Politics, Rights, Guns:
The Great Political Dysfunction

Potowmack

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Introduction

As this goes to print, another tragic event in Colorado saturates the news. It has never happened before, but can we expect political leadership now? There is no reason so far for optimism. The gun lobby's childish political fantasy is not yet under threat.

The first crisis is in public knowledge. The first hope here is to introduce serious substance into the 2012 election season. It is getting late for that but the seriousness of what is at stake remains and we can hope, maybe subsequently, there is enough future and life to the Republic that we can have civic consciousness and leadership with a message and a vision. This is where we get seriously political.

The argument here is that gun rights are about promoting a childish political fantasy. The childish political fantasy takes its place in a much larger ideological struggle over the modern state and the twentieth century social contract. We can distinguish between *politics*, the fundamental concepts, values, and institution, from *politicking*, electioneering and legislating within those concepts, values, and institutions. *Politics* is the substitute for violence. When gun rights become part of the larger struggle, they put at stake the *politics*, the most vital and fundamental issues of political life. We can argue the contours of the modern state and the twentieth century social contract on the merits policy by policy. What we cannot do is throw out the constitutional state baby—the *politics*—with the modern state bath water—the *politicking*. Fortunately, the courts have not done that. What the courts have done is open the path for policy.

All of this is very far removed from public knowledge and civic consciousness. The arguments here are directed toward results which have to begin with changes in public consciousness, in the civic culture and in political leadership. Those changes are the great challenge. What starts here has implication for everything else in the political culture. .

This treatise is kept to 33,000 words. This is at the same time too long and too short, too long for cursory reading, too short to cover the subject adequately. Much direction is provided for further study if such a thing exists as a citizenry concerned with the most vital and fundamental issues of political life. A 6000 word shorter version of this treatise was successively proposed for publication starting in November, 2011, to *Harper*'s magazine, *The American Prospect*, *The Nation* magazine, and *The Atlantic Monthly* and the *Washington Post* (through columnist Eugene Robinson). There was not one response. Not one of these periodicals opened the file to the manuscript. That is not a poor reflection on the quality or relevance of the arguments. That is a poor reflection on the state of the political culture. These are our organs of public enlightenment. When we fail on the most vital and fundamental issue of political life, the consequences are devastating. We are in the midst of not just a crisis in gun violence mostly in the cities and in sovereignty on the Southwest border but a larger crisis in political power, civic consciousness and civic values—the *politics*.

The Potowmack Institute filed many of the arguments here in *amicus curiae* briefs in *US v. Emerson* (5th Cir., 1999, decided 2001), http://www.potowmack.org/emerarg.pdf, and *Parker et al. v DC Gov.* (D.C. Cir., 2006, decided 2007), http://www.potowmack.org/parkarg.pdf. The highly politicized courts pander to a malignant constituency. They are not interested in the fundamental concepts either. The courts apparently unwittingly, have, nevertheless, unobserved by anyone else, settled the issue and opened the path for leadership and constructive policy. This treatise makes a provocative proposal for the politicians, particularly the Obama Campaign, in

the 2012 election season. It is, however, a nonpartisan proposal. This is *politics* not *politicking*.

From the provocative proposal this treatise proceeds to a discussion of the modern state, the twentieth century social contract, and culture war politics. It examines the fallacious arguments that have made their way into the courts and offers a small hope of direction for national policy. Central to the discussion is libertarianism as a political ideology. It gets much treatment.

If the issue is the *politics* and the fundamental concepts, maybe we can try to bring together David Horowitz and William Ayres, Steven Halbrook and Don Kates, David Keene and Dennis Henigan, Mitt Romney and Barack Obama, Eric Holder and John Ashcroft, Chris Matthews and Rush Limbaugh to decide what they agree on as a fundamental proposition. What they and we have to agree on starts with the proposition that the Constitution is a frame of government not a treaty among sovereign individuals. Much *politicking* follows from that agreement. They, we, could then clear up two great confusions: 1) the difference between the republican right of the people to participate as conscript citizen soldiers in the military functions of the state and the libertarian right of the people to be armed outside of the knowledge and reach of law and government in order to maintain the "armed populace at large"; and, 2) the difference between a right in the State of Nature before there is law and government and a civil right secured by government in a viable constitutional order.

There are many books under the rubric of gun control. Some convey useful information. Some are utterly mindless. Regardless, they don't sell. The gun controllers cannot get much past promoting trigger locks and suing the gun manufacturers. These are public health strategies. Gun violence is a public health problem. It does not have a public health solution. The solutions are political. There is no energized constituency behind their strategies—and, no one else cares. What is missing is the fundamental political concepts. Some things we have to get right first and those turn out to be the easy ones. No one in this failed political culture cares about those either. The publishers, meanwhile, have no interest in books that don't sell.

Potowmack
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Chapter 1

Knowledge and Leadership

Gun rights are about furthering a childish political fantasy and a childish concept of the political self. This starts very simply. What the gun lobby wants as its core doctrine is what the National Rifle Association argued to the Supreme Court in *Perpich v. DOD*[1] (1990): to maintain the militia as the "armed populace at large", a collection of sovereign individuals who made a treaty not a government. The difference between a government and a treaty is fundamental—the *politics*—and this treatise will get to it. The one policy the core doctrine's extreme libertarian individualism cannot accommodate is accountability to a governing authority—that is, to the very legitimacy of a governing authority. Accountability means specifically registration of firearm ownership. That is the only way firearms can be effectively regulated and that is what the NRA works hardest to defeat. Opposition to registration runs afoul of the civic obligation manifest in the original militia concept and institution. It runs afoul of public necessity.

Events have not been good for the core doctrine. Recent gun rights cases were devastating defeats for the "armed populace at large". The great conflict is between libertarian privacy and civic obligation. There is a little judicial background. In *Griswold v. Connecticut* (1965) Justice William O. Douglas found in the "penumbra" and "emanations" of the Constitution a right to privacy that protected married couples from being prohibited from using contraceptives. The Supreme Court was not out in front of public attitudes. Connecticut was one of only two states that prohibited contraceptives to married couples. Does anyone today disagree with the ruling? Conservative legal scholars, nevertheless, call this fabrication judicial activism. The ideologues ridicule it. With the precedent of this privacy discovery and without using the words "penumbra" and "emanations", the Supreme Court in *Roe v. Wade* (1973) ruled that there is a right to privacy that includes a right of a woman to terminate a pregnancy, the libertarian right "to choose", as they say. More judicial activism.

Then, in *Parker et al. v. DC Gov.* (DC Cir., 2007), Judge Silberman again without using the words discovered a right to be privately armed outside of militia service that applied to keeping a handgun in the home. In discovering this right Judge Silberman disparaged the purposes of civic obligation and military preparedness manifest in the original militia concept and institution. *Griswold*, *Roe*, and *Parker* all discovered libertarian privacy rights, but Judge Silberman then defeats himself and his whole purpose. He arrived at the conclusion that "registration of firearms gives the government information as to how many people would be armed for militia service if called up." That conclusion resurrects the original purposes of civic obligation and military preparedness. The conclusion is not contradicted in the subsequent Supreme Court rulings in *DC Gov. v. Heller* (2008) or *McDonald v. Chicago* (2010). Meanwhile, there seems to something of a revolt in the lower courts to these rulings as more judicial activism.[2]

Silberman's conclusion is, nevertheless, where policy making begins. The Constitution is clear: Congress shall have the power "To provide for calling forth the militia" and "To make all

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[1] http://www.potowmack.org/nraperp.pdf

[2] Judge J. Harvie Wilkinson III, "Of Guns, Abortions, and the Unraveling Rule of Law," *Va. Law Review*, April, 2009.

laws necessary and proper" to that purpose. The militia was a creature of law. Militia duty was conscript duty. There are no privacy rights in a conscript military organization. Even the "unorganized militia" (10 USC 311), the legal "armed populace at large" in present gun rights ideologies, is not exempt from Judge Silberman's conclusion.

Leadership has to start somewhere. It won't start with the *NY Times* and the bankrupt Democratic Party. In an editorial, April 22, 2011, the *NY Times* lauded Rep. Debbie Wasserman-Schultz, new chair of the Democratic National Committee, for showing "real leadership" in rejecting former Dem chief Terry McAuliffe's instructions to Democrats after Al Gore's defeat in 2000 to steer clear of gun control—that is, clear of their oath of office, clear of the *politics*. The bloody consequences of the failed leadership are in the daily news. That oath marks the difference between Civil Society and the State of Nature—the *politics*. (Chapter 4). If we cannot decide that difference we survive only on force of habit without any understanding of who we are, what we are doing here, and where we are going.

Before an audience of more than a hundred at the Women's National Democratic Club on May 5th, 2011, Potowmack asked the guest speaker, Ms. Wasserman-Schultz, if we could have public discourse on what the courts have decided that would lead to national policy. She gave the conventional politician's response. She supports the latest lame gun control bills. Potowmack went to Ms. Wasserman-Schultz after the assembly and told her she did not answer the question and that this is serious business. It demands serious attention. She seemed to be taken aback that there is more to this than her support for some lame gun control bills. She was given a letter proposing that a congressional committee undertake a study that updates Attorney General Ashcroft's 2004 study, "Whether the Second Amendment Guarantees and Individual Right,"[3] in the context of Ashcroft's own "reasonable restrictions" and what the courts have decided. No response. No leadership. If not a congressional committee, then the Eric Holder Justice Department. In addition to providing direction toward national policy, a study could challenge the policy agendas and strategies of the various players on fundamental concepts and be a resource that clarifies the ignorance and utter nonsense that abounds and has made their way into the federal courts.

We can still look for where leadership begins. It may have been too much to have expected Supreme Court nominees Sotomayor and Kagan to have had the political savvy to turn the Second Amendment questions around on the senators at their confirmation hearings and asked, "Do you accept and support the conclusion of the courts that we can have 'Registration ... for militia service if called up.'?" The rest of us do not have to be restrained. Any member of Congress who said, "yes", would be ***VICIOUSLY*** attacked by gun rights militants led by the NRA. If anyone doesn't thinks so, just ask the question.

If leadership fails everywhere else, it can start at the top. If President Obama thinks that what is at stake in the 2012 election is a choice between fundamentally different visions for our future, he could have gotten started on that difference in 2008. The argument in this treatise is that there are two competing vision: one, a twentieth century social contract that involves an expanded civic obligation in a modern industrial society and, the other, an imaginary vision of eighteenth century libertarian liberty, the fundamental characteristic of which is the political cynicism that we cannot have anything more than the most minimal governing authority. We cannot have the twentieth century social contract. This last vision is most explicitly—and

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[3] http://www.justice.gov/olc/secondamendment2.pdf

vulnerably—manifest in gun rights ideologies.

A few weeks after the *Heller* ruling in June, 2008, candidate Obama announced that he would seek to create a Civilian National Security Force. It was attacked by right wing demagogues as a formula to create a police state. It would have been better called a Homeland Security Militia modeled after the *Militia Act of 1792.* If Obama was going to bring the subject up at all, he needed to put it in terms not just of the recent rulings of the *Parker* and *Heller* courts but also the *Militia Act of 1792* and then challenge McCain on where he stood on "registration" and "call up". Was McCain, a graduate of the Naval Academy who served and suffered honorably in the armed services, going to take exception? The gun vote goes to Bob Barr and Ron Paul, who are sadly the only candidates who would even have understood the implications of the question, and is neutralized in national politics.

The gun lobby is already hard at work to defeat President Obama in 2012. As this treatise argues, the gun vote is part of a broader political agenda and vision. This is where Obama can define the two visions by circumventing the demagoguery and making a bold appeal directly to members of gun rights organizations. In simple outline:

> I am the commander in chief of the armed forces of the United States and the militia of the several states when called into the actual service of the United States. The courts after many pages devoted to protecting an individual right to gun ownership arrived at the conclusion that "registration of firearms gives the government information as to how many people would be armed for militia service if called up." That conclusion resurrects the original civic purposes manifest in the original militia concept and institution. Firearms policy begins with civic obligation, accountability to a governing authority, and military preparedness.
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> There is a competing, widely believed, very antagonistic purpose. It is that the purpose of a right to private gun ownership outside militia service is to maintain an anarchic balance of power between a privately armed populace and any and all government. There is no secret about this claim, but it is a right that can have no place in any viable concept of constitutional government. The people do have a right to take up arms against oppressive government, but it is a right in the State of Nature outside of civil society. It is not a civil right that can be secured by government. The Declaration of Independence is a prime example. It was a charter for revolution. The King rightfully cried treason. I, as President, am under oath of public office to preserve, protect, and defend the Constitution against all enemies foreign and domestic. Domestic enemies include those who would act out a childish political fantasy about armed insurrection.
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> I have set up a designated post office address for members of gun rights organizations to write to me directly as commander in chief of the militia to explain their positions and convictions on the purposes of gun ownership—whether it is a civic obligation to fulfill a constitutional duty to enforce the laws of the Union, suppress insurrections, and repel invasions—Or, on the contrary, to make insurrections.

One provocative question changes everything else. Having failed to challenge McCain in 2008, Obama can challenge Romney in 2012. If Romney or anyone else doesn't accept the opinions of the courts, the challenge then is, will he launch a campaign for a constitutional amendment to redefine Second Amendment rights—that is, redefine the contours of citizenship? If so, what will be the wording? Will the Constitution still be a frame of government, or will it become a

treaty among sovereign individuals? (Hamilton, *FP 33*, Chapter 4) That difference is central to present *politics*. It would be an opportunity to get beyond bumper sticker slogans and sound bite demagoguery at which the demagogues are the masters and introduce substance for once into political discourse. From substance we can go to policy.

