republic and National Socialism

The Weimar Republic was a government that did not have the political will to maintain its internal sovereignty. Rival extralegal private militias (the Nazi Party's Stormtroopers and the Communist Party's Red Front Fighters League) fought gun battles in German cities in which dozens were killed in the late Weimar period while the legally constituted authorities were powerless to maintain public order. On March 23, 1933, when Adolph Hitler demanded a constitutional amendment that would allow him to rule by decree, he bought is private militia into the legislative chambers with him to insure the vote.*
(* The Stormtroopers were not armed on this event. They were an intimidating presence. Hitler did not allowed the carrying of weapons,

because they were constantly search for weapons by the Weimar authorities and Hitler did not want to antagonize the German army, the only institution the Nazi cabal never got complete control over. They, nevertheless, maintained arsenals, under went arms training, and brought out their arms when needed.)

Armed citizen guerrillas, vigilantism, and insurrectionist fantasies are the inevitable result of a government that does not have the political will to function as a government. We see an explicit manifestation on the Southwest border with vigilante border patrols (fn: History does not repeat itself, but at the end of the First World War Germany's borders were undefined. Vigilante militias, called Freikorp, emerged with the tacit support of the Weimar Republic, when in place, and the German Army, limited to 100,000 by the Treaty of Versailles, to secure the borders. They invaded neighboring states and committed atrocities that were precursors of the actions of the German Army 20 years later. Many of the Nazi Party's later leaders cut their political teeth and tasted their first political blood in the Freikorps) . The rule of law, the state's monopoly on violence, and the state's internal sovereignty all mean the same thing. This court asserts in Heller: "It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." By affirming the insurrectionist doctrine, this court, a branch of this government, becomes like the Weimar Republic complicit in its own demise.

B. Marx, Engels, and Lenin, Bolshevism and Stalinism.

Unlike the Founders, Marxist theory has not theory of the state or of political power. Lenin's *State and Revolution* (August, 1917) was the last Marxist/Leninist tract before there was Marxism in power. It has numerous references to the "armed people", "armed masses", "armed workers", no different from the NRA's "armed populace at large". Lenin rejected public authority:

> So long as the state exists there is no freedom. (p.114)

The "armed people" will abolish the bourgeois state which protects capitalist property and replace it with the "dictatorship of the proletariat" which would not govern persons but would administer things (p. 19) in a transition period called "socialism". This state serves no perpetual purpose and will "wither away" into stateless communism.

Then what of maintaining public order without law and government?

> We are not utopians [*sic*], and do not in the least deny the possibility and inevitability of excesses on the part of individual persons, or the need to suppress such excesses. But, in the first place, no special machine, no special apparatus of suppression is needed to do this; this will be done by the armed people itself,... (Lenin, p. 108)

The Plaintiffs' right to individual armed self-defense leads ultimately to the same utopian doctrine of vigilante policing. Ultimately, the self-defense sought is self-defense in the State of Nature which is the state of anarchy. There is no individual self-defense in the state of anarchy. Vanden Haag:

> In fact anarchy is actually impossible. The monopoly of legitimate force held by the state can be replaced only by polyarchy which cannot but be worse.

Our local warlord, "the strongest[,] carries it" (1LOCKE, §1). Witness Iraq. This apprehension pervaded the consciousness of the Founders. Also, from Haag:

> The individual would be fully sovereign in the libertarian non-society and peace would be as precarious among individuals as it is now among the [state] powers.

Is the Ninth Circuit Circuit's "amorphous body" of the armed people any different from the NRA's "armed populace at large" or Lenin's "armed masses", a burden falls on the federal judiciary to define and defend constitutional government against anarchy. Stalinist tyranny was the inevitable outcome.

History does not repeat itself but when we have political leadership that will follow the path to the national policy this court has opened the gun rights militants will discover they do not have a right to individual sovereignty and this court will discover it has created a constitutional mess.

VI. Civic Purpose.

The Emerson majority panel (2001), the dissents to an en banc rehearing of Silveira (2003), the Parker majority panel (2007), this court's majority

in Heller (2008), and the revisited Nordyke panel (2009) have sought to "tease out" (the Parker court's phrase applied in the converse) of the historic record the primacy of a right to be privately armed for self-defense. While acknowledging a civic purpose, the civic purpose becomes secondary. However, when the court concludes "registration ... for militia service when called up" the civic purpose is primary and trumps all other purposes.

A plain reading of the Militia Act, enacted by the same people who frame and ratified the Constitution, makes clear that the whole militia concept and institution, consistent with "imploy his force', was about conscription (a coerced civic obligation), military organization, military discipline and military preparedness. The original conscript militia institution died in the early Republic because no one wanted it and because, unlike under the eighteenth century British Constitution, it served no theoretical purpose (infra, p. ___). Cromwell's military dictatorship in seventeenth century England was living memory to the Founding generation. The US Army, unlike the British Army, did not become a feared instrument of political intrigue. One great apprehension of the Founders never materialize. The original civic obligation was resurrected in the twentieth century Selective Service Acts. (Infra, p. ___).

The original antagonistic relationship between the state based conscript militia and the mercenary US Army, which as created in the Constitution was explicitly modeled after the British army, was combined in the twentieth century.

The US Army as created in the Constitution was explicitly modeled after the mercenary British Army recently removed. The right of the people in the militia, in the militia clauses of the Constitution, the Second Amendment and the Militia Act of 1792 was the republican right of the people to participate in the military functions of the state as conscript citizen soldiers rather than leave those functions up to a mercenary army. The antagonistic relationship between the conscript state militias and the mercenary US Army was combined in the twentieth century selective service acts. The US Army became in a sense a national militia. The life of the Republic moves on. The militia discussions in the Federalist Papers were relevant to the issues and concerns of the ratification period. They are anachronistic to our present politics and policies.

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VII. Anarchy, Insurrection, Treason and the Libertarian Fantasy

The libertarian fantasy is on the Ninth Circuit.

A. The Ninth Circuit.

Judge Reinhardt wrote in Silveira:

> In any event, ..., it is clear that the drafters believed the militia that provides the best security for a free state to be the permanent state militia, not some amorphous body of the people as a whole, or whatever random and informal collection of armed individuals may from time to time appear on the scene for one purpose or another.

In dissent to an en banc rehearing of Silveira, Judge Kleinfeld with Judges Kozinski, O'Scannlain, and Nelson joining (Judges Pregerson, Gould and Kozinski filing separate dissents), wrote referring to the US Code (10 USC &#167 331. Militia: composition and classes):

> The "unorganized militia" is precisely what the panel says it is not, "an amorphous body of the [armed] people as a whole".