The Foundation for Free Expression's *amicus* brief in *Heller* filed in Feb., 2008, tells us:

> Three horrific European shooting sprees in gun-free "safe" zones show that other countries experience similar results: sixteen people killed in a public school shooting in Germany (April 2); fourteen regional legislators killed in Zug, a Swiss canton (September 2001); and eight city council members massacred in a Paris suburb (March 2002). Strict European gun laws failed to prevent these tragic crime sprees.

All very true except that the overall rate of gun violence in Western Europe is in the hundreds per year not the tens of thousands as in this country. Strict European gun laws work. The real problem to be addressed in this country is not random mass shooting as atrocious as they are but, as any big city mayor or police chief will tell us, the daily carnage on the streets. We may never reach Western Europe's low level of per capita gun violence but, once a regulatory principle is carried from the courts to national policy, in time a fifty percent reduction if gun violence deaths and injuries is a realistic goal and an eighty percent reduction is not far-fetched. The greatest benefit would be to the life of the Republic. In addition to deciding between two alternative visions, we might clear up much absurdity and nonsense that abounds on gun rights.

There is no end to the absurdity and nonsense. The gun rights crowd proclaims, Gun laws don't work. Criminals don't obey laws. That is why they are criminals. Many of the same people demand strict law enforcement against illegal immigrants. No one says, Immigration laws don't work. Illegal immigrants don't obey laws. That is why they are illegal. The problem is the powers of enforcement the gun rights militants work hard to sabotage. The solution is laws that make sense, enjoy broad support, are enforceable and are enforced.

What makes sense? We arrive at the great difficulty of policy making. The only necessary goal for federal policy is to do what state and local governments cannot do, to control the illegal traffic between and among jurisdictions. That is empowerment policy for state and local jurisdictions. That can only be accomplished by registration and reporting of private sales. As states led by Montana clamor for constitutional protection against federal regulation of guns sold and kept within their borders, give them their hearts' desire. A national policy which registers for call up, regardless that a call up ever happens, could achieve another goal. It could be structured to say to the states, You keep your guns within your boundaries and the Federal Government will leave you alone. If not, it will invade your space and do it for you. There is a rough precedent for this policy. There was a Civil War national conscription law (March, 1863) but because the draft was so unpopular it was never vigorously enforced. It functioned as a threat against the states, You deliver your quotas to the Union Army or the Feds will invade your space and do it for you. The states delivered their quotas.

Bold leadership as proposed here from President Obama, his Justice Department or the Congress could get something started. But more likely, it will take public pressure and public pressure has to come from public knowledge of which there is precious little.

The Socialist Party candidate Eugene Debs said in the early twentieth century:

> I am not a Labor Leader; I do not want you to follow me or anyone else; if you are

> looking for a Moses to lead you out of this capitalist wilderness, you will stay right where you are. I would not lead you into the promised land if I could, because if I led you in, some one else would lead you out. You must use your heads as well as your hands, and get yourself out of your present condition; as it is now, the capitalists use your heads and your hands.[4]

His comments are general for any enlightened citizenry capable of self government that can lead itself us out of present anarchic conditions to the fundamental concepts—the *politics*—the country was founded on. Or, as Barry Goldwater once said,

> Our future will be what we make it.

The politicians, news organs and courts fail us. The future will be what we, the enlightened, civilized people, make it. Now is the long overdue time to get started. The courts have opened the path.

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[4] As quoted in "Life of Eugene V. Debs" by Stephen Marion Reynolds, in *Debs : His Life, Writings and Speeches* (1908) edited by Bruce Rogers and Stephen Marion Reynolds, p. 71

Chapter 2

Humanity's Progress

We have come a long way in human history. In his recent book, *The Better Angels of our Nature* (2011), Steven Pinker asserts with good evidence and supporting scholarship that prestate societies were extremely violence. The civilizations of the ancient world through the Middle Ages in Europe, although still quite violent, reduced personal and communal violence by about fifty percent. The progress of law and government in modern states over the past five hundred years reduced violence from prestate levels by about ninety percent. In Pinker's account even the devastating wars of the twentieth century did not raise the level of per capita violence to prestate levels. Reducing most of the remaining ten percent requires a civic culture in which the citizenry accommodates to the legitimacy of a governing authority and accepts that it is efficient, humane, effective and just. Reducing that remaining ten percent is the challenge of the twenty-first century. Some Western European and Asian societies have made progress on the remaining ten per cent. The challenge is most critical in the United States and, as will be argued here, takes its place in the larger struggle over the modern state and the social contract.

There were two major factors in the reduction of violence in emerging nation states. One was the subordination of feudal warlords to a central military authority. It was part of establishing a uniform system of law and political authority that was located in nation states. The other was a transformation in attitudes, mostly influenced by Protestant religions, toward personal revenge, pride and honor. Personal violence became a matter of law.

American soldiers in Afghanistan find themselves in a culture where it is said:

> Life is more important than wealth
> Honor is more important than life.

That is not alien to us. It also happened here. Dueling, often over the most frivolous slights to honor, was common in the Western world well into the nineteenth century when personal violence became largely, or at least in principle, subject to law. (Changes in attitude were also influenced by improvements in the reliability and accuracy of handguns which dramatically increased the prospect that one or the other the duelists would end up dead rather than superficially wounded or unscathed. The technology of war in the twentieth century culminating in atomic weapons similarly changed attitudes towards war. There was utter devastation rather than glory in vanquishing the foe. There was no longer even loot to be had.)

It is beyond the scope of this treatise to examine and elucidate the evolution of political concepts, institutions, and values over the past five hundred years. The literature is large and has occupied the careers of many professional scholars. Niccolo Machiavelli, Jean Bodin, Thomas Hobbes, John Locke, Montesquieu, to name only a few, are contributors in the evolution of political thought. A cursory but incomplete treatment of political concepts relevant to this discussion can be found under "Republicanism" in Wikipedia. A general overview can be found in Eugen Weber's 52 segment video program, "The Western Tradition" (1989). Segments 21 through 44 describes the Middle Ages through early industrialization—that is, the formation of nation states.

A few simple observations can be made. Republicanism and liberalism are important ideologies. The concepts and institutions that emerged out of them shaped the modern political world. They overlap in their secularism and their opposition to monarchy, especially absolute

monarchy buttressed by religion and not restrained by law. The difference was that republicanism emphasized civic virtue and a common purpose. Liberalism emphasized individualism and property rights. Liberal institutions became the basis of a free enterprise economy, but much of republican civic obligation, however, was included. Political authority became secular. In the US Declaration of Independence the "just powers" of government were derived from the consent of the governed rather than derived from the divine right of rulers. Faith became secondary to reason. Public space and civic purposes became part of the political landscape. The American Revolution was an important stage in the development, influence, and application of these concepts and modern concepts of nationhood.

The dominant political form in both the ancient world and in the early modern period was dynastic empires. By the end of the nineteenth century nation states after a few centuries of evolution had become the vessels of law and government, secular authority and civic values. The rule of law, the state's internal sovereignty, and the state's "monopoly on violence" (*Das Monopol der legitimer Gewaltsamkeit* in the late 19th century observation of German sociologist Max Weber) all meant the same thing. The fundamental concepts play an important role in this examination of the present context of political values, and the concepts still make our world as we march through time into the twenty-first century. In gun rights ideologies the state's monopoly on violence without the "armed populace at large" created by the Second Amendment to keep it in check is an alien European concept that led to fascism. It is as if the law of gravity like humanity's progress and the rule of law is different in the Western Hemisphere from in the Eastern.

It must be cautioned that there are no perfect political concepts, institutions or values. Nation states in the twentieth century went tribal and produced devastating wars.

Chapter 3

The Libertarian Right

Industrialization in the nineteenth century produced enormous material progress and at the same time enormous, unprecedented injustices and societal strains. The strains produced widely diverse opposition ideologies from Robert Owen, Charles Fourier, Pierre-Joseph Proudhon, Karl Marx, Ferdinand Lassalle, Peter Kropotkin, to name only a few. The opposition ideologies are known under the names of communism, socialism, anarchism, syndicalism, among others. The worldly philosophers were optimistic about progress and they saw the injustices and economic anarchy of capitalism as barriers to progress.

In the United States the robber baron capitalism of the new industrial order in 1900 was a world we would not recognize and would not live in again. People worked 70 hours per week in dangerous conditions on railroads and in sweat shops and coal mines, lived in company housing in company towns and were paid in company script redeemable only at the company store. The company set wages and all prices. (Does anyone remember the words "I owe my soul to the company store" from Tennessee Ernie Ford's 1955 hit "Sixteen Tons"? The words were written years earlier.) Life in the agricultural sector, much romanticized in literature, was not a whole lot better.

After a few devastating wars and policy making in response to economic collapse, Western industrial democracies by mid twentieth century settled on what can be generally called social democracy which involved a role of government to regulate and contain the excesses and injustices of industrial and financial capitalism and produced the modern state, the mixed economy and the twentieth century social contract. The social contract included health and retirement benefits, worker safety protections, and a role for organized labor. To have those protections and benefits the social contract in an industrial economy involved an expansion of political authority and with that of the civic obligation already present in republican ideologies. Social democracy was carried the farthest in Scandinavia. It was carried farther in Western Europe than in the United States, but the United States arrived at a consensus on policy making out of the Great Depression and the New Deal Constitutional Revolution which established a role for the Federal Government in the national economy.

Secretary of Defense Robert McNamara early in the Kennedy Administration asserted that all our domestic policy problems are now technical. The premise was that in the mid twentieth century the modern state had found a consensus in institutional arrangements of labor, capital and government that had emerged out of the New Deal. These were the mixed economy and an American version of social democracy. It meant that all problems could be solved through the discovery and application of the right policy technical measures. Michael Harrington's *The Other America* (1962), describing the continued existence of poverty in the new status quo, caused a stir in the political establishment and was very influential in the Kennedy and Johnson Administrations to develop the right policy technicals for a "war on poverty."

Not so fast. With all respect to McNamara, history and ideology do not end as some seem to think. Stephen Newman's subtitle to *Liberalism at Wits' End: the Libertarian Revolt Against the Modern State* (1984) captures the spirit of what we can call the "Libertarian Right". The enemy is the expansion of a governing authority, in particular, in the United States, federal authority, to create the modern state and the twentieth century social contract. National policy was produced by long and bitter struggles to establish a national interest and respond to public necessity. The expansion addressed serious issues that tore at the fabric of the life of the

Republic. For the Libertarian Right, however, the only issue is the anarchic libertarian issue of accommodating to an expanded federal governing authority. A governing authority, if at all, was primarily and ineffectively located in the several states. The result being that we are bound together only in utopian free market competition without any social contract or national collective purpose. Political cynicism drives the vision. We cannot govern ourselves. There can be no national interest, no national domestic policy. We cast our fate to the free market winds, to the golden rule that those who have the gold make the rules.

There is a large literature, too large to list here, that describes the struggles, agitation, injustices, insecurities, discontent, economic boom and bust cycles, workplace violence, strikes, and tragedies in the workforce in the period between the end of the Civil War when industrialization began in earnest and the Great Depression and the New Deal. That literatures is readily available to anyone who seeks it out.

The life of the Republic had to change. The modern state was created by five transformations in the United States of constitutional proportion through the Progressive Era, the New Deal, and mid twentieth century that made the United States into a modern state more capable of managing an industrial economy, performing on the world stage as a great power, and securing liberty and justice for all:

1) Creation of the Federal Reserve, a central bank.
2) The 16th Amendment which constitutionalized income tax, the only transformation that involve a constitutional amendment.
3) The *Selective Service Act of 1917*, national conscription, the most radical departure from original design and intent.
4) The New Deal Constitutional Revolution, which established the authority of the Federal Government to regulate a national economy.
5) The Civil Rights Revolution, in which the federal judiciary expanded the authority of the Federal Government by incorporating articles of the Bill of Rights into Fourteenth Amendment protections.

All of these transformations responded to public necessity and all involved expansions of federal authority. The Libertarian Right on sweeping ideological principles not merit or need and blind to consequences has never accepted the expansions of federal authority in any of these transformations. The Libertarian Right and the conservatives, however, are most conflicted over national conscription.

John Meacham's article, "We are all Socialists Now", *Newsweek*, Feb. 6, 2009, misses much. We are all socialists now but in ways that are greater than the ways he thinks. William Greider's title, "Rolling back the Twentieth Century," *The Nation*, 2003, is more instructive. Greider quotes Grover Norquist, the President of Americans for Tax Reform and the very personification of the present political cynicism, "...the history of the country for the first 120 years, up until Teddy Roosevelt, when the socialists took over."

The socialist agitation began earlier. See Peter Irons' *A People History of the Supreme Court* (1999), Chapter 19, "The Spectre of Socialism". Most of the "socialism," the making of the modern state and the social contract, that is under assault now, came out of the Populist Era of the late nineteenth century and the Progressive Era of the early twentieth century and was enacted in the New Deal in the 1930s.

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

Ronald 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.

All involved expansions of federal authority. The first three of these were achieved in the New Deal. We are still struggling with the fourth. The forty hour work week was bitterly fought over for sixty years. It was enacted in the *Fair Labor Standards Act of 1938* and upheld in *US v. Darby* (1941). Edward Corwin's constitutional law text (1978) calls *Darby* the culmination of the New Deal Constitutional Revolution. The Texas Justice Foundation's *amicus* brief in *US v. Lopez* (1995) argued at great length against the "infamous" *Darby* ruling without ever stating what *Darby* actually did. Has anyone heard of the New Deal Constitutional Revolution outside of a constitutional law course?