Judge Kleinfeld goes so far as to include the full text of the Militia Act insisting that it was all about and "amorphouse body..." The"amorphous body...", the "armed populace at large," "a much broader swath of the population, regardless of actual military service" (NRA's petition for cert. in Silveira) are the essence of the libertarian fantasy that the Constitution

can be reduced from a frame of government to a whimsical notion. When this court asserts (Heller, p. 26) that there is more to the right than "the right to keep and use weapons as a member of an organized militia," it

hints toward the same fantasy.

The immediate question is: Are the members of this “amorphous body ...” citizens bound by law or individual sovereigns in the State of Nature which is the state of anarchy? Do they consent to be governed? Do they give "just powers" to government? Do they surrender up the executive power of the law of Nature, which is the law of the jungle? Do they give civic obligation? Does the individual serve the civic purpose that he has “given up a right to the commonwealth to imploy his force for the execution of the judgments of the commonwealth whenever he shall be called”?

The only court that has decided in favor of 14th amendment incorporation is the Ninth Circuit in its revisit to Nordyke—revisited after this court’s Heller opinion. The same Ninth Circuit judges have asserted that what the Second Amendment protects is the “amorphous body ...”, no different from the NRA’s “armed populace at large”. From there we go to “armed citizen guerrillas” and others with insurrectionist fantasies. From there we go to the Nazi Party’s “armed citizen guerrillas” called Stormetroopers. Will this court now affirm the anarchic revisited Nordyke opinion with 14th Amendment incorporation.

C. To Make or Suppress Insurrections.

One constitutional civic purpose is to suppress insurrections not make them. Or, is it?

NRA national board member wrote in the Washington Post July 6, 1989:

> As the Tiananmen Square tragedy showed so graphically, AK-47s fall into that category of weapons, and that is why they are protected by the Second Amendment.
>
> Twentieth-century military machines are far from invincible when outflanked by armed citizen guerrillas. Tanks and even high-tech military hardware were unavailing to the U. S. forces in Vietnam and the Russians in Afghanistan.

NRA Executive Vice President Wayne LaPierre wrote in his book Guns Crime and Freedom (1994):

> Certainly Jefferson, and his co-authors of the Declaration, preferred peaceful changes in government. But those four words— "the Right of the People"— state in plain language that

> the people have the right, must have the right, to take whatever measures necessary, including force, to abolish oppressive government.

The Second Amendment Foundation argued in its amicus in Warin (1976):

> What your Amicus asserts is a basic right of free men to take up arms to defeat an oppressive government.

Fall on your knees. This a Constitution you are expounding. The Declaration of Independence was a charter for Revolution. It was treason against the Crown. The people do have a right a right to take up arms to defeat an oppressive government. It is a right in the State of Nature before there is law and government. The Constitution is not perverted. The Constitution defines treason as the waging of war—bearing of arms—against the United States. It does not then secure a civil right to commit the same.

A bill or rights, separation of powers, regular elections are restraints on sovereignty; "armed citizen guerrillas" are a rival sovereignty.

This court has already address the issue:

> We reject any principle of governmental helplessness in the face of preparations for revolution, which principle, carried to its logical conclusion, must lead to anarchy.
> —*Dennis v. United States* (1951)

D. An Individual Right to Armed Self-Defense.

The insurrectionist doctrine has not won and cannot win the right it wants under any viable concept of constitutional government. It has to have the right by defeating legislation. That struggle will continue. The struggle makes for much small-minded, cynical, obstructionist demagogic politics. Armed self-defense is the great present demagogic appeal.

The insurrectionist doctrine has to have the right by defeating legislation. Registration for militia service makes the gun owners responsible for the laws. John Locke (infra, p. ___): "For hereby he authorises the society, or which is all one, the legislative thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own

assistance (as to his own decrees) is due." The civic purpose this court has affirmed demands accountability.

When we cannot have laws that apply against the lawless, we need a fundamental individual right to armed self-defense. Even the smallest protection for a individual right gives credence to this childish political fantasy. This court panders to an anarchic constituency with a malignant vision of economic, social and political life that is part of a larger political struggle over the modern state and political economic of capitalism. (Infra, p. ___) Dimwitted (Judge Easterbrook in *NRA v. Chicago*); grotesque (this court's *Heller* majority), "a dissolution of the government" (John Adams, infra p. ____) , "patron[s] of anarchy" (John Locke, infra, p. _____)

VIII. The Parker/Heller Policy Conclusions Have Good Company.

"Registration ... for militia service when called up" affirms as primary the civic purpose of the Militia Act of 1792 as primary. The state based conscript militia was moribund by the 1830s. The Militia Act nevertheless remained on the books until 1901. Not one of the many political players from enactment to repeal, all of whom lived under of the Militia Act, objected to the inventory requirement of the Militia Act. Those often cited are George Washington, John Adams, Thomas Jefferson, Alexander Hamilton, Tench Coxe, Noah Webster, James Madison, Joseph Story, William Rawle, and Thomas Cooley.

Thomas Jefferson.

As President, Jefferson for ideological reason want to rely on the militia over the regular army. He enforced the inventory requirement authorized in the Militia Act which Washington and Adams had ignored. The inventories, called "Return of Militia," were reported to the president from 1802 into the 1830s. Jefferson's militia became discredited in the war of 1812 and lost its support and purpose.

Joseph Story

Joseph Story is interesting and significant. Despite the attention given to his "palladium" quotation, when it came to a real conclusion, Story was adamant. Story was unrestrained in his hostility to the actions of the Dorr Rebels in the early 1840s. Thomas Dorr as governor under the unauthorized Suffragist Constitution had led a militia against the Charter

Government which had the support of Story and the US Government. Dorr was convicted of treason in state court.*
(*http://www.potowmack.org/dorrreb.html)

William Rawle

Whatever else William Rawle had to say he was the US Attorney who prosecuted the Whiskey Rebels for treason in the 1790s.