The Texas Justice Foundation does not want us working 70 hours per week in coal mines and sweat shops any more than Judge Alito (then on the Third Circuit) in his dissent in *US v. Rybar* (1996) wants unrestricted access to machine guns. They just cannot accept a federal governing authority, a consolidated government, that applies to individuals intrastate. Alito, nevertheless, wrote *McDonald v. Chicago* (Sup. Ct., 2010).

Grover Norquist said on C-Span in 2001, labor unions were created by government. It was those closet Stalinist New Deal bureaucrats who wanted more power to oppress us. What was created by government was suburbia and the Sunbelt where Norquist finds his political following.Should we be surprised to find Norquist and his political cynicism on the NRA's National Board? This is all part of the same story. Nevertheless, what law and government really create is property.

The Socialist Party, which in the early twentieth century won millions of votes and elected hundreds of public officials, still exists but is very marginal because it was our most successful political party. It achieved three quarters of its goals. Those are still fundamental parts of our national existence. Those are the modern state and the social contract. Ronald Reagan had the next twenty-five years of his political life including eight years as president to dismantle the achievements of Thomas' Socialist Party. We never heard again about those Socialist Party achievements and the advance of the dreaded "socialism".

It is asserted today that Ronald Reagan did not oppose the New Deal which enacted most of Thomas' socialism. He voted for Roosevelt four times. His enemy was Johnson's Great Society programs and the New Left's architects of destruction. His conflicted record does not consistently support that characterization. The Libertarian Right's pressure is seen in the political entourage be brought with him to Washington and his appointments to the Supreme Court particularly of Antonin Scalia, the failed nomination of Robert Bork, and countless lower

court appointments. 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. Our political consciousness begins with understanding the revolt against these achievements and why in revolt we need a gun in every pocket.

Ironically, as David Yassky observes[5], as the modern Leviathan expanded its powers to regulate an industrial economy, it also expanded its powers to secure civil liberties against the new Leviathan in the incorporation of articles in the Bill of Rights into Fourteenth Amendment protections. Second Amendment protections, however, were not incorporated until *McDonald*. Those protections were rejected in *US v. Miller et al.* (1939). How did we survive and why do we need those protections now?

Norman Thomas' socialism is only one of the variety of socialisms that have any historic meaning. The usual understanding of socialism is that the state owns the means of production and the workers are, thereby, freed from the injustices of capitalist exploitation—Or, something else. Sometimes there is "lemon socialism" when the state takes over and supports with public funds a bankrupt enterprise when otherwise many would be unemployed.

These do not convey the complete meaning. For Karl Marx, Friedrich Engels and V.I. Lenin, the capitalist state had two functions. One was to protect capitalist property and the other was to try to reconcile the irreconcilable class struggle. When the proletariat became a class for itself, a new classless society would emerge and the state would serve no purpose. It would wither away. Their vision was of libertarian producer collectives. The one big difference in their libertarian utopian vision from our present libertarian ideologies, which are completely devoted to private property, is that private property would wither away also into a kind of unspecified communal ownership. What was left of a governing authority would administer things not govern persons. The communal ownership of this utopian vision in practice turned out to be the state. In Stalinist Russia it was a very authoritarian paranoid national security state shaped by Stalin's perceived public necessity of forced industrialization in a backward country and the very real public necessity of a defense against a foreign invasion.

The great failure of Marx, Engels and Lenin is that they, unlike the American Founders, very naively had no theory of political power. If we just remove capitalist property relations a new benign world order would emerge. Lenin wrote in *State and Revolution*[6] (August, 1917) the last Marxist/Leninist tract before there was Marxism in power:

> 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 state], no special apparatus of suppression is needed to do this; this will be done by the armed people itself,... (p. 108)
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> So long as the state exists there is no freedom. (p.114)

If this utopian vision did not work for Lenin, should we suppose it will work for anyone else? Is

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[5] "The Second Amendment: Structure, History, and Constitutional Change," *Mich. L. Rev.*, Dec., 2000.

[6] People's Publishing House, English edition, Peking, 1965, 1970

there a difference between Lenin's vigilante policing and the NRA's? Can we call the National Rifle Association our own home grown Marxist/Leninist advocacy organization? This is all part of the same story.

In our present political polarization, the socialism is rather the expansion of a governing authority. The libertarian revolt is against a governing authority. In the original liberal conception the rights protected were property rights and then civil rights. Property rights and civil rights were protected from the arbitrary rule of absolute monarchs. Protected rights expanded in the twentieth century to include workers' rights, women's rights, consumer rights, etc. It is that expansion of a governing authority to protect those rights that is, in present libertarian consciousness, the socialism. True presocialist freedom, in this consciousness, was under robber baron capitalism—Or, some would take us back to the preCivil War constitutional arrangements and some extreme ideologies find true freedom in the Articles of Confederation.

The source of true freedom is a libertarian individualism imagined to be manifest in a true understanding of the Constitution and the Bill of Rights. The American Revolutionaries took up arms against the perceived tyranny of King George and Parliament. The Libertarian Right transfers the American Revolutionaries' arguments against British rule to arguments against the tyranny of the modern state manifest in the expansion of federal authority. Ever since the New Deal Constitutional Revolution the real constitution, the constitution of the Libertarian Right, has been the "Constitution in Exile," subscribe to by those called "the Remnant".

The Libertarian Right that pursues this vision is a loose assortment and cabal of ideological interests, intellectual ferment, fabulous funding, and gullible constituencies that have worked aggressively for more than sixty years to dismantle the policy achievements of the modern state. The cabal is divergent and often contradictory. They would not be libertarians if they had a central committee and a disciplined party line.

The first great enemy of the Libertarian Right is, of course, Stalinist Russia. The second great enemy is European social democracy. We hear this in our present political rhetoric that President Obama wants to create a European style social democratic welfare state. This enemy is not new. It has long been a staple of the Libertarian Right. The Cato Institute's Edward Crane in Moscow in 1990 advised on the collapse of the Soviet Union: "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."[7] The enemy isn't just social democracy. All forms of statism include all forms of law—or, at least, Crane might explain himself.

We already find here the identification of socialism with statism. Libertarians get very agitated and proclaim, "We don't want a coercive state." There is no other kind of state. They don't want to be governed. The state is law and law is coercion. Thou shall, Thou shall not, or suffer the punishment. The expansion of law in the social contract is an expansion of civic values, civic obligation, civic consciousness and civic purposes that were inherent in the original republican ideologies. The Libertarian Right's political cynicism rejects just about anything civic. Will it keep constitutional government? That is a serious question. When it embraces anarchic gun rights we need to know.

This is not just an inconsequential fringe attitude. It is a broad political and intellectual

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[7]Cato Policy Report 13, No. 1, Jan/Feb 1991

movement. We find the doctrine in a large and growing literature. It is manifest as what Sidney Blumenthal called the "counter establishment".[8] Nicholas Wapschott's *Keynes Hayek* (2011) is an objective and reasonable description in the polarization of twentieth century economic policy making. We can argue what Keynes and Hayek got right and wrong but there is a serious problem. The polarization takes us in another anarchic direction. We need our guns not just for self-defense against each other but self-defense against the modern state and any governing authority at all. Just as the American Revolutionaries took up arms against British rule, the Libertarian Right will maintain a permanent prerevolutionary situation in defense against the modern state. The permanent prerevolutionary situation is imagined now as the true purpose of the Second Amendment.[9] In some places these rights are explicit, in others more implicit. We need only listen to the politicians. This is more than cynical campaign rhetoric to energize a constituency. There is a serious will to believe. More in the next chapter.

Friedrich Hayek is one of the avatars of the Libertarian Right. Hayek dedicated *The Road To Serdom* (1944) to "Socialists of all Parties." Hayek wrote volumes on the rule of law. What else he had to say on Stalinist and German totalitarianisms is relevant and instructive:

> 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. (p. 157)

Marx's proletarian class was redefined as Stalin's authoritarian state. The Weimar Republic was redefined as a national socialist "republic". The revolt against the modern state uses these same methods to create an alternative political and moral reality. Words are redefined for presentist purposes. The Libertarian Right redefines government as socialism. The Constitution is redefined as a treaty among sovereign individuals. Anarchy is redefined as freedom. The republican right of the people to participate in the military functions of the state is redefined as the unrestricted libertarian right of every yahoo individualist to gun ownership.

We can see what is at work, among other places, in Thomas DiLorenzo's works on Hamilton and Lincoln, Ronald Pestritto's work on Progressivism, Jonah Goldberg's *Liberal Fascism*, Hillsdale College's ten part online video course, Constitution 101, William Anderson's "The Courts and the New Deal," and David Keene's lecture at the Citadel, "William F. Buckley, Jr., and the Modern Conservative Movement," March 7, 2012.[10]

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[8] Sidney Blumenthal, *The Rise of the Counter Establishment* (1986).

[9] http://www.potowmack.org/parkappe.pdf

[10] http://www.c-spanvideo.org/program/304707-1

One can get another perspective on what is at work with Robert Levy. He pursued *Parker* all the way to the Supreme Court. He wrote (with co-author) *The Dirty Dozen* (2008) on the twelve Supreme Court cases that offend his libertarian sensibilities.

David Keene is a more interesting spectacle. He is past Chairman of the American Conservative Union and now president of the National Rifle Association. His lecture at the Citadel is an intellectually competent overview of the socalled "Conservative" Movement. (Conservative is in quotation marks for a reason. Chapter 4) He describes how Buckley was at pains to create a respectable movement. He had to purge out and distance his movement from the irrational and the malignant starting with the John Birch Society, then the Ayn Rand objectivists and other libertarians, and the racists and malignant elements that called themselves "conservative". Keene's problem is that he is president of the National Rifle Association. He wants to present himself and the NRA as a respectable part of the "Conservative" mainstream. Unlike Buckley, he has not distanced himself and the NRA from the malignant, anarchic, insurrectionist, treasonous ideologies that are abundant in his gun rights constituency and can be found on a thousand websites and internet bulletin boards. It is not that these internet proclamations can be easily dismissed as not having any connection to the NRA. It is rather that anarchic, insurrectionist, and treasonous ideologies are unabashedly and abundantly proclaimed in the NRA's own literature and by NRA officials (Wayne LaPierre, Chapter 5), NRA national board members (Sue Wimmershoff-Caplan, Chapter 5) and NRA "scholars" (Stephen Halbrook, Chapter 6). These will get more attention. What a gun in every pocket will accomplished in this steady decent into socialism and statism has not been explained. The gun question is asked here. Is there anyone else who will ask it? Will there be an answer?

We can hear of the descent from the imagined libertarian liberty of the Founding generation between the lines in present campaign discourse when the talk is of deregulation, return power to the states, return to Founding principles, restore the original Constitution, untax us here and now.

Well, maybe, if there is a will to believe, but not really. The Constitution and Bill of Rights were forged out of enormous contradictions, ironies and conflicted agendas. It is beyond the scope of this treatise to examine all the competing and conflicting interests and agendas except to say the Constitution was not a shoo in. It was bitterly contested and was ratified by only a slim margin in critical states. Someone can get started with Pauline Maier's *Ratification* (2010), Thorton Anderson's *Creating the Constitution* (1993), David Stewart's *The Summer of 1787* (2007), and the early chapters of Peter Irons' *A People's History of the Supreme Court* (1999).

Sixteen of the 55 attendees to the Constitutional Convention refused to support the final document. Thirteen of those left the Convention before the work was completed. No one was completely happy with the final result. Many of the Framers would have felt that they were successful if the new government they created had lasted for a generation. The Founding generation even debated whether one generation could impose is values and institution on all future generations. They hedged that concern with a process for constitutional amendment which did not exist in the British Constitution. The Bill of Rights was similarly controversial and contested. The Founders would find the twentieth century beyond comprehension from everything from Prohibition—the American colonies were the most alcoholic society the world has ever known—to participation as a great power in world wars that originated in Europe, a place from which the Founders wanted great distance. Oh, how the future failed them.

The Founding generation was imbued with Enlightenment thought. They were

progressives in that they removed the trappings of feudalism. They did not want hereditary monarchs, divine right, primogeniture, bills of attainder, titled nobility, and religious tests. But their political vision was still conservative and hierarchical. George Washington believed that for an officer to command soldiers in battle he had to be bred naturally to command in a social class. If they removed monarchy and divine right they had to find a new source for sovereignty in the people, but they were not very democratic. The people who framed and ratified the Constitution were property owners. Owning property, which in a pre-industrial society was agricultural land, meant having a stake in the political system and was essential to political responsibility. Property ownership was required to vote, hold public office, and in some cases in the slave states, property ownership for public office required slave ownership. Property ownership was conservative because it preserved the existing political and social order.

It was the new states that democratized the political system. One of the concerns of the Framers and Ratifiers was that the new supergovernment would become perniciously aristocratic, class bound and overly hierarchical. It did not happen. Vermont, the fourteenth state, was the first to remove property requirements for voting. The transAppalachian states followed. The militia was part of the hierarchical social system. One reason the militia never became well established in the new states was that the social hierarchy was more egalitarian. Democracy continued to expand in the movement west. Wyoming Territory in 1869 was the first jurisdiction anywhere to allow women's suffrage. Other Western jurisdictions followed.

There is nothing in the Constitution that says the president shall be popularly elected. There was a concerted effort in the early decades of the Republic to make the Electoral College subject to a popular vote.[11] By 1828 all states had popular vote for the Electoral College except South Carolina which did not provide for popular vote until it reentered the Union after the Civil War. When the frontier barbarian Andrew Jackson won the popular vote in 1824 and the presidency in 1928, some of the original Founders were still around and were horrified by the ascendency of the common man.

It was not just that the compromises were worked out of many divergent interests and agendas but that the Founders themselves changed over their long careers. James Madison, the architect of the Constitution, was different as President Madison twenty years later. In the House of Representatives in 1791 he voted against the creation of the controversial First Bank of the United States, a central bank, chartered for twenty years. In 1817 he signed the Second Bank into law, chartered for another twenty years. He kept his notes on the Convention out of public view until after his death in 1836 because he wanted the Constitution to develop traditions and authority and a life of its own without anyone trying to divine original intent out of the arguments at the Convention. Thomas Jefferson, author of the Declaration of Independence and advocate (from Paris) for a Bill of Rights, was different when it came to the exercise of presidential power. Jefferson late in life thought that a constitution should be rewritten every generation. Many state constitutions actually have been rewritten rather frequently. The 1776 Pennsylvania Constitution even went so far as the provide for a Council of Censors to be elected every seven years with the sole function of deciding whether the constitution should be rewritten. This is hardly the stuff of rigid principles which we are all bound to for all eternity as if divinely dictated. Years later when people wanted to deify the Framers, some of the Framers were still alive and thought that purpose was ridiculous. Today with originalism we will deify the Founding parchment like

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[11] Sean Wilenz, *The Rise of American Democracy* (2005)

Moses' tablets brought down from Mount Sinai.

Constitution writing is *politics* and *politics* like *politicking* is the art of the possible. What was possible then is not where we are now. The law does not move by leaps but it does move. It has to move or we would not survive. Where we are now is the modern state and the opposition to it. The opposition started early with Albert Jay Nock's *Our Enemy, the State* (1934), published when the early New Deal ink was still wet. He coined the phrase "the Remnant". The opposition runs right up to the present T(axed) E(nough) A(lready) Party activism with its implied insurrectionist inspiration from the original 1773 Boston Tea Party. We can see where insurrectionist ideologies are creeping into the revolt against the modern state. This all part of the same story.

The John Birch Society was formed in 1958 by Robert Welch[12] in reaction to President Eisenhower's refusal to dismantle the political establishment created by the New Deal. Eisenhower was clear on what he thought of the Libertarian Right's extremists.[13] For Robert Welch, Eisenhower's devotion to the modern state made him a "card carrying Communist." Communist, socialist, statist, whatever: We can already see where the opposition to the expansion of political authority, particularly federal authority, in the modern state and the social contract had broader ideological associations. William F. Buckley, while repudiating without enough rationale, the irrationality of the JBS, created *National Review*, the Intercollegiate Studies Institute, and Young Americans for Freedom to stand astride history and say stop to the advance of the dreaded socialism. YAF broke up during the Vietnam War over conscription. Some of its members went on to found the Libertarian Party in the 1970s.[14]

In the Barry Goldwater (1909-1998) and George Wallace (1919-1998) campaigns in 1964 and 1968 the Libertarian Right discovered opportunities to build an electoral base. The very patient strategy from the 1960s to the 1990s to shape the political culture is described in "Moving a Policy Agenda: The Strategic Philanthropy of Conservative Foundations"[15]

Goldwater had voted against the Civil Rights Act of 1964 not on racist principles but on libertarian principles that opposed expansion of federal authority to enforce civil rights. The force in the political establishment behind the civil rights movement was inspired by the Cold War. The United States could not compete with the Soviet Union's propaganda for the hearts and minds of mostly nonwhite Third World people as long as it maintained its domestic apartheid system. Goldwater was a dedicated Cold Warrior but he was blind to the Cold War public necessity of the civil rights movement. He nevertheless captured the public mind in the

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[12] "Republics and Democracies" (1961), http://www.serendipity.li/jsmill/welch.html

[13] http://www.eisenhowermemorial.org/presidential-papers/first-term/documents/1147.cfm

[14] and were influential in founding and participating in other organizations: American Legislative Exchange Council, Conservative Political Action Conference, The Conservative Caucus, The Second Amendment Foundation, Cato Institute, Reason Foundation, The Ludwig von Mises Institute, Citizens United.

[15] http://www.ncrp.org/index.php?option=com_ixxocart&Itemid=41&p=product&id=7&parent=3

Democratic Party's Solid South and began its transformation to Republican Party dominance. The economic populism of the Solid South was converted into anti-government populism.

George Wallace's campaigns in the 1960s demonstrated the other possibility for an electoral base in the Democratic Party's formerly Solid South.

(Enormous contradictions run through this whole discussion. George Wallace's record is worthy of expanded mention for its contradictions. He started out like everyone else in the Solid South as a New Deal Democrat. The Franklin Roosevelt vote in Alabama in 1936 was ninety percent, about the same as in Brooklyn—And, there were few blacks voting in Alabama then. He grew up politically under the tutelage of Governor Big Jim Folsom, one of the more ridiculous characters in American political history. Folsom once said (in paraphrase), "I don't understand why everyone gets so worked up about segregation. When I look at black folks they ain't all black. Some of them are yellow. They did not get to be yellow from being out in the sun. It seems to me that there has been a lot of integrating going on in the night time." Wallace became a racist demagogue in 1957. He defeated Folsom for governor in 1962. In 1964 much to the shock and horror of the political establishment, he took his demagoguery out of the deep South. He ran on the American Independent Party ticket in 1968. Wallace was an organizational clutz. The AIP got on the ballot in the Southern states through the organizational efforts of the White Citizens' Councils. It got on the ballot in the remaining states through the organizational efforts of the John Birch Society. In 1972, his new wife, Folsom's niece, encourage him to run as a Democrat and shun the malignant elements—paramilitary militias (they were around in the 1950s and 60s) and rabid racists—the AIP had attracted. Wallace had the same problem with respectability as Buckley. NRA president David Keene has the problem too but he does not need to worry about accountability or embarrassment in this failed political culture.

(When he was forced out of presidential politics during the campaign in 1972, Wallace returned to Alabama, asked for the forgiveness of the black community, and became a New Deal Democrat again, hardly what the JBS would have supported. When he was proclaiming in public, "Segregation now, Segregation forever!" he was sneaking to the house of his old classmate and friend, federal judge Frank Johnson (1919-1999, one of the uncelebrated great men of the twentieth century) in the wee hours to get papers signed to keep himself out of jail. Johnson had a mentally ill adopted son who took abuse in the schools indirectly from Wallace's vicious demagoguery. He later committed suicide. The black community forgave Wallace. Frank Johnson never did.

(The American Independent Party was still on the ballot in all states in 1972. The standard bearer was John Schmitz (1930-2001) who was so extreme that even the JBS distanced itself. Schmitz' daughter Mary Kay Latourneau, a Seattle elementary school teacher, caused a media sensation years later when she abandoned her four children and struggling husband and took up a dalliance with one of her sixth grade students. Can't we just love the many associations and permutations that appear in the political culture?)

We don't have to look far to find political cynicism and hypocrisy. In December, 2002, Senate Majority Leader Trent Lott lauded Senator Strom Thurmond on his 100th birthday: "When Strom Thurmond ran for president [as a Dixiecrat in 1948], we voted for him. We're proud of it. And if the rest of the country had followed our lead, we wouldn't have had these problems over all these years." Lott was appropriately condemned for the implicit racism in his statement, but the problems Lott laments are much broader than civil rights. The problems are the modern state and the twentieth century social contract.

Race, largely muted now as a legal and constitutional issue, was the first big wedge to

break up the New Deal coalition. Regardless, Southern politicians in the mid twentieth century had two contradictory jobs. One was to scream state sovereignty in matters of federal civil rights enforcement. The other was to feed at the federal trough for defense contracts, public works projects, and agricultural support payments. The political establishment had apparently decided that the South needed economic development or it would remain ignorant and backward and a racist embarrassment. Contrary to present proclamations about the dead hand of government on the economy, the development came from New Deal type public spending; and, ironically, rather than become enlightened, progressive social democrats, the old Solid South under the Republican Party became anti-government libertarians—to the satisfaction of Trent Lott.

To build political pressure to dismantle the modern state and the social contract, the Libertarian Right has had to discredit the Populist Era and the Progressive Era where much of the policy advocacy that created the modern state and the social contract got started by conflating Populism and Progressivism with racism, fascism and police state tactics. What was progressive in Progressivism can be separated from what was reprehensible.

The conflation is easy as far as it goes. William Jennings Bryan was the Democratic Party standard bearer in 1896, 1900 and 1908. He was the granddaddy of all modern religious fundamentalist politicians. He supported creationism and Prohibition. To be sure, his Democratic Party in the Solid South was then the party of white supremacy. It was also the party of economic populism which the New Deal absorbed. Bryan supported the forty hour work week, income tax, worker protections and regulation of banks, railroads and other corporations. In his famous Cross of Gold speech in 1896 he advocated the trickle up theory, still a credible guide for policy making: "The Democratic idea has been that if you legislate to make the masses prosperous their prosperity will find its way up and through every class that rests upon it."

Populist reform has other roots in the Solid South. The history of campaign finance reform started with the *Tillman Act of 1907* and runs through *McCain-Feingold* (2002) and the recent, much criticized *Citizens United v. FEC* (Sup. Ct., 2010) opinion. The *Tillman Act* was pushed through Congress by Pitchfork Ben Tillman (1847-1918), senator from South Carolina (1895-1918. He died in office.) Tillman was not only a Populist Era reformer. He was a rabid racist. When President Theodore Roosevelt hosted Booker T. Washington in the White House in 1901, Tillman proclaimed that "entertaining that nigger would necessitate killing a thousand niggers in the South before they learn their place." We don't know if Tillman personally killed any blacks (he did kill a white man once in a gambling dispute), but he encouraged the climate. Sadly, despite the present attempt to identify racism exclusively with Progressivism, the Tillman sentiment was only an extreme manifestation of what was common throughout the Western world in the early twentieth century. The British Empire's "white man's burden" and the French Empire's "civilizing mission" had racist implications. The most extreme racist criminal insanity was King Leopold's imperial exploitation of the Belgian Congo.

Tillman defeated the old Bourbon planter plutocracy in South Carolina and promoted Populist Era reform for farming interests, but the reforms were exclusively for white farmers. There is a parallel in Jonah Goldberg's inclusion in an appendix to *Liberal Fascism* of the Nazi (acronym in German for NA*tional So*ZI*alismus*) Party Platform of 1920. The platform was national and socialist. It advocated progressive policies for German workers, small businesses and the German people for retirement care and education, but the advocacy was exclusively for real Germans. Non-Germans, mostly but not exclusively Jews, would be expelled or tolerated only as guests in Germany. We can separate, although the Libertarian Right's demagogues don't, the progressive elements of the Nazi Party platform from the racism and nationalism the same as

we can separate Tillman's rabid racism from this populist reform policies.

The Libertarian Right also includes the police state tactics of the Wilson Administration to suppress dissent during the First World War as part of the statism—that is, fascism. It was not unusual that mobs took action against dissenters from wars going back to the Revolution, the War of 1812, and the Civil War, but, if Wilson used state powers, there was a reaction within the state. Supreme Court Justice Oliver Wendell Holmes was a veteran of the Civil War. He had little sympathy with war protestors, but he had less sympathy for Wilson's police state repression. He and other Supreme Court justices set off on a course of protecting civil liberties which ran through the rest of the twentieth century. The repression, however, was also against socialists and leftists even while Wilson pursued Progressive reforms. The socialists and leftists are the same people who advocated the policies of the social contract that the Libertarian Right wants to dismantle. Somehow the government tyranny of the modern state is conflated with Wilson's police state tactics against the same agenda.

Progressives and Wilson were also motivated by religious and moral fervor. The moral fervor culminated in Prohibition. The Libertarian Right doesn't shrink from exploiting religion and moral fervor today for its present purposes.

Chapter 4

The Libertarian Fantasy

The extreme libertarian individualism the Libertarian Right reads into the Founding of the Republic doesn't stop there. It proceeds to another even more extreme political disposition. We levitate ourselves out of political existence in what we can call the "Libertarian Fantasy". Clutching the gun becomes part and parcel of the libertarian revolt but the revolt is not just against the modern state. It is against any governing authority at all. We can see a hint in William Anderson's "The Courts and the New Deal" (2005, Chapter 3). The Second Amendment gets it due mention. (More on the implications from van den Haag, below.) We can examine and argue the contours of the modern state policy by policy. What we cannot do is throw out the constitutional state baby with the modern state bath water.

Libertarianism is another subject that has produced a large literature and a small but very energetic following. We see it in the energetic following of perennial candidate Ron Paul. In its totality, it is again more than this treatise can begin to examine, but there are a few points to make. Acquiring knowledge and arriving at conclusions on these points are essential to understanding who we are.

This is not an anti-libertarian diatribe. We are all libertarian in some sense. This treatise seeks to expand public consciousness on fundamental concepts which are now under threat and hopes that much can be clarified through substantive political discourse especially in an election season. There has to be an appreciation that something else is at work.

In human history there are times when a public mood for good or ill, rational or not, transforms a society or large parts of it. It happened with Christianity in the late Roman Empire, Protestantism in early modern Europe, and fascism in interwar Europe. Libertarianism seems to be making a transformation of society now at least in the Western world. The complexities of modernity and the faulty efforts of the political order to deal with them produce something else. We see a demoralized public mood and a defeatist retreat from political life. The will to believe denies reality. When we levitate ourselves out of political existence, we repudiate civic obligation and deny any political reality that could include public necessity. The Libertarian Fantasy is that we are now sovereign individuals in the State of Nature before there is law and government. All commitments are voluntary. The Constitution is reduced from a frame of government to a treaty among sovereign individuals who give no more than word of honor and promise of good faith. (Hamilton, *FP 33*, below) The fantasy is that it is a viable concept. It is only viable when there is no civic obligation and no public necessity. The problem is that there is always civic obligation and public necessity in a viable constitutional order.