Thomas Cooley

Thomas Cooley educated a whole generation of lawyers and jurists to the doctrine of substantive due process to protect capitalist property. He mused about a general right to arms, but did he embrace the idea that the restive, growing industrial working class had a right to take up arms to assault capitalist property.
(Fn. Peter Irons, A Peoples History of the Supreme Court, "The Specter of Socialism")

IX. Teasing Out an Individual Right.

A. Giving New Meaning.

The armed populace at large fantasy has been fabricated by lifting words of out context from historical sources. Stephen Halbrook, much cited in gun rights literature, in the briefs filed and in the opinions issued by the courts, is the chief fabricator:
"Abusing Federalist Paper No. 46"
http://www.potowmack.org/196fp46.html
"Abusing John Locke"
http://www.potowmack.org/196locke.html
"Abusing Federalist Paper No. 29"
http://www.potowmack.org/emerappi.html#abus29
Or, the technique is giving words new meaning. Gun rights is a political movement, imbued with a delusional will to believe, infecting, among others, federal judges and Plaintiff *amici*'s host of "scholars", which abuses history, logic, law and language. There is nothing new here. Friedrich Hayek explained how totalitarian regimes operate:

> The most effective way of making people accept the validity of the values they are to serve is to persuade them they are really the same as those which they, or at least the best among them, have

> always held, but which were not properly understood or recognized before. The people are made to transfer their allegiance from the old gods to the new under the pretense that the new gods really are what their sound instinct had always told them but what before they had only dimly seen. The most efficient technique to this end is to use the old words but change their meaning. Few traits of totalitarian regimes are at the same time so confusing to the superficial observer and yet so characteristic of the whole intellectual climate as the complete perversion of language, the change of meaning of words by which the ideals of the new regimes are expressed. (HAYEK, p. 157)

The libertarian fantasy's will to believe employs the same technique. We have an intellectual climate that has fabricated and tolerated fabrication by the same techniques of a preposterous doctrine of political liberty. That doctrine is before the court.

A. The Federalist Papers.

1. FP No. 46. The most ubiquitous words to prove an individual right are "the advantage of being armed" from No. 46. On plain reading the words describe not a civil right of private individuals but the military federalism that has been amply argued in the briefs to this court. The militiamen were "commanded by officers", attached to "subordinate governments."

It is not clear that Madison really believed what he wrote. He wrote long before there was a Bill of Rights. The Federalist Papers, lofty and insightful, were nevertheless political polemics to advocate ratification of the Constitution. The Constitution was not a shoo in. Madison knew the Constitution defined treason as the waging of war against the government. In any event, it was the state governments that would lead the armed resistance not private individuals.

In *Gun, Crime and Freedom*, the NRA's Wayne LaPierre lists 32 law journal articles which are purported to assert an individual right. Most of these cite the words out of context. The John Birch Society's magazine *The New American* cites the words in full context in an article, "The Rise of Citizen Militias", Feb 1995, but still insist the words mean the very opposite of what they plainly say. Regardless of what a growing number of federal judges and the host of the gun lobby/libertarian "scholars" they cite would have us believe, James Madison was not describing a civil right of private individuals. The issue was military federalism, a federalism that was part of the great concerns of the

ratification period but which today is anachronistic and irrelevant. The Constitution created a delicate military balance between the conscript state militias and a federal army which as created in the Constitution was explicitly modeled after the mercenary British Army recently removed. The larger context of the Second Amendment was the republican right of the people to participate in the military functions of the state as conscript citizen soldiers, fulfilling a civic obligation, rather leave those functions up to a mercenary army whether the British Army or the US Army. The Second Amendment only makes sense in those 18th century terms. The original antagonistic relationship was combined in the twentieth century Selective Service Acts. The US Army became in a sense a national militia. The United States became a modern state capable of performing on the world stage as a great power.

2. Federalist Paper No. 25

Hamilton gave little credence to the capacity of "armed citizen guerrillas": "The citizens must rush tumultuously to arms, with concert, without system, without resource; except in their courage and dispair.

2. Federalist Paper No. 29.

Judge O'Scannlain in the revisited Nordyke opinion cites Alexander Hamilton from Federalist Paper No. 29. The part in bold is the part he cites. The words support the gun lobby/libertarian anarchic doctrine, but when the full context is restored the meaning is quite different:

> The attention of the government ought particularly to be directed to the formation of a select corps of moderate extent, upon such principles as will really fit them for service in case of need. By thus circumscribing the plan, it will be possible to have an excellent body of well-trained militia, ready to take the field whenever the defense of the State shall require it. This will not only lessen the call for military establishments, but **if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens**, little, if at all, inferior to them in discipline and the use of arms, **who stand ready to defend their own rights and those of their fellow-citizens.** This appears to me the only substitute that can be devised for a standing army, and the best possible security against it, if it should exist.

Hamilton was clearly describing a select state based militia force the gun rights militants find so objectionable. It was the same military federalism describe by Madison.

Now even federal judges have gotten into the act of lifting words out of context. The NRA's"armed populace at large" and Judge Kleinfeld's "amorphous body..." are invented out of the historic context. All the armed populace meant was that conscription into the militia was a universal obligation. Try to resurrect that obligation now and impose it on the NRA's "armed citizen guerrillas".

D. John Adams

Much attention is given to the self-defense purpose in this passage leaving out the “commanded by laws” and “support of the laws” part. The civic purpose trumps all other purposes.

> It must be made a sacred maxim, that the militia obey the executive power, which represents the whole people in the execution of laws. To suppose arms in the hands of the citizens, to be used at individual discretion, except in private self defense, or by partial orders of towns, counties, or districts of a state, is to demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man is a dissolution of the government. The fundamental law of the militia is, that it be created, directed, and commanded by the laws, and ever for the support of the laws.

What “is due” is again from Locke. Private self-defense cannot be against the same government that will secure the right.

Here is a conspicuous example from people who should know better:

> While Adams was generally opposed to the use of armed military power outside government controlled channels, even he acknowledged the legitimacy of “arms in the hands of citizens, to be used ... in private self-defense.
> —Heartland Heller brief.

E. It began with Emerson.

Garwood embraced the gun rights "fraud" that the late Chief Justice Berger denounced (UVILLER/MERKEL, p. 410n). The embrasure manifests a reprehensible politicization of the federal judiciary to further partisan demagoguery. Emerson meant nothing as law for gun rights claimants. Emerson was remanded to the district court for trial and convicted.

Garwood relies on three sources (VC1b) to fabricate a right to be armed outside of the militia context:

1) Jefferson's "bear a gun" (1785)
2) Noah Webster's "arms in a coat" (1828) and
3) "defense of themselves" from the Pennsylvania MINORITY DISSENT (Silveira, footnotes 28, 46, 47) and state rights declarations.

All other sources Garwood cites are vague references to "personal liberties", "private rights" and "private arms" usually from private expressions; Or, his sources describe in general terms the need for a bill or rights and for the militia as a balance against a standing army. Your Amicus, as the Potowmack Institute, gave the Fifth Circuit panel an examination of over 300 uses of "bear arms" in an overwhelming and unambiguous military context compiled by a PhD historian of the Second Amendment.*

Garwood's fabrication is not just fallacious but comical:

1) Jefferson's "bear a gun" has a very different connotation from "bear arms" and immediately fails.
2) Noah Webster's definition "bear arms in a coat" is read to mean "bear arms in a coat [pocket]" when the meaning is "bear arms in a coat [of arms]". On this kind of comical fabrication we will dissolve law and government and institute anarchy.
3) What did "defense of themselves" mean? Garwood's state constitutions also asserted a right of the people to "alter or abolish" their government (from DOI, a charter for revolution) but only to assemble and petition peaceably.

"Defense of themselves" originated in the 1776-1790 Pennsylvania Constitution. James Madison concluded from his study of history that for consolidation under a central government to be viable the government had to draw at least some of its authority directly from the people. The MINORITY DISSENT wanted a confederation of states and rejected consolidated government.

The Framers, some of whom had direct experience with political violence (FERLING, p. 221), wanted security and order through law and a strong central government. It is preposterous today to assert that, after Shays' Rebellion and other civil disorders, maintaining the "armed populace at large" was part of their consciousness and intent.

But, did the Pennsylvania Constitution maintain it? Enactments under the Pennsylvania Constitution required gun owners to swear a loyalty oath to the Revolution and the revolutionary Pennsylvania government—or, be disarmed. (Appendix H)
Judge Garwood goes on to the most ubiquitous words to support the individual right, James Madison's "advantage of being armed" and "keep"(infra, p. ___)

E. The Second Amendment

A. A free state

Free from what? Dynastic empires were the dominant political form in the ancient world and early modern Europe. (infra, p. ___)

B. The people

The people under the British Constitution were an estate of the realm. (infra, p. ____)

C. Keep Arms.

Much is made of the use of the word "keep" arms in the Second Amendment. The first use of "keep" arms in any Anglo-American document of fundamental law was the 1780 Massachusetts Constitution. The Revolution was not yet won. The Massachusetts Constitution was treason against the Crown. The right to "keep" arms was to keep them from the Crown to use against the Crown for treasonous purposes. As the words are repeated the original context is lost.

The Massachusetts Constitution is the only one of the original 13 state constitutions still enforce. As the states clamor for a states right free from federal regulation (infra, p. ____), are they claiming in the spirit of our present anti-government ideologies a right to keep arms from the federal government for treasonous purposes against the Federal Government. Has the Federal Government become the Crown, unresponsive, remote, unaccountable, unrepresentative? If so, whose fault is that?

D. Bear Arms

The Parker majority cites Vigil's Aeneid, "Beware of Greeks bearing gifts." The original words are:

Danaos [Greeks] *et* [even] *dona* [gifts] *ferrentes* [bearing] *timeo* [I fear].

Ferrentes is the participle of *ferre* (to bear) as in *arma* (or *dona*) *ferre.* It was not *arma* (or *dona*) *portare* (to carry).

The Latin roots make their appearance in modern English with their different meanings. :

transfer - transport
confer - comport
refer - report
infer - import
defer - deport

Applying the same reasoning as the Tennessee court in *Aymette*: A *porter* can work on the loading dock of a department store at Yuletide carrying customers' gifts all day long without ever *bearing* gifts.

We have already seen bear arms "in a coat [pocket]".

Even this court has gotten into the act.

X. Poverty of Public Knowledge and Discourse, the Failure of Political Leadership and the Crisis In Policy Making

The court cannot compensate for failed policy making. Too much is stake to rely on public ignorance over an oath of public office. .

A. The DC Government.

The DC Government had no business taking Parker to this court. It had everything it needed in the Parker conclusions to launch a campaign for a national policy based on the civic purpose and addressed at controlling the illegal traffic that would make its efforts to address gun violence in the District effective and meaningful (infra, p. ____). Rather than pursue a policy based on fundamental concepts, the DC government's response to a constituency in crisis is failed policy making. It has to do something but makes a unenforceable, counter productive gun law.* (*The primary author of this brief lived in the District in the early 1980s and kept a loaded fully operational shotgun in the closet. Unless seen and reported by a malevolent house guest, there was not way District authorities could have known it was there. Even if used against a criminal intruder, there is no way the District could have proven in court that it was not assembled

and loaded in the moments before it was used. Assuming the legality of armed self-defense under that circumstance, the only prosecutable offense would be that the piece was unregistered.) Failing to start with fundamental concepts and provide serious political leadership, the DC Government takes its place in a false progun/antigun culture war. When this court enters into the fray, it takes its place in the same culture war.

B. Public Ignorance

William Vizzard's Shots in the Dark is an authoritative treatment of firearms policy. It has never been cited in the thousands of pages of briefs filed and opinions issued in Second Amendment cases since it was released in 2000. Vizzard told the primary author of this brief in a telephone conversation shortly after his book was released that "No one knows anything about firearms policy". He spend many years on Capital Hill lobbying for firearms policy. He was speaking mainly of members of Congress, but the ignorance is general.

C. Congress

In early 2009, Rep. Bobby Rush (1st Cong. District of Ill, Chicago) introduced the Blair Holt Registration and Licensing Bill. The Potowmack Institute tried with no response to arrange a meeting with Rep. Rush for the primary author of this brief, Michael Beard, President of the Coalition to Stop Gun Violence and John Kenneth Rowland*, the only living PhD historian of the Second Amendment to provide some enlightening discussion on his bill.
(* There were only two other PhD historians of the Second Amendment pre-1990.
John K. Mahon (1912-2004)
http://www.potowmack.org/mahonch3.html, .../mahonch4.html, /mahonch5.html
and Lawrence Cress (1947-2001)
http://www.potowmack.org/lcress.html
Cress may have been the most prolific of Second Amendment historians. Joyce Lee Malcolm much cited in gun rights literature had the enormous conceit to tell a House committee in 1995 that there were no historians for her to argue with anymore,
http://www.potowmack.org/malcolm.html
http://www.potowmack.org/cong6.html
Malcolm has severe critics among professional historians.
In her book The Right to Keep and Bear Arms she gives Cress only one sentence.)

His bill is the beginning of movement towards the national firearms policy that this court has opened the path for, but it has not co sponsors and will not get a committee hearing. Without aggressive leadership it only serves the purpose of hysterical fund raising. (App. ____)

Rep. Rush is a pariah in Congress because of his past Black Panther associations. He nevertheless has one of the strongest arguments in favor of a national policy. In his book That Everyman be Armed, gun rights advocate and very active litigant in these cases Stephen Halbrook cites the Black Panther Party Platform as support for an individual right to armed self-defense. The Platform may have been thinking about individual self-defense and defense from threats that may come from the Ku Klux Klan, but it was also thinking about self-defense against the police. Rep. Rush can make the argument that the insurrectionist doctrine is not an equal opportunity doctrine. The Black Panthers were gun down in the streets and shot up in their beds. There were no members of Congress standing up for their Second Amendment rights.