Defining some much abused terms at the outset is essential. In political theory there is no clear distinction between *libertarian* and *liberal* that very many would agree on. Everything American is liberal/libertarian. Both are very different from any proper definition of conservative. In the larger conservative concept we are born into political community with obligations. Whatever rights we have we receive when we have fulfilled our obligations. There is no American conservative tradition properly understood. We find the difference right there in the Declaration of Independence. We are born in the State of Nature endowed by our Creator (Nature's God, Deism's God, not the God of the Trinity or God of Abraham) with certain unalienable rights. To secure those rights governments, deriving their just powers from the consent of the governed, are instituted among men. The other choice in the eighteenth century, the conservative choice, was rule by divine right. Consent of the governed repudiated rule by

divine right. Previously, we obeyed the monarch's edict because the monarch is God's representative on earth and issues edicts by the grace of God. To resist is not just treason but sacrilege. Consent removed the sacrilege, but armed resistance remained as treason. Treason is defined right there in the Constitution.

Consent is to the fundamental law of a constitution not to every legislative enactment. The consent to be governed is *politics*. Challenging a given legislative enactment is *politicking*. Consent accepts the legitimacy of the process and recognizes that we, the people, have a right and a capacity to express ourselves and pursue political goals. When we loose, we, nevertheless, accept that the process is legitimate. In the matter of civil rights, in the Declaration of Independence and the Constitution it is *certain* inalienable rights that are secured not *all* inalienable rights. It is government—the courts—that decide which inalienable rights will be secured and on what terms. Armed resistance is an unalienable right but it is not one of those certain unalienable rights, not an individual or group civil right, that can possibly be secured by government.

Maintaining a viable constitutional order is a public necessity and public necessity comes in different degrees. When Franklin Roosevelt made his acceptance speech to the Democratic Party convention in 1940, the Battle of Britain was raging. He told the American people:

> It is not an ordinary war. It is a revolution imposed by force of arms, which threatens all men everywhere. It is a revolution which proposes not to set men free but to reduce them to slavery—to reduce them to slavery in the interest of a dictatorship which has already shown the nature and the extent of the advantage which it hopes to obtain.
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> That is the fact which dominates our world and which dominates the lives of all of us, each and every one of us. In the face of the danger which confronts our time, no individual retains or can hope to retain, the right of personal choice which free men enjoy in times of peace. He has a first obligation to serve in the defense of our institutions of freedom—a first obligation to serve his country in whatever capacity his country finds him useful.

Roosevelt in the same speech proposed peacetime national conscription, enacted in Congress by one vote in the *Selective Service Act of 1940*, in the middle of an election campaign, mind you. Try that now. We were not at war and Roosevelt campaigned in 1940 to keep us out of war. The public necessity was for military preparedness.

We come now to the twenty-first century. Immediately after the September 11, 2001, terrorist attack on the United States, President Bush, very likely under the influence of Grover Norquist, instructed "Just go shopping." Norquist wrote a book, *Leave Us Alone: Getting the Government's Hands Off Our Money, Our Guns, Our Lives* (2008). The public necessity and the response to the threat in 1940 was far greater and very different from the public necessity and the threat in 2001. The world, nevertheless, was suddenly very different, but the government would ask for no sacrifices from the people. We went to war in Iraq and, for the first time in all of war history, taxes were lowered not raised to pay for it. Grover Norquist doesn't want government—or public necessity—to touch our money. We can suppose that we are to make voluntary contributions. Taxation is one of those coercive powers of government. Paying taxes is a coerced civic obligation. The modern state is built on taxation. Taxation is *politics*. How much we pay in taxes and how the taxes are spent is *politicking*. "*Our Guns*" Norquist and his political cynicism are right there on the NRA's national board. This is all part of the same story.

The dominant version of libertarianism is the minimalist state. Can we get Norquist to explain how far he will depart even from the minimalist libertarian state and take us into the other state, the State of Nature? Most libertarians accept the legitimacy of a governing authority in the minimalist state. The state maintains the monopoly on violence, maintains internal sovereignty, enforces contracts, protects property (a form of contract enforcement), and secures national boundaries (external sovereignty) but does little else. Max Weber's observation is satisfied. This was well understood among the Founders and had deeper intellectual roots than the present disaffection with dysfunctional government and the much lamented ideological polarization. If at first we don't succeed, read the instructions.

The only place the courts have given any attention at all apparently since 1823 to the roots in fundamental concepts is in footnote 32 of Justice Stevens' dissent in *McDonald*:

> Moreover, it was a basic tenet of founding-era political philosophy that, in entering civil society and gaining "the advantages of mutual commerce" and the protections of the rule of law, one had to relinquish, to a significant degree, "that wild and savage liberty" one possessed in the state of nature. 1 W. Blackstone, Commentaries *125; see also, e.g., J. Locke, *Second Treatise of Civil Government* §128, pp. 63–64 (J. Gough ed. 1947) (in state of nature man has power "to do whatever he thinks fit for the preservation of himself and others," but this "he gives up when he joins in a … particular political society"); *Green v. Biddle*, 8 Wheat. 1, 63 (1823) ("It is a trite maxim, that man gives up a part of his natural liberty when he enters into civil society, as the price of the blessings of that state: and it may be said, with truth, that this liberty is well exchanged for the advantages which flow from law and justice").

Stevens' observation belongs in his introductory paragraph not buried in a footnote toward the end of his opinion.

The attention, nevertheless, deserves more prominent mention. The Founders took much of their instructions from John Locke's *The Second Treatise of Government* (1689) that something changes with the consent to be governed and the creation of a governing authority—a constitutional state. *The Second Treatise* is one of the founding documents of American political consciousness. It is as much American political scripture as the Declaration of Independence, the Constitution and the *Federalist Papers*:

> § 88: "...[In Civil Society] he has given a right to the Commonwealth to imploy [*sic*] his force, for the Execution of the Judgements of the Commonwealth, whenever he shall be called to it [that is, conscripted];.."

Already the consent to be governed has serious implications for private gun ownership as this treatise will assert—And, as the courts have decided. There has always been conscription. In the colonies and the early Republic it was into the colonial and state militias. The big change was in 1917 when conscription became national. It was a defining moment in the evolution of modern nationhood. Where is "*Our Guns*" Norquist on this?

> §89. "Where-ever therefore any number of men are so united into one Society, as to quit every one his Executive Power of the Law of Nature, and resign it to the publick, there and there only is a Political or Civil Society."

> §94: "No man in civil society can be exempt from the laws ...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 one will say, the State of Nature and Civil Society are one and the same thing, which I have never yet found one so great a Patron of Anarchy as to affirm."

The minimalists are not Patrons of Anarchy. Even as they reject the social contract they recognized a difference between Civil Society, as minimal as it is, and the State of Nature. The difference is manifest in the oath of public office.

There are more instructions from Locke. See his Chapter XI, "Of the Ends of Political Society and Government", §123-§131. Since Justice Stevens cites it, here is §123:

> §123. If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he part with his freedom? why will he give up this empire, and subject himself to the dominion and controul of any other power? To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.

Locke ends *The Second Treatise*:

> §243 To conclude, The Power that every individual gave to Society, when he entered into it, can never revert to the Individuals again, as long as the Society lasts, but will always remain in the Community; because without this, there can be no community, no Common-wealth

James Wilson, one of the 55 Framers, argued for ratification before the Pennsylvania ratifying convention:

> Civil liberty is natural liberty itself, divested only of that part which, placed in the government, produces more good and happiness to the community than if it had remained in the individual.

The part of civil liberty placed in the government is the republican part which creates civic obligation and the common good. The link is established between the individual and political community.

This was an evolving history. In political community there is something called public power and public power is the state. The English historian Richard Tawney (1880-1962) writing

in 1931[16] exquisitely contrasted public authority and secular sovereignty in the West with the political culture of 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 [*majesta* is the Latin word for sovereignty] 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...

We need to know what mental furniture the Libertarian Right's revolt against the modern state will remember.

Alexander Hamilton in *Federalist Paper No. 33* was more or less explicit that there is a difference between Civil Society and the State of Nature:

> [The Constitution] would 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 (caps in original)

No one then objected to "POLITICAL POWER AND SUPREMACY"—that is, they accepted that the rule of law, the state's internal sovereignty, and the state's monopoly on violence all meant the same thing. They anticipated Max Weber by 100 years.

Where the minimalist state has difficulties, as found in the Chapter 3, is with the expansion of a governing authority in the modern state which produced the twentieth century social contract. The Libertarian Right expunges the republican purposes of an expanded civic obligation and common purposes in pursuit of its cynical vision.

President Lincoln's First Inaugural reaffirmed the fundamental concepts of the Founders:

> Perpetuity is implied if not expressed in the organic law of all nations.
>
> 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.

Obviously Lincoln accepted the idea of a living constitution, but he would defend the Constitution as a frame of government:

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

Lincoln's first Inaugural was published in all the newspapers. In the North is was regarded as

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[16] Reprinted, *Washington Post*, June 25, 1989.

very reasonable. In the South where most of the states had already seceded, it was regarded as an incitement to war.

The Libertarian Right loses its grip and the demoralized public mood takes hold. Individual secession has now become the new essence in the Libertarian Fantasy's levitation out of political existence. We are now individual sovereigns in the State of Nature which is the state of anarchy. In our present discourse we hear talk of the "sovereign citizen," another contradiction in terms. Citizens are bound by law. Sovereigns are laws unto themselves. A citizen consents to be governed. A sovereign gives and enforces law. A sovereign does not consent to be governed, give just powers to government, or surrender up the executive power of the law of Nature which is the law of the jungle.

In *The Second Treatise* John Locke recognized that states are sovereign. States make treaties, based on no more than trust and promise of good faith, not a government. If individuals are sovereign the Constitution is reduced from a frame of government to a treaty among sovereign individuals, a whimsical notion. We can take it or leave it. We give no more than word of honor and promise of good faith. Perpetuity is neither expressed nor implied.

Conservative constitutional scholars George Friedman and Gary McDowell whose conservative devotion is to ordered liberty, describe libertarianism mildly as a "caricature" of American liberty.[17] We can find a more severe definition in Reinhold Niebuhr: "the children of darkness are evil because they know no law beyond the self."[18] The unencumbered self becomes its own moral arbiter. We enter into the politics of ego.

It is, oddly, the Buckley conservatives who have given attention to the Libertarian Fantasy—right there in *National Review*. Whittaker Chamber's scathing review of Ayn Rand's *Atlas Shruggled* (1957) was early.[19] Frank Myer's title "Libertarianism or Libertinism" (1969)[20] is instructive. Conservative legal scholar Ernest van den Haag's "Libertarians & Conservatives," (1979)[21] is an expansive and cogent critique. Van den Haag writes:

> 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.

A phrase heard among personal gun right claimants is "an armed society is a polite society." States have developed elaborate rules of diplomacy so that their signals are not misunderstood. Diplomacy is very polite, but, because sovereign states recognize no higher law, when differences become irreconcilable and communication breaks down, sovereign states go to war. Van den Haag, in the same article:

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[17] "The Libertarian Movement in America," 1983, http://www.potowmack.org/libmovam.html

[18] Reinhold Niebuhr, *The Children of Light and the Children of Darkness*, p. 10 (1944).

[19] "Big Sister is Watching You," http://www.potowmack.org/aynrand.html.

[20] http://www.potowmack.org/libertin.html

[21] http://www.potowmack.org/emerappg.html

> Institutions form a social order, ultimately articulated and defended in essential respects by the state, through the monopoly of legitimate coercive power exercised by its government. Any particular coercion (law) of the state may well be contested [the *politicking*]. But libertarians object not just to specific laws, but to legislation, to the authority of the state, and to its coercive power *per se* [the *politics*]. Libertarians dissent from history and from the political institutions it has created in all known civilization. For, although political institutions vary no society has been able to do without them, as the libertarians propose.

Shall we reverse the process celebrated by Pinker that has created modern civilized life?

Self-defense is a great gun lobby demagogic appeal. There is no individual self-defense in the state of anarchy. If this is what we want, we need to be very careful. If we are all now alone as competitive sovereign individuals to defend our own rights and to provide for our own security, we may get some other things we may not want. Van den Haag again:

> 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" (—John Locke, *The Second Treatise*, §1). We return to Medieval feudal anarchy. This time it will be rule by "armed citizen guerrillas", street gangs, organized crime syndicates, and vigilante militias. These will spend most of their time fighting each other with the rest of us paying tribute and caught in the crossfire.

Libertarianism is at its base an adolescent ideology. There is an adolescent insolence to the childish political fantasy. The adolescent insolence is embraced by middle aged adults with college educations some of whom sit on the federal judiciary.

Something else is missing from this conception. Despite all the anti-government, anti-state, anti-authority libertarian rhetoric, libertarianism shares characteristics with fascism: 1) It spans the political spectrum. 2) It looks for security in an invented past when we were all free. 3) Fascism gives all power to a great leader who will purge out the corruption of the present and restore our lost freedom. Libertarianism spans the political spectrum and will, with qualifications on a great leader, nevertheless, restore the freedom of the past.