Rep. Barney Frank wrote a chapter in his book, Speaking Frankly, on gun control. He wrote of gun control in the lame category of crime control. Frank is a graduate of Harvard College and the Harvard Law School. If he cannot explain the difference between Civil Society and the State of Nature which is the state of anarchy, he becomes identified as a "patron of anarchy".

The Federal Courts

When nominees to the federal bench including nominees to this court are before the Senate Judiciary Committee, increasingly they are questioned on Second Amendment rights. If there was real political consciousness, the nominee would turn the Second Amendment questions around and ask the senators, Do you accept and support the conclusions of the Parker/Heller opinions, namely "registration ... for militia service when called up"? Any member of congress who said, "Yes," would be viciously—*viciously*, ***VICIOUSLY***—attacked and opposed by gun rights militants led by the NRA.

The Air Waves.

The Parker/Heller cases transpired starting in 2003 in the immediate neighborhood of NPR's Diane Rehm. She has never devoted a program to the cases. She responded to the Potowmack Institute with, Take me off of your mailing list. If she has difficulty with the subject, she need only

read her mail. http://www.potowmack.org/196rehm.html.

The gun lobby's most reliable asset, the one the NRA calls "the rabidly antigun Washington Post" adamantly refuses to print anything that would enlighten this subject above the level of promoting trigger locks and suing the gun manufacturers. The Washington Post prints uncritically and in relative abundance the words "the advantage of being armed" from Federalist Paper No. 46, but always in the gun lobby version.
http://www.potowmack.org/washpost.html
http://www.potowmack.org/parkappc.pdf

The Gun Controllers

The Potowmack Institute was at the Million Mom March in 2000 and 2004 and could not find a single person out of hundreds asked who had heard of the cases in court. The gun rights militants follow these cases with intense interest. Their time has arrived. The 2000 March may have been 300,000 strong. In 2004, it was less than 2000. There was no 2008 March. What is at stake in these cases are the most vital and fundamental issues, concepts and values of political and civic life, but there is no knowledgeable, energized constituency of a viable concept of constitutional government. The members of this court are nevertheless under oath of public office.

The Candidates

The Potowmack Institute worked from when the Parker opinion was release in March, 2007, upto the 2008 election to encourage the question to presidential candidates, Do you accept and support the Parker conclusions? (Appendix ___). The simple question was not asked. Asking the question neutralizes the gun vote in national politics. The gun vote goes to Bob Barr and Ron Paul. They are the only candidates who would even have understood the implications of the question.

In July, 2008, candidate Obama proposed a Civilian National Security Force. This has been condemned as creating a police state. If the Obama campaign was to bring the subject up at all it should have put it in the context that the proposal is completely consistent with the Heller opinion and with the Militia Act of 1792. We don't have the political commentary to point that out. We learned no more about it in the campaign.

XI. The Heller Majority

Justice Anthony Kennedy in his talk to the Ninth Circuit judicial conference, July 31, 2008, on C-Span's archive dated August 9, said,
"Law cannot be isolated from history."
"Each generation shapes its destiny."
"The rule of law is in mortal danger."
"The state must have the monopoly on force."
It was incumbent on Justice Kennedy to explain his statements in light of his vote in Heller. He does not have to worry that anyone else will take him or the Supreme Court to task. The court has isolated the law from history to pander to a present day anarchic constituency. If he will admit that every generation shapes its destiny, he is in conflict with Justice Scalia who wrote the Heller opinion. Scalia wants us to be frozen in the political values, concepts, and institutions of the 1780s— as he will redefine them to satisfy present agendas. Kennedy went on to tell how most people in the world live outside of the law. Street gangs and warlords rule. This is polyarchy not anarchy. See Van den Haag (infra, p. ___). It is already reality not just in the Third World but in many American and European cities. It is incumbent on Justice Kennedy to qualify his vote in Heller as to how far he will take us in the direction he finds so dangerous—but, this is just a mundane matter of working out the details of Second Amendment jurisprudence. "Second Amendment jurisprudence is in its infancy." ( ) and constitutional government is regressing into its infancy. A less ignorant, less politicized and more responsible man might tell us something about sovereignty—that the rule of law, the state's monopoly on violence, and the state's internal sovereignty all mean the same thing—and the larger context of our present politics. He might say something about anarchic and insurrectionist proclamations that abound on internet websites and message boards. We will throw out the constitutional state baby with the modern state bath water. *Dimwitted. Grotesque. The dissolution of the government. A patron of anarchy.* If we have a future, history will judge severely.

Justice John Roberts said in his confirmation hearings that the justices will act as umpires who will impartially apply the rules as written, not seek to participate in the game and change the results. Yeah. Right. The present Supreme Court is the most politically appointed, politically motivated in Supreme Court history. There is no better example than the Heller opinion to which Roberts signed on. The political agenda is to dismantle the modern state. None of this is examined in public consciousness.

In Rybar, Judge Alito dissented on the grounds that intrastate commerce in machine guns does not quality as interstate commerce subject to federal regulation. In the first place, the authority to regulate lethal weaponry is in the militia clauses and the Second Amendment. (Infra, p. ____) Without federal authority to regulate through registration and licensing as enacted in the National Firearms Act of 1934, if one jurisdiction were to allow unrestricted access to serious military lethal weaponry, it would become a spigot to supply lethal weaponry to the whole country and the whole world. Justice Alito does not want a concealed submachine gun in every pocket. He denies the modern state as created under the authority of the Commerce Clause. It is the Commerce Clause that is central to Libertarian Right's agenda to dismantle the modern state. *Dimwitted*. *Grotesque*. *A dissolution of the government*. *A patron of anarchy*. If we have a future, history will judge severely.

The gun rights ideologues look to Justices Scalia and Thomas for their salvation. It is very ironic that ultimately the only meaning the Second Amendment can have as an individual right protected against state and local regulation is Fourteenth Amendment incorporation. The hard core ideologies of the Libertarian Right have never accepted the expansion of federal power to incorporate any articles of the Bill of Rights into Fourteenth Amendment protection. What then do we have? In A Matter of Interpretation Scalia wrote, fn p. 137:

> Of course, properly understood, it [the Second Amendment] is no limitation upon arms control by the states.

Thomas wrote in his concurring opinion in Printz:

> If, however, the Second Amendment is read to confer a "personal right" to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections.

Oops! No Fourteenth Amendment incorporation against the states. Can we expect logical consistency from Supreme Court justices?

XII. The Modern State, the Social Contract, and the Dreaded Socialism.

The members of the this court can search as easily as anyone the internet for some combinations of such words as “Second Amendment”, “socialism”, “marxism”, “liberal”, “government oppression”.

very remote from public knowledge and discourse.
All part of the same story.