In spanning the political spectrum, the Libertarian Fantasy has its roots as much in the New Left as in the Libertarian Right. *A New History of Leviathan* (1972) is a collection of essays by authors some of whom would call themselves socialist and others who would call themselves libertarian. The Leviathan is the modern state. It has been forty years. As much difficulty as we have with the new Leviathan, it cannot be said that the libertarians and the socialists have worked out a common vision that we can rally to.

In the same perspective, women's reproductive rights are not liberal or conservative in the present false polarization. Potowmack only makes an observation here without judgement. Women's reproductive rights are very unconservative but they are not liberal. They are another libertarian right. Women don't want an outside authority whether the law, the state, the village elders, the patriarch family or the church fathers controlling their bodies and their choices. Conservatism invests in some concept of political community. Just as men are coerced when public necessity demands it to defend the community under arms, women are coerced to produce children to maintain the population against hostile neighbors. Yasir Arafat told Palestinian women to have six children, two for themselves, four for him. Israeli woman may respond to the

same pressure for the same reason.

Like everywhere else there is no end to the contradictions. Ron Paul who adheres to strict libertarian principles in every other position nevertheless supports a constitutional amendment that will define life as beginning at conception and will give to law and the state the very unlibertarian power to compel a woman to carry a pregnancy to term.

We find our invented past in originalism, a guiding concept at present right there on the Supreme Court. The Supreme Court can change the law and, as warned by Hayek, it can change the meaning of words. It cannot change history. The past is subject to interpretation that serves present needs and illusions. There were original principles, not just political but moral, social, and cultural, written in stone like the tables Moses brought down from Mount Sinai that we are beholden to for all time and have to struggle back to for our moorings. This idea would not have made sense to the Founding generation (Chapter 3). The Nazis invented a past out of the Teutonic forests. The Libertarian Right finds its past in constitutional fundamentalism. We were once free now we are corrupted by the modern state. Judge Janice Rogers Brown, now on the US Court of Appeals, DC Circuit, 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...[22]

Are things really that bad? How much of the debauched culture and moral depravity is a result of the new Leviathan and how much is a result of libertarian free market consumer depravity, the morals of the market place? We can find much fault with the modern state, but the modern state was created in good part as a countervailing balance against private concentrations of corporate power. Judge Brown's complaint can be directed with as much relevance against private concentrations of power. But, now, private power is okay as in the *Citizens United* ruling.

If anyone doesn't think this gets quite cuckoo, Porter Stansberry's libertarian financial advisory letter, Dec., 2011, at the end of an article titled, "The Corruption of America" adds:

> What gives me confidence for the future? Gun sales, for one thing. U. S. citizens legally own 270 million firearms—about 88 guns per 100 citizens (including children) today.
>
> That's a hard population to police without its consent. America is the No. 1 country in the world ranked by the number of guns per-capita. That plays a major factor in the kind of government you will see take root in America. Things might go too far in this country for a while ... And I'd argue they've been going the wrong way for too long.

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[22] Brown, Janice Rogers, "'A Whiter Shade of Pale': Sense and Nonsense, The Pursuit of Perfection in Law and Politics", The Federalist Society, April 20, 2000. http://www.constitution.org/col/jrb/00420_jrb_fedsoc.htm.

> But the government can only take things so far before they'll be faced with a very angry, well-armed opposition.

Really. As much as half of all guns are owned by ten percent of gun owners. Are these the "armed citizen guerrillas" who will rescue us? What does Judge Brown have to say about this? What about the Weimar Republic's non-Nazi politicians? Where do Lenin's "armed people" make their appearance? Where is David Keene?

Implicit in Judge Brown's and the Libertarian Right's complaint is that we do not find values, certainty, and security in the present. We find them frozen unalterably in the structures of the past. It is a form of libertarian authoritarianism, another contradiction in terms. We give up our capacity to function in the present. Constitutional fundamentalism can be likened to religious fundamentalism where values and certainties are found in the literal text of Scripture to the point where even the printers' errors become part of the Holy Writ. The invented past was a golden age when we were all free. Fascism found freedom in an imaginary past. We can find it now in constitutional fundamentalism. We can all be free again if we just purge out the corruption of the present. Fascism will give all power to a great leader who will lead us to freedom.

The libertarians would not consciously give political power to anyone. They find their great leader in the memory of Ronald Reagan, not the real Ronald Reagan of historical record who was as full of as many contradictions as anyone else but the Ronald Reagan of the imagination. Grover Norquist has campaigned in recent years to get at least two public entities in each state named after Ronald Reagan. The effort produces absurdities. We now have Ronald Reagan Washington National Airport. It is the only public facility named after two presidents. Norquist tried to get Mount Clay in New Hampshire's Presidential Range changed to Mount Reagan. Mount Clay is named for Henry Clay an important historic figure. The locals objected. One characteristic of fascism is not that it just invents a new past. It obliterates the real past. Maybe Norquist should have tried for Mount Ronald Reagan Henry Clay.

Some have called the elevation of the name and image of Reagan a cult of personality. It was said that Richard Nixon was president of every place in America that did not have a bookstore. Ronald Reagan is still president of everyone in America who needs a fairy godfather. We find him ubiquitous in present political rhetoric.

The Libertarian Fantasy gets implicit endorsements from unexpected places. Sanford Levinson (U of Tex.) has made valuable contributions in other areas with his political and constitutional analyses and observations. Here he establishes himself as a libertarian flake. Levinson wrote in "The Embarrassing Second Amendment" (*Yale Law Journal*, 1989):

> [O]ne aspect of the structure of checks and balances within the purview of 18th century thought was the armed citizen. That is, those who would limit the meaning of the Second Amendment to the constitutional protection of state-controlled militias agree that such protection rests on the perception that militarily competent states were viewed as potential protection against a tyrannical [federal] government...But this argument assumes that there are only two basic components in the vertical structure of the American polity—national government and the states. [The words in added bold that continue are quoted in full by the district court in *Emerson*.] **It ignores the implication that might be drawn from the Second, Ninth and Tenth Amendments: that the citizenry itself can be viewed as an important third component of republican governance insofar as**

it stands ready to defend republican liberty against the depredations of the other two structures, however futile that might appear as a practical matter.

He referenced Sue Wimmershoff-Caplan's "armed citizen guerrillas" (Chapter 5) with approval. He might have referenced the Nazi Party's Stormtroopers. The Stormtroopers were certainly defending their liberty against the perceived tyranny of the Weimar Republic. The immediate questions are: *Is Levinson's armed populace composed of citizens bound by law? Do they consent to be governed, give just powers to government, give civic obligation, unite into one society, quit every one his executive power of the law of nature? Or, is the armed populace composed of sovereign individuals who give no more than word of honor and promise of good faith?* Is there any serious thought here? Fall on your knees Prof. Levinson: This is a constitution we are expounding. The Constitution is a frame of government. It is not a treaty among sovereign individuals. The gun lobby has exploited Levinson's article to great benefit.

It gets worse. Six judges on the Ninth Circuit dissented to the refusal of an *en banc* rehearing of *Silveira v. Lockyer* (2003). Judge Kozinski sees the Second Amendment as a "doomsday provision." Judge Reinhardt wrote in *Silveira* that the militia was not "an amorphous body of the people as a whole"—that is, not the "armed populace at large". Judge Kleinfeld asserted that that is exactly what it is. But, *are they citizens bound by law? etc.* Judge Kleinfeld goes on at length to find explicitly in the *Militia Act of 1792*, a conscription law, mind you, the "amorphous body of the people as a whole." When people with college educations read words in their plain text to have a very opposite meaning, we enter into another paradigm of political life. The will to believe redefines reality. As Hayek warned, the old words still have their appeal but with new meanings. Judge Silberman in *Parker* cited Kleinfeld 12 times. Can we make the contours of citizenship under law and government part of our public discourse in an election season?

Chapter 5
Insurrectionist Fantasies.

The Kennedy Administration created the Green Berets as a counterinsurgency force. To understand their mission the Green Berets were required to study Maoist revolutionary tracts. The Maoists discovered this and were concerned. They took their concerns to Chairman Mao himself. Mao assured them that it was all right if the imperialists study our revolutionary tracts because we have the one thing they don't have. We have the revolution.

If we want to understand revolution we study the people who know something about it—that is, those who have done it. Revolutions become possible when a targeted regime loses its legitimacy. It is usually a difficult struggle as the American Revolutionaries discovered.

In the late 1940s the United States sent convoys of surplus World War II war materiel to Chiang Kai Shek's Nationalist regime when everyone in Washington knew that eighty percent of the war goods were passing right through the Nationalists to the Red Army. Fidel Castro brought down Batista's much larger better equipped army with less than 800 guerrilla fighters. Chiang's and Batista's regimes had lost their legitimacy. They did not even command the allegiance of their armed forces In many cases of a revolutionary situation the police and the armed forces go over to the revolution and the weapons flow out of the government itself

The American Revolutionaries had a revolution, a critical mass in the public willing to make the sacrifices to throw off British rule. The King's militia defied the King's authority and went over to the side of the Revolution. The Declaration of Independence only expressed a purpose that was already established in a critical mass (not a majority) of the public mind. Much nonsense is asserted about the War for Independence and the militia as a revolutionary force. We find this right in the federal judiciary. The district court in *Emerson* is where present gun rights claims got their start in court. The gun controllers were upstage by this opinion. They thought gun control was about public health and gun safety. As argued here, gun rights and the gun vote are part of a broad political and intellectual movement.

Judge Garwood in the appeals court devoted many pages of completely gratuitous, utterly pointless *dicta* to rehash gun lobby arguments. The *dicta* were nothing less than a sop to the gun rights ideologies. For him the right was there, but the threshold had not been reached. Emerson's indictment was reinstated and he was sent back to the district court for trial.

Emerson's fundamental arguments in the district court are where the libertarian doctrine is explicit. The arguments have not been contradicted by other courts. The district court opinion was not written by Judge Samuel Cummins. It was written by an adolescent law clerk.

The will to believe is strong:

> The American colonists exercised their right to bear arms under the English Bill of Rights

Already the opinion is utterly fallacious. In the English Bill of Rights, they bore arms as citizens not insurrectionists. The American gun rights insurrectionist ideologies do not have their roots in Anglo-American fundamental law. The roots are in the rebellious traditions of Scotland and Ireland which are not only not a part of the Anglo-American legal tradition but have been constantly at war with it to this very day. The rebellious traditions transferred across the Atlantic. The Whiskey Rebels in 1794 were mostly Scots-Irish, a few Germans and fewer English. They did not even speak English.

> As in England, the colonial militia played primarily a defensive role, with armies of volunteers organized whenever a campaign was necessary.

Fallacious again. Militia duty was conscript duty both in the England and in the colonies. There is, nevertheless, something to the defensive part. The constitutional functions of the militia are to enforce the laws of Union, suppress insurrections (not make them), and repel invasions. These conscript functions can only be performed standing on domestic soil. Repel invasions is a defensive function, albeit coerced, performed consistent with libertarian ideologies. The *Selective Service Act of 1917* in response to public necessity, nevertheless, sent conscripts to foreign shores. The United States became a world power. There was a new reality.

> Statues in effect bore evidence of an individual right to bear arms during colonial times. For example, a 1640 Virginia statue required "all masters of families" to furnish themselves and "all those of the families which shall be capable of arms . . . with arms both offensive and defensive . . "

Again, the point is fallacious. The statue "required"—that is, coerced. The colonial settlements were military garrison communities threaten by hostile natives on the interior and the Spanish Empire from the sea. Every man and his weapons were coerced to make his contribution to defense and pull his weight.

> The individual right to bear arms, a right recognized in both England and the colonies, was a crucial factor in the colonists victory over the British Army in the Revolutionary War. Without that individual right, the colonists never could have won the revolutionary war. After declaring independence from England and establishing a new government through the Constitution, the American founders sought to codify the individual right to bear arms, as did their forebears one hundred years earlier in the English Bill of Rights.

The republican right—and duty—of the people to participate in their common defense is conflated with some kind of meaningless individual right.

To invent an individual civil right, the district court exalts the militia to a status of revolutionary and military competence it did not have. The Revolution was won by the Continental Army with much help from the French Army. Libertarian flakes proclaim that the Continental Army was an association of volunteers who could take it or leave it. General Washington and his officers executed about 50 soldiers for desertion during the Revolution out of an army of about 13,000. During the Second World War the United States executed one for desertion out of an army of 13,000,000 (only about 90 were executed for all offenses). The United States would have had to execute about 50,000 for desertion to be on the same scale as Washington, or for that matter Adolph Hitler whose army executed about 50,000 for desertion. Revolution is war and war is serious business.

Alexander Hamilton is someone who had done it and knew something about it. These issues are not new in the historical record. We might appreciate that the Founders did not have much use for the militia as a military force and even less regard for Judge Kleinfeld's "amorphous body of the people as a whole". Hamilton wrote in *Federalist Paper No. 25*.

> Here I expect we shall be told that the militia of the country is its natural bulwark, and

> would be at all times equal to the national defense. This doctrine, in substance, had like to have lost us our independence. It cost millions to the United States that might have been saved. The facts which, from our own experience, forbid a reliance of this kind, are too recent to permit us to be the dupes of such a suggestion. The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind. Considerations of economy, not less than of stability and vigor, confirm this position. The American militia, in the course of the late war, have, by their valor on numerous occasions, erected eternal monuments to their fame; but the bravest of them feel and know that the liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.

and in *No. 28*:

> The citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair. The usurpers, clothed with the forms of legal authority, can too often crush the opposition in embryo. The smaller the extent of the territory, the more difficult will it be for the people to form a regular or systematic plan of opposition, and the more easy will it be to defeat their early efforts. Intelligence can be more speedily obtained of their preparations and movements, and the military force in the possession of the usurpers can be more rapidly directed against the part where the opposition has begun. In this situation there must be a peculiar coincidence of circumstances to insure success to the popular resistance.