A. The Dreaded Socialism.

In his speech to the Republican Convention in 1964 which launched his political career, Reagan said,

Last February 19 [1964] at the University of Minnesota, Norman Thomas, six-time candidate for President on the Socialist Party ticket, said, "if Barry Goldwater became President, he would stop the advance of socialism in the United States." I think that's exactly what he will do.

Well, what was the advance of socialism? Thomas' Socialist Party had four major policy goals:
1) Collective bargaining for labor.
2) The basic provisions of the original Social Security Act.
3) The forty hour work week.
4) National health insurance.

The first three of these were achieved in the New Deal. The fourth is still on the agenda. These are the twentieth century social contract. Ronald Reagan had the next twenty-five years of his political life including the last eight years as president to dismantle the achievements of Thomas' Socialist Party. We never heard another word about the dreaded "socialism". There is no political or intellectual leadership that makes the advance of socialism part of our national consciousness and holds our candidates accountable for what they are really talking about. And, of course, no member of congress of any political persuasion has ever introduced legislation to repeal the policy achievements of the Socialist Party. We are all socialists now.

B. The Twentieth Century Transformations.

There were at least five transformations of the United States in the twentieth century of constitutional proportions that made the United States into a modern state capable of performing on the world stage as a great power, managing an industrial economy, and guaranteeing liberty and justice for all. The Libertarian Right has never accepted any of these:

1. The Federal Reserve

A central bank, nowhere enumerated in the Constitution, had been controversial from the beginning of the Republic. Andrew Jackson vetoed extension of the Second Bank of the United States in the 1830s. The Federal Reserve was created after the Panic of 1907. England had had a central bank since 1694. Even the late Milton Friedman, the most prestigious of our Libertarian Delivers, thought the Federal Reserve should be abolished.

2. The Sixteenth Amendment

This was the only actual constitutional amendment in these transformations. It gave the modern state its most important source of revenue. No one likes taxation. The tax code is certainly eligible for revision and reform, but there are those who think the Sixteenth Amendment was fraudulently ratified and should be repealed which means they think the modern state should be repealed.

3. The Selective Service Act of 1917

Of these transformations, this was the most radical departure from original design and intent. Throughout the nineteenth century, dating from a speech by Daniel Webster during the War of 1812 (.../dwebcons.html), national conscription was regarded as unconstitutional. Chief Justice Taney prepared an opinion during the Civil War to declare the 1863 national conscription law unconstitutional, but, because the draft was so unpopular during the Civil War, the law was never vigorously enforced and a case never came up for him to issue his opinion. It is on conscription that the latent authoritarianism of the Libertarian Right is most conflicted. (.../conscri1.html)

The abandonment of conscription in 1973 was as significant in the political culture as national conscription in 1917. From the end of the Korean War till the beginning of the Vietnam War, there was a ten year period of peace time conscription. Every young man went down to his draft board and registered for the draft without thinking too much about it. The US in the mid-twentieth century became a national republic and the US Army became a national militia in the sense of the state militias of the early Republic. It was also a complete anomaly in American history, politically impossible in previous history and politically impossible now. It was not Newt Gingrich's "counter culture McGovernicks" or anti-Vietnam War protestors who abolished the civic obligation of

military service. It was the same Milton Friedman who was the guiding light and driving force on Nixon's all volunteer army commission, http://www.reason.com/news/show/118494.html. The conversion to the all-volunteer army was another radical departure, this time from the civic culture of the twentieth century. Friedman's motivation was libertarianism's political cynicism. Nixon's motives were a different political cynicism. He wanted to take the wind out of the sails of the protest movement and thereby largely remove political constraints from the conduct of foreign policy and the projection of American military power at the disposal of the president. The inevitable consequence is not only the present involvement in Iraq and Afghanistan, but also the enormous presence of private mercenary contractors, http://www.thenation.com/doc/20070402/scahill_vid. The Founding generation is horrified.

4. The New Deal Constitutional Revolution

greatly expanded federal authority to address national issues of financial and banking regulation, worker rights and protections, etc. See the Texas Justice Foundation's amicus curiae brief in Lopez (.../loptjf.html). The TJF goes on at great length about the "infamous" US. v. Darby (1941) ruling without ever stating what Darby did, which was uphold the Fair Labor Standards Act of 1938, which established in national law the forty hour work week for wage labor reversing the truly infamous 1905 Lochner v. New York ruling. Darby is described in one constitutional law text as the culmination of and the very essence of the New Deal Constitutional Revolution.

5. The Civil Right Constitution Revolution

The federal judiciary undertook a judicial revolution in the 1950s and 1960s under the authority of the Fourteenth Amendment to establish national standards for individual civil liberties. The Libertarian Right is all in favor of individual rights, but these are rights we secure to our individual selves. That is why we need a gun in every pocket. The Libertarian Right will curtail protections for all rights but one.

The Libertarian Right would dismantle on sweeping ideological principles all of these (except in some quarters national conscription) to return to the golden age of political liberty of robber baron capitalism and preCivil War constitutional arrangements. The Libertarian Right's problem is that most people accept the contours of the twentieth century social contract (.../ike541108.html). The strategies have to employ stealth

politics and demagoguery.

C. Dismantling the Modern State and the Twentieth Century Social Contract.

Cato's CRANE in Moscow in 1990: "When looking to the West you must reject those who promote democratic socialism, . . . or even the so-called mixed economy of the United States. Yours is a unique opportunity to reject all forms of statism, whether in its most pernicious form, communism, or in its more insidious form, the mixed economy."—And, then, degenerate into gangster capitalism. The "socialism" is statism. Law becomes statism. Law now no longer secures, protects, and makes free. Law only oppresses.

G. Gordon LIDDY, nationally syndicated talk show host:

> The way they [the Founders] attempted to guard against the tendency [of a central government] to grow and become tyrannical was twofold. One was to say, the only powers this new central government will have are the ones specifically enumerated herein. Everything else is reserved to the states and to the people. Then there was the Second Amendment which was designed so that the people would remain armed so that if once again the central government became tyrannical the people would have the means to overthrow it and free themselves.

Political cynicism demands a permanent pre-revolutionary situation. The tyranny is the modern state. The Constitution becomes perverted. It defines treason as the waging of war against the United States and then secures a civil right to the same. While a big supporter of Second Amendment rights, Liddy is also a big supporter of military service. On one side, there is only the most tenuous accommodation to a governing authority in Civil Society; on the other, complete surrender to military command. And, of course, national conscription is not enumerated in the Constitution.