Today the militia is variously called the “unorganized” militia, “sedentary” militia, and “reserve” militia or simply as the”armed populace at large”. It was created in the Second Amendment as the perpetual guardian of American liberty; or, so we are assured. The protections are not just against tyranny in government. From Chapter 3 and 4 this militia is the guardian against the modern state.

G. Gordon Liddy, an NRA life member and an articulate voice for the basic ideology, the implicit political cynicism, and more contradictions, in a broadcast interview, January 25, 2005, with 2004 Libertarian Party candidate, Michael Badnarik, made clear:

> ...they decided very reluctantly, as I read the founding documents, to create a central government. They were so fearful of the tendency of central governments to metastasize and grow in power and become tyrannical ... they would ratify the Constitution and then immediately amend it, the first ten amendments, which would spell out the individual rights... The way they attempted to guard against the tendency 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.

It does not seem to matter that the Federal Government has been exercising unenumerated

powers since the Washington Administration without armed resistance. The tyranny now is the expansion of federal authority to make the modern state and twentieth century social contract. Political cynicism demands a permanent pre-revolutionary situation.

The contradictions just don't end. Liddy is a big supporter of martial virtues and military service. He denounced Bill Clinton for eight years as the coward-in-chief for avoiding military service in Vietnam. Regardless, *national* conscription, enacted in 1917 and upheld by the courts, is nowhere enumerated in the Constitution. It was actually proposed during the Founding period but rejected.

The *Emerson* district court presages Liddy's permanent pre-revolutionary circumstance with the great confusion between natural rights and civil rights. The Constitution would be perverted if it defined treason as the waging of war against the United States and then guaranteed a civil right to do the same.

The courts' gun rights opinions are replete with references to "lawful purposes". Someone should tell David Keene that treason, contrary to what his ideologues proclaim, is not a lawful purpose. Regardless, insurrectionist ideologies, possessed even by individuals, are read unabashedly into the Second Amendment. The assertions are explicit:

Sue Wimmershoff-Caplan, a member of the National Rifle Association's National Board, wrote in "The Founders and the AK-47," *Washington Post*, July 6, 1989:

> The private keeping of hand-held personal firearms is within the constitutional design for a counter to government run amok, as when the military and police use such firearms against their fellow nationals. 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. . .[23]

Modern military machines are maintained by governments. There is no distinction here among governments. Meanwhile, a proper AK-47 is a machine gun requiring a federal permit.

The NRA's "armed citizen guerrillas" need their guns to protect themselves from the tyrannical encroachments of government. The rest of us depend on this government to protect us from "armed citizen guerrillas". Where is the guarantee that "armed citizen guerrillas" will not run amok? When we see "armed citizen guerrillas" coming up the street, unauthorized by any law, unbeholden to any governing authority, we call 911 and expect this government to respond.

The NRA's Executive Vice President Wayne LaPierre wrote in *Guns, Crime and Freedom* (1994), p.7:

> ...those four words—"The Right of the People" [in this case, from the Declaration of Independence, a charter for revolution, not the Second Amendment, part of a frame of government]—state in plain language that the people have the right, must have the right, to use whatever means necessary, including force, to abolish oppressive government.

The people do have a right to use force to abolish oppressive government. It is a natural right, a

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[23] http://www.potowmack.org/parkappe.pdf, p. 40

moral right, a God-given right, but it is not one of those "certain unalienable rights"—not an individual civil right—that can possibly be secured by government. We see again the great confusion between a natural right in the State of Nature and a civil right secured by government. The Declaration of Independence asserted an extraconstitutional natural right not a civil right in the English Bill of Rights as the district court would have us believe. Revolution becomes possible when there is a critical mass to support it. Treason becomes patriotism only when revolution is successful.

David Kopel, a prolific individual right advocate, wrote in "Trust the People: The Case against Gun Control," *Cato Institute Policy Analysis No. 109* (1988) explicitly in the context of gun ownership:

> The tools of political dissent should be privately owned and unregistered.

The Second Amendment Foundation asserted in its *amicus* in *US v. Francis J. Warin*, (1976), and sought Second Amendment protection for:

> ...a basic right of freemen to take up arms to defeat an oppressive government.

Speaker of the US House of Representatives Newt Gingrich wrote in his book *To Renew America* (1994), p. 202:

> The Second Amendment is a political right written into our Constitution for the purpose of protecting individual citizens from their own government.

No one has inquired into what a "political right" is in this context. The same Gingrich wants to be president of the United States.

Gingrich condemns Daniel Ellsberg for releasing the Pentagon Papers. To Gingrich for Ellsberg to release the Papers when we were at war (undeclared war, for the consideration of all the constitutionalists) bordered on treason. These were published in the *NY Times*. The Supreme Court upheld the *Times*' right to publish. Are the *NY Times* and the Supreme Court also treasonous? Senator Wayne Morse told Ellsberg years later that if he had had those papers in August, 1964, the Golf of Tonkin Resolution would never have gotten out of committee. Nevertheless, we are to keep and bear arms to defend our moral autonomy against tyrannical encroachments of government and at the same time give blind obedience when the government goes off on an ill-conceived military adventure.

The insurrectionist fantasies have already been addressed by the Supreme Court:

> 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)

To understand the middle we look at the extremes. David Koresh, to take one example, acted out the childish political fantasy by amassing an arsenal of weapons in defiance of federal law. He set himself up as a sovereign potentate in his Branch Davidian Compound. The hysterical and destructive reaction is revealing of the nature of the fantasy. In the midst of this we don't have a government which understands what it means to be a government. If the

government created by the Constitution is something less than "POLITICAL POWER AND SUPREMACY"(*Federalist Paper No. 33*, Chapter 4), we enter onto unstable political ground.

We can see the unstable political ground in the strong demagogic appeal of personal self-defense. No one is against self-defense. Self-defense is much protected in law, but the self-defense right claimed now is in the State of Nature. It is a right of self-defense against the very state the gun rights militants want to secure the right. A right we have as long as we do not exercise it is not a right at all but the fantasy of a right. Once the right is successfully exercised the state no longer exists to secure the right. The right reverts to the State of Nature where it was all along.

What needs to be part of our public consciousness is that the way we defend ourselves as citizens under law and government is to create legal categories of gun ownership that apply against the lawless. If David Keene wants to have constitutional credibility and respectability, he can devote himself to constructive policy making that is in the best interests of gun owners as citizens (Chapter 1) not as "armed citizen guerrillas" in the State of Nature which is the state of anarchy. There is no conflict in principle between gun ownership for self-defense and accountability to a governing authority.

Self-defense becomes a demagogic obfuscation. The only reason there is a claim for an individual right, the only reason we cannot have laws that apply against the lawless are that the gun rights militants, led by the NRA, work very hard and successfully to defeat any law that would apply against the lawless because the same law would apply against "armed citizen guerrillas" and others with insurrectionist fantasies.

The most reprehensible aspect of recent court opinions on gun rights is that the courts say nothing about the insurrectionist fantasies. The courts' pandering to a malignant constituency indirectly endorses the insurrectionist fantasies. An important message here is that the state of the political culture is such that there is no accountability for the courts' politicization that furthers a childish political fantasy.

There is no accountability for much of anything else. History does not repeat itself but there are instructive historic precedents. Someone might have told Lou Dobbs when he had a television program and promoted the idea of vigilante border patrol militias that at the end of the First World War Germany's borders were undefined. Paramilitary militias, called "Freikorps", formed to secure the borders. They had the tacit approval of the German government once the Weimar Republic was in place. They invaded neighboring territory and committed atrocities that were precursors of the actions of the German army twenty years later. Many Nazi Party leaders cut their political teeth and tasted their first political blood in the Freikorps.

It gets worse. The Weimar Republic was a government that did not have the political will to maintain its internal sovereignty against the "armed citizen guerrillas" who would outflank it. The history books tell us that the Weimar Republic ended when Hitler was made chancellor in January, 1933. Not exactly. The Weimar Constitution remained on the books until 1945. The Nazis just amended it out of existence. On March 23, 1933, when Hitler demanded a constitutional amendment (*Das Ermaechtigunggesetz*) that would empower him to rule by decree he brought his "armed citizen guerrillas", called Stormtroopers, into the legislative chambers with him to guarantee the vote. The Nazi Party's "armed citizen guerrillas" certainly thought the Weimar Republic was tyrannically oppressing them. The Nazi Party operated within the rule of law to destroy the rule of law. Our gun rights ideologues operate within the law to destroy any viable concept of law.

The Stormtroopers were not armed on that day. Their presence was only a threat. Hitler

did not allow them to carry arms because they were constantly search by the Weimar police for weapons and Hitler did not want to antagonize the German Army, the only institution in Germany the Nazi cabal never got complete control over. They nevertheless maintained arsenals, underwent arms training, and brought out their weapons when they needed them. They fought street battles with rival political gangs in which dozens were killed.

The NRA's "armed citizen guerrillas" imagine that they are the unanimous people and that the military machine is an alien occupier. If they just brandish their weapons (handguns, shotguns and hunting rifles), the malignancy of government will simply run scared. They cannot imagine that most people, surely the vast majority will side with the government and the "armed citizen guerrillas" will be identified as another disaffected criminal group. This is more of the same political cynicism. If "armed citizen guerrillas" are the unanimous people then they should be able to achieve their political goals through electoral processes. They are certainly able to achieve much on gun rights when they are nowhere near a majority.

One great concern in this ideology is, Will the US armed forces fire on American citizens? American citizens can worry who "armed citizen guerrillas" will fire on in a genuine struggle for power. During the Revolutionary War Charles Lynch "lynched" many (the historical record says hundreds but that seems a bit much) Tories in Southwestern Virginia. In the 1960s the Ku Klux Klan committed violence acts in Alabama which were an embarrassment to George Wallace in his political campaigns. Wallace tried to prevail upon the Klan leaders to contain the violence. The problem was that there were rogue elements in the Klan that the leadership did not have control over. When order breaks down, order breaks down. When malignant element are psyched up, no one is safe.

It just gets flakier and flakier. In dissent in *Nordyke v. King*, (9th Cir., 2003), Judge Gould writes[24]:

> By giving inadequate weight to the individual right to keep arms, the *Silveira* [*Silveira v. Lockyer*, (9th Cir., 2002)] majority does not do justice to the language of the Second Amendment and disregards the lesson of history that an armed citizenry can deter external aggression and can help avoid the internal danger that a representative government may degenerate to tyranny. The right to "keep and bear arms" is a fundamental liberty upon which the safety of our Nation depends, and it requires for its efficacy that an individual right be recognized and honored.
>
> I reach this conclusion despite a recognition that many may think that these ideas are outmoded, that there is no risk in modern times of our government becoming a tyranny, and that there is little threat that others would invade our shores or attack our heartland. However, the Second Amendment was designed by the Framers of our Constitution to safeguard our Nation not only in times of good government, such as we have enjoyed for generations, but also in the event, however unlikely, that our government or leaders would go bad. And it was designed to provide national security not only when our country is strong but also if it were to become weakened or otherwise subject to attack. As the people bear the risk of loss of their freedom and the pain of any attack, our Constitution provides that the people have a right to participate in defense of

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[24] http://bulk.resource.org/courts.gov/c/F3/319/319.F3d.1185.99-17551.html

the Nation. The Second Amendment protects that fundamental right.

Does the Second Amendment protect the right of we, the people, to participate as conscripts or as vigilantes?

Can we find examples of "good government"? In 1873, President Grant launched an aggressive campaign that destroyed as a national organization the Ku Klux Klan, which was terrorizing the freed slave population. He was politically weakened from doing more. In the mid twentieth century the Federal Government got serious about enforcing civil rights protections against Klan violence. The Klan in both cases certainly thought the government had gone bad.

There is a response to Judge Gould's absurd arguments. The conservative French political philosopher Joseph DeMaistre wrote (1811):

> Every nation has the government it deserves.

Which was revised to read better as,

> Democracy guarantees that every nation gets the government it deserves.

When an enlightened citizenry capable of self-government goes bad—that is, degenerates into tyranny, *WHOSE FAULT IS THAT*?

Gould's scenario resonates with the language of Madison in *Federalist Paper No. 46* (Chapter 6): "That the people and the states should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both; ... must appear ...like...incoherent dreams...". We find it also in Hamilton in *Federalist Paper No. 28*:

> ... When will the time arrive that the federal government can raise and maintain an army capable of erecting a despotism over the great body of the people of an immense empire, who are in a situation, through the medium of their **State governments**, to take measures for their own defense, with all the celerity, regularity, and system of independent nations? The apprehension may be considered as a **disease**, for which there can be found no cure in the resources of argument and reasoning. [bold added]

Did Hamilton call it right? Is Judge Gould infected with a disease? Did Madison call it right? Does Judge Gould suffer from "incoherent dreams" and "misjudged exaggerations of a counterfeit zeal" (Chapter 6)? Whatever those words are supposed to mean, they don't sound good for Judge Gould.

Madison and Hamilton were arguing against the apprehensions of a potential federal tyranny. In both Madison and Hamilton it would be the state governments with their conscript militias not every private yahoo individualist with a gun and an individual right to the gun that would be the "barrier" against federal tyranny.

This is all really neither here nor there. The other courts have decided that we can have "Registration . . . for militia service if called up" to enforce the laws of the Union, suppress insurrections (not make them) and repel invasion. Civic obligation triumphs over libertarian private gun ownership. Policy making starts there (Chapter 1). The difference between individual versus collective right becomes meaningless for policy making.