The same Robert Levy who argued Parker/Heller all the way to the Supreme Court wrote with his co-author William Mellor The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom, released May, 2008. We can argue Supreme Court cases on their merits and demerits, but the ruling value is still unequivocally the political cynicism that we cannot address national

issues and national problems with a national governing authority. US v. Miller (1939), which upheld the National Firearms Act of 1934, is included in the twelve. Maybe the Supreme Court was thinking that sawed off shotguns, machine guns, handgrenades, field artillery, etc., in every personal arsenal are not appropriate for self-defense against the rulings of the Supreme Court. Levy and Mellor DO NOT list the Selective Draft Law Cases (1918) which constitutionalized national conscription in the most radical departure from original design and intent and the Federal Government's most severe imposition on individual sovereignty; NOR, do they list US v. Darby (1941) which upheld the Fair Labor Standards Act of 1938 establishing the forty hour work week as national law. One constitutional law text describes Darby as the culmination of and the very essence of the New Deal Constitutional Revolution which Levy and Mellor find so horrifying and want each of us to have a gun in our pocket to defend ourselves against. It gets very contradictory because the same federal judiciary expanded federal powers under the Fourteenth Amendment to protect individual liberties.

C. A Demoralized Public Mood and a Defeatist Retreat from Political Life.

There is a larger political context to gun rights. Judge BROWN, now on the DC Court of Appeals, has said:

> At this moment, it seems likely leviathan will continue to lumber along, picking up ballast and momentum, crushing everything in its path. Some things are apparent. Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: families under siege; war in the streets; unapologetic expropriation of property; the precipitous decline of the rule of law; the rapid rise of corruption; the loss of civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible.

Their objection is the hard right wing sweeping ideological objection to expansions of federal authority under the commerce clause. If the issue is commerce not militia call up, the National Firearms Act of 1934 becomes in jeopardy. See Alito dissent in Rybar. The Federal Government does not need to microregulate guns anymore than do the courts. The responsibility of the Federal Government is to do what state and local

jurisdictions cannot do: Shut down the illegal traffic between and among jurisdictions. That is accomplished with registration for militia call up and reporting of private sales. Those requirements, in national policy, are the essential powers of enforcement of those "reasonable restrictions" for local jurisdictions. The obstacles are political not constitutional. Local regulations could vary widely as the several amici argue.

XIII. A National Firearms Policy.

A. The Federal Government and Original Design and Intent.

The business of the Federal Government is to do what state and local jurisdictions cannot do—shut down the illegal traffic between and among jurisdictions. The crisis is not only strictly domestic. It is international. That is empowerment policy for local jurisdictions. That can only be accomplished by registration of ownership and reporting of private sales. For which this Court has given constitutional approval.

As states clamor for a states right that if they keep their guns within their state borders, they are outside the reach of federal regulation. Let the congress give them their hearts' desire. A national policy could be structured in such a way that if the states keep their gun within their borders, the Federal Government will leave them alone, but if they show up on the streets of Chicago, Washington, DC etc., or in the chambers of Congress or this high court or in the courtrooms of Judges O"Scannlain, Kozinski, Kleinfeld, Gould, and other anarchists on the Ninth Circuit, the Federal Government will have the authority move in to enforce the illegal traffic where the states fail.

There is a precedent for this. During the Civil War there was a national conscription law (March, 1863). Chief Justice Taney wrote an opinion to declare it unconstitutional, but, because the draft was so unpopular during the Civil War, the law was never vigorously enforced and no case came up for Taney to issue his opinion. Instructive for today, the law was used as a threat against the states: You deliver your quota of soldiers to the Union Army or the Federal Government will invade your space and take them. The states did not want the Feds invading their space so they delivered their quotas.

Rather than candidate Obama's Civilian National Security Force, call it more accurately, the Homeland Security Militia Reserve Act. The Congress can make maintaining the militia reserve the business of the states. There would be another result. Taking its cue from Montana and

Civil War recruitment, the policy would operate as a threat to the states: You register your guns and keep them within your boundaries or the federal government will do it for you.

The crisis is less a crisis in a civil right that is the business of the courts but a crisis in policy making which is the business of the legislators not the business of the courts. The courts have opened the path for a national policy through "registration ... for militia service when called up." Consistent with the original design and intent manifest in the militia clauses of the Constitution, the Second Amendment, the Militia Act of 1792 and the state militia acts that followed from Militia Act, there is nothing unconstitutional about the Congress declaring privately owned weapons to be a public resource subject to call up with or without their owners (confiscation in gun rights terms) for public duty. The secondary goal would be to shut down the illegal traffic between and among jurisdictions. The Federal Government need do little more.

The gun rights crowd will proclaim, Gun laws do not work. Criminals do not obey laws. That is why they are criminals. Many of the same crowd demand strict laws and law enforcement against illegal immigrants. No one says, Illegal immigrants do not obey laws. That is why they are illegal. As with all laws, effectiveness is based on powers of enforcement. The solution is laws that make sense, enjoy broad public support, are enforceable and are enforced.

B. Handguns

Handguns may be commonly used for self-defense. The are also commonly used for criminally activity. There are credible substitutes for handguns for home defense. See DC Heller brief. p. _____. There are less credible substitutes for criminal use.

The problems with handguns is that they are concealable. When the first reasonable accurate, reliable handguns first became available in the 1830s, their concealability was recognized as a menace and legislatures rushed to enact conceal weapon prohibitions. The gun manufacturers could design a small bore shot gun for home defense. The gun rights militants would assert that in a few minutes with a hacksaw it could be made concealable. It would also be in violation of federal law and be eligible for ten years and $10,000 penalty. The prohibition could be made more effective by offering substantial rewards for reporting illegal possession.

Just because something is popular, historical, commonplace and has a tradition does not mean it is eligible for constitutional protection as a fundamental right. Prostitution, illegal gambling, and moonshining have their ancient and some would say "honorable" traditions. (One grandfather of the primary author of this brief went to jail in the 1920s for his activity in the illegal whiskey trade. The other grandfather did not go to jail but should have.) If we survive as a civilized society this passage will become recognized as on of the most reckless and ignorant in Supreme Court history.

IXV. A Fundamental Right

When the police show up at a crime scene and see someone holding a firearm, they should "Police. Drop the gun". If the gun holders does not drop the gun immediately, the police shoot him dead. Would the same be possible if someone were holding a book or newspaper or standing on soap box making a speech without a proper permit. Surely, guns are different. Would the gun holder if he were lucky enough to survive or his estate have standing to sue the police for the violation of his civil rights. Or, turn the right around. If the commonwealth can register and conscript gunowners and their guns for public duty, can it register and conscript printing presses for state propaganda purposes. Dimwitted. Grotesque.

The first big test was US v. Francis J. Warin, http://www.potowmack.org/warin.html, in the Sixth Circuit in the 1970s. The gun rights militants lost and retreated into the law journals to fabricate their anarchic doctrine. The doctrine is now in the courts.

The gun rights claimants maintain an enormous confusion between a civil right secured by government and a natural right in the State of Nature—the right of armed resistence, treason—outside of law and government. The NRA's Wayne LaPierre wrote in *Gun, Crime and Freedom* (1994), "... the people have a right, must have a right, to take up whatever measures necessary, including force, to abolish oppressive government." The Second Amendment Foundation ended its amicus brief in US. Warin (1976): "What your amicus asserts is a basic right of freemen to take up arms to defeat an oppressive government." The gun rights anarchists lost that case. They retreated into the law journals—the weak link in legal scholarship because law journals have no standards. They will publish anything—to fabricated an anarchic, insurrectionist,

treasonous right which the federal judiciary, even the Supreme Court, has now embraced.

XV. TWO GREAT CONFUSIONS

Second Amendment claims are built on two great confusions: 1) The difference between a civil right secured to individuals and the Second Amendment republican right of the people to participate as conscript citizen soldiers in the military functions of the state; 2) the difference between a civil right secured by government and a revolutionary right in the State of Nature.

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The brief for the Center for Individual Freedom
http://www.potowmack.org/hellCIF.pdf
makes important arguments about the collective right vs the individual right. It describes the military federalism that many brief have argued but describes it in terms that have unsavory implication. Someone needs to address these. The military federalism was very conflicted but it was original design and intent as manifest in the Militia Act of 1792. No one, least all the courts, have examined this. If there are unsavory implications for the collective right, there are also unsavory implications for the individual right. The right has been built on a fundamental right to armed self-defense. Where is the court going to take this? If someone led a life of crime in a street gang, was eventually arrested, convicted, served time and is now out trying to live a law abiding life as a convicted felon, that person may have enemies from his previous gangland life who would threaten to do him harm. A convicted felon would under those circumstances have a greater right to armed self-defense than the rest of us. Do the courts want to sort this out as a civil right? The courts have had nothing to say about either the collective right or the individual right for more than 200 years. Meanwhile the Constitution and military organization evolve to meet public needs. When the issue is public necessity, the individual right/collective right, liberal/conservative, progun/antigun culture polarizations become meaningless. When the Congress declared war in 1917, the very next month it enacted the Selective Service Act of 1917. I have described that as the most radical departure from original design and intent. Congress did not take a poll. There is no great need for a conscript militia or even a conscript national military force now. But, there is the pressure for an individual right now? My argument is that the courts have become politicized to respond to a malignant constitution that is part of a larger political struggle.

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If we will resurrect the collective right as the CIF describes it, will we resurrect the original militia institution and concept? We can be sympathetic to McDonald and Heller's complaint but policy requires something different. Heller is an ideologue like the lawyers who represented him. He was in the news last year as a candidate for office on the Libertarian Party ticket. There is an ideological agenda. If McDonald and Heller want a Second Amendment right by original design and intent, the authorities would conscript them into a neighborhood militia, coerce them to be armed, trained, disciplined, and commanded by officers to patrol their neighborhood, with or without pay, against the threat of the lawless. That was what the militia was all about.

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There is no security in an unrestricted individual right. If all citizens armed for self-defense and there are not laws that apply against the lawless, the armed predators will simple ambush their victims. This is Vizzard's "learning curve."

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Michael Bellesisle got into much trouble fudging some of his data. He was a fool if he thought he would get away with it when the gun rights crowd would be watching. One of my important lessons has been that there is no energized constituency that examines the falsehoods and half-truths that the gun rights doctrine is built on.

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"The people" as a political concept is like "society" as a sociological concept. They both emerged in those terms in the Enlightenment. In the late 18th century they were still in formation. "The people" did not mean every atomized individual. In England, as I have argued in the briefs, "the people" was an estate of the realm represented in the House of Commons. The House of Commons was mostly composed of the untitled nobility, the younger brothers of the members of the House of Lords who had not inherited the family title.

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There appears to be a revolt in the lower courts against the anarchic implication of the Parker/Heller opinions. If there is 14th Am incorporation, the lower courts may produce confused, convoluted, complication ruling which the Supreme Court will need to sort out with more confused, convoluted, complication rulings.

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William Shepard, a graduate of the Harvard Law School, ran for governor of Maryland in 1994. He lost in the primary. On a radio call in program in September 1994, he was asked a question about the 2nd Am. He said, the Bill of Rights is not an a la carte menu we can pick and chose from. Isn't the doctrine of selective incorporation part of the curriculum at the Harvard Law School? There were no editorials in the Washington Post or the Baltimore Sun the next day pointing out the ignorance of the statement.

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Tribe, Levinson, and Amar have retreated from their earlier concessions to gun rights ideologies.

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If the right is to individual sovereignty, there is no consent of the governed and therefore no "just powers" of government to secure civil right on do much of anything else.

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In his Dec2000 article David Yassky, makes three points. 1) military federalism which enough others have argued. 2) the transformation of the Civil War amendments that made possible national conscription even though the Supreme Court did not use those arguments in the Selective Draft Law opinions. 3) the expansion of federal authority in the mid-20th century to create the modern state and address national issues. At the same time that the new leviathan was created, the federal judiciary expanded authority to protect civil liberties against the new leviathan. Hitherto the Second Amendment was not included. The agenda of libertarian ideologies is to reverse the expansion of federal authority to address national issues, but while it will dismantle the federal authority in the modern state it will expand federal authority to protect gun rights.

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G. Gordon Liddy makes his statement above. He has not filed a brief in the Second Amendment cases to explain himself.

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Hamilton is often cited: "there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government". Hamilton was citing without attribution John Locke, the Second Treatise,
http://www.potowmack.org/2ndtreat.html#168

In Locke it was an appeal to heaven not a civil right secured by government.

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The Heller Alaska brief, http://www.potowmack.org/hellALAS.pdf, describes Max Weber's monopoly on violence observation as an alien German import. This kind of reasoning and assertion is widely believed and has been put before the court. Is now the law of gravity different in the eastern hemisphere from in the western hemisphere? To be taken seriously on a fundamental concept, the court needs to make perorations into political philosophy and say something about this.

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The brief of private security agencies
http://www.potowmack.org/hellBUCK.pdf
documents, probably with considerable accuracy, that the DC government and police are corrupt and inefficient and private security agencies can be responsible and efficient. They do say what happens when private agencies become corrupt and inefficient and like so many other private interests are able to control the legislatures and politicians to serve their interests.