Chapter 6

Inventing a Civil Right

The courts have defeated the gun rights militants' long struggle to have a civil right to maintain the "armed populace at large." The gun lobby with a broader political movement behind it, nevertheless, will have the right anyway by the same old methods of defeating legislation. Legislation is defeated by demagoguery. The demagoguery and the will to believe invent a parallel constitutional reality. The confusion between a right of individuals and the collective right of the people is exploited no end. For policy making in the end the difference means nothing. Regardless, no one, not the politicians, the gun controllers, the news organs, has exploited the courts' rulings to pursue a national firearms policy.

We can start with Hayek and the use of words (Chapter 3). Constitutional government was an evolving concept in the eighteenth century. "The people" was also an evolving concept—and, full of ambiguities. The civil right claimed now starts with "the people". The American Revolutionaries grew up as British subjects. They knew their history. The simple replacement of consent and popular sovereignty for divine right and arbitrary power involved England for much of a century in civil war and revolution. The eighteenth century British Constitution which came out of those struggles was a balance among the classical forms of government described by Aristotle: monarchy, aristocracy and democracy, manifest in the estates of the realm: the Crown, the nobility (House of Lords), and the people (House of Commons). It was regarded at the time as a model of political perfection. The rulers (the Crown) and the ruled (the people) were separate estates of the realm. "The people" were not every atomized, yahoo individualist in the "armed populace at large". Less than ten percent of the people in England had the right to vote and it was by oral declaration not secret ballot. Mostly the House of Commons was the untitled nobility, the younger brothers of the titled nobility in the House of Lords. The American Revolutionaries took up arms to defend their English rights but ended up transforming the fundamental concepts and institutions on republican terms.[25] Constitutional government is always evolving but much that was vital and fundamental was settled in the US Constitution and its supporting arguments. The Constitution is a frame of government not a treaty among sovereign individuals certainly not sovereign individualists with insurrectionist fantasies.

If "the people" was an ambiguous term, other words were not ambiguous. Start with "the advantaged of being armed" from James Madison's *Federalist Paper 46* to establish the credibility of any author or federal judge and to understand what is at work:

> The only refuge left to those who prophesy the downfall of the **State governments** is the visionary supposition that the federal government may previously accumulate **a military force for the projects of ambition**. The reasonings contained in these papers must have been employed to little purpose indeed, if it could be necessary now to disprove the reality of this danger. **That the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both**; that the traitors would, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and the people of the

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[25] Gordon Wood, *The Creation of the American Republic* (1998).

> States would silently and patiently behold the gathering storm and continue to supply materials until it should be prepared to burst on their own heads must appear to everyone more like the **incoherent dreams** of a delirious jealousy, or the **misjudged exaggerations of a counterfeit zeal**, than like the sober apprehensions of genuine patriotism. Extravagant as the supposition is, let it, however, be made. Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say the **State governments** with the people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British arms will be most inclined to deny the possibility of it. **Besides the advantage of being armed, which the Americans possess over the people of almost every other nation , the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments of the several kingdoms of Europe**, which are carried as far as the public resources will bear, the governments are **afraid to trust the people with arms**. And it is not certain that with this aid alone they would not be able to shake off their yokes. But were the people to possess the **additional advantages of local governments chosen by themselves**, who could collect the national will and direct the national force, and of officers appointed out of the militia by these governments and attached both to them and to the militia, it may be affirmed with the greatest assurance that the throne of every tyranny of Europe would be speedily overturned in spite of the legions which surround it. Let us not insult the free and gallant citizens of America with the suspicion that they would be less able to defend the rights of which they would be in actual possession than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors. Let us rather no longer insult them with the supposition that they can ever reduce themselves to the necessity of making the experiment by a blind and tame submission to the **long train of insidious measures which must precede and produce it**.
> [bold added]

And, in the next paragraph.

> [The Federal Government's] **schemes of usurpation will be easily defeated by the state governments** who will be supported by the people.

The gun lobby has invented an anarchic doctrine of political liberty largely from words lifted out of context—particularly, the "advantage of being armed"—from this one passage in *Federalist Paper No. 46*. Regardless of what the "rabidly antigun *Washington Post*", the National Rifle Association, NPR's Diane Rhem, a host of gun lobby/libertarian pseudoscholars and a growing number of anarchic federal judges would have us believe, Madison was not describing a civil right of private individuals.

Hamilton echoed the thought in *Federalist Paper No. 28*:

> It may safely be received as an axiom in our political system, that the **State governments** will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. **Projects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information**. They can discover the danger at a distance; and possessing all the organs of civil power, and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.
> [bold added]

It should be abundantly clear in both Madison and Hamilton that the whole argument was to defend the sovereignty of the states as a barrier against a potentially aggrandizing federal government with a mercenary army at its disposal. Who we were then is not who we are not.

There was a real concern. The US Army created in the Constitution was modeled after the mercenary British Army. The theme of Russell Weigley's authoritative *History of the United States Army* (1967) is the polarization from the beginning between citizen soldiers and professional soldiers (p. 87):

> The strong-government men had desired sufficient authority to create a strong national army, and the Constitution fulfilled their wish. But in the Constitution they retained the dual military system bequeathed to the United States by its history: a citizen soldiery enrolled in the state militias, plus a professional army of the type represented by the British army or, more roughly, the Continental Army.

Its having a mercenary army was one of those great concerns about the new supergovernment. Standing armies in the eighteenth century were the mercenary armies of dynastic empires composed of social lowlife. The locally based conscript state militias with civic virtue and civic obligation would be a constitutional balance against the perceived dangers of a mercenary army at the disposal of the Federal Government and would preserve some measure of state sovereignty. The military purpose in the conscript state militias was clear. The *Militia Act of 1792* required gun ownership, required the state militia officers to enroll—that is, in gun lobby consciousness, *register*—militiamen, to maintain inventories—that is, in gun lobby consciousness, *registries*—of their privately owned weapons, called "Return of Militia," and to report them to the state governors and the US president. The issue was military federalism, a federalism which today is irrelevant and anachronistic. Absolutely no one then objected to the militia inventory.

Presidents Washington and Adams had ignored the militia inventory but Jefferson for ideological reasons enforced it. He wanted to emphasize the militia over the regular army and required the Return of Militia be reported. He was sorely disappointed in compliance.[26] The militia discredited itself in the War of 1812. Secretary of War John C. Calhoun in the Monroe Administration reorganized the military to the disparagement of the militia. The Returns of Militia were reported into the 1830s by which time the state militias were a moribund institutions.

The best that can be said of the Founding Generation and the early Republic is that they were comfortable with the general presence of arms in the society. They were also comfortable with conscripting those arms and their owners into public duty.

The conscript state militias died in the early Republic because no one wanted them and because they did not serve the theoretical corporatist purpose the militia served in the British Constitution. Apprehensions about a federal army were misplaced. The US Army did not become a feared instrument of political intrigue reminiscent of Oliver Cromwell. There was, however, a larger Second Amendment purpose that remained from the moribund republican militias. Not exactly an individual civil right but rather the republican right of the people to participate as conscript citizen soldiers in the military functions of the state rather than leave those functions up to a mercenary army. The previous 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 United States became a modern nation state. The gun lobby maintains a great confusion between the real Second Amendment republican civic purpose and the libertarian right of the people to be armed as private individuals outside of law and government. As Hayek warned, the gun lobby and its libertarian fellow travelers give the old words new meaning.

The great other concern of the states in putting themselves under a new supergovernment calling itself the supreme law of the land was that they would lose their sovereign existence. They would become absorbed into a "consolidated" government that was binding not just on the states but on individuals. Madison had studied history and had concluded that, if there was not some connection between the new federal government and "the people" as individuals, the new government would be unstable. That connection was the beginning of an evolving modern nation state which found its most extreme manifestation in the twentieth century selective service acts. Madison originally wanted the Senate to be popularly elected. Providing that state legislatures would elect senators and guaranteeing the state militias served the same purpose of protecting state sovereignty against the great apprehensions over the powers of the new supergovernment.

Madison had more to say that is problematic for present libertarian ideologies[27]:

> Was there ever a constitution, in which if authority was vested, it must not have been executed by force, if resisted? Was it not in the contemplation of this state, when contemptuous proceedings were expected, to recur to something of this kind? How is it possible to have a more proper resource than this? That the laws of every country ought to

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[26] http://www.potowmack.org/milret.html

[27] http://lcweb2.loc.gov/ammen/amlaw/lwed.html

> be executed, cannot be denied. That force must be used if necessary, cannot be denied. Can any government be established, that will answer any put, pose whatever, unless force be provided for ...?(3 Elliot's Debate 413, June 16, 1788)
>
> A government leaving it to a man to do his duty or not, as he pleases, would be a new species of government, or rather no government at all. (3 Elliot's Debate 414, June 16, 1788)

The gun lobby will have it anyway. The words from *Federalist Paper No. 46* get much play. In *Gun, Crime, and Freedom* (1994), NRA's Wayne LaPierre, cites the words four times, not always accurately. He lists four so-called "antigun states' right" law review articles and 32 so-called pro-"individual rights view" law review articles. About half of these 32 cite from *Federalist Paper No. 46* sometimes in full context. The lopsided numbers, 32 to 4, are supposed to synch the argument. Albert Einstein once said, It only takes one to be right. (LaPierre did not write the book. It was written by an NRA committee.)

Many reputable scholars write in law journals, but the law journals notoriously have no standards. They will publish anything. The gun lobby/libertarians found a weak link to produce their doctrine and specious history. The law reviews have had an impact on federal judges who enter into this subject with a will to believe.[28]

Stephen Halbrook is the primary formulator of the gun lobby's anarchic doctrine. He is also is a prolific intellectual charlatan. He is, nevertheless, listed by Supreme Court Justice Clarence Thomas as a credible contributor to public discourse. Halbrook was laid bare by gun rights activist and researcher Don Kates in his article in the *Michigan Law Review* in 1983,[29] in which he concluded in intellectual honesty that there was no right to privacy in gun ownership and that guns could be registered, as the courts have decided, for militia call up. Halbrook was outraged. He wrote in the *American Rifleman*, Nov., 1984, "To Bear Arms for Self-Defense," that this was "Orwellian Newspeak". It has been 30 years. Kates and Halbrook have not resolved their differences. Neither has David Keene. The courts have done it for them.

Halbrook's *That Everyman Be Armed* has 1304 footnotes in 197 pages. That is not unusual for reputable scholarship. It is requisite for pseudoscholarship. He lays out the doctrine, the gun lobby's doctrine (p. 8-9):

> An appreciation of the significance of these elementary books of public right is indispensable to a correct understanding of the meaning of the Bill of Rights, in general, and of the Second Amendment, in particular. Furthermore, an understanding of the authoritarian absolutism of Plato, Bodin, Hobbes, and Filmer is as necessary as an understanding of classical libertarian republicanism in order to know what America's founders rejected as well as what they accepted. Those who drafted and supported the Bill of Rights followed the libertarian tradition of Aristotle, Cicero, and Sidney, and they

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[28] Judge Alex Kozinski, "Who Gives a Hoot about Legal Scholarship?", *Houston Law Review*, 2000, http://saf.org/LawReviews/Kozinski.htm

[29] "Handgun Prohibition and the Original Meaning of the Second Amendment," http://www.guncite.com/journals/kmich.html

> rejected the authoritarian, if not totalitarian, tradition of Plato, Caesar, and Filmer. These two basic traditions in political philosophy have consistently enunciated opposing approaches to the question of people and arms, with the authoritarians rejecting the idea of an armed populace in favor of a helpless and obedient populace and the libertarian republicans accepting the armed populace and limiting the government by the consent of that armed populace.

There is no historic record of the libertarian political cynicism that militiamen, muskets in hand, going to the ratifying conventions for the Constitution, voting to ratify, then leaving, muskets still in hand, kept outside of any accountability to a governing authority, hedging their consent, just in case things did not go right in the new regime. That hedge is the height of political cynicism.

On page 195, Halbrook tells us something else:

> Although the National Rifle Association is often depicted as conservative, its philosophy is akin to radical libertarianism.

Halbrook's "radical libertarianism" denies the legitimacy of government. Where is David Keene on this? Does he want to be taken seriously? Does his "Conservative" Movement want to be taken seriously? Why his "Conservative" Movement needs a gun in every pocket has not been explained.

Halbrook's division of the evolution of Western political concepts between authoritarian absolutists and libertarian republicans is just as absurd. Republicanism is a form of government. The extreme libertarianism Halbrook formulates is anarchy. His division does not hold. The dominant political form in the ancient world as in early modern Europe was dynastic empires. The Greek and Roman city states were anomalies. They did not survive as viable political entities. The Greek city states (*polis*) were subsumed into Alexander's Hellenistic Empire which lasted in fragmented form for 300 years until is was conquered and absorbed into the Roman Empire. The city states nevertheless are where political thought began. The world *metropolitan* comes from the Greek *metro* + *polis*, womb + city state. It was the mother community. It was not a collection of yahoo individualists. Greek and Roman men whether in the theories of Plato, Aristotle or Cicero or the reality of political life in the city states, were obligated to defend their communities not maintain some childish political fantasy about taking up arms against them. They and their arms were a public resource, subject to public duty, as in the Second Amendment.

The evolution of modern political theory is more a division between the secular and religious as a basis of political authority and obedience rather than Halbrook's authoritarian absolutists and libertarian republicans. In the late sixteenth century, when the Dutch Republic freed itself from the Spanish Hapsbergs (poor Phillip II who looted the Americas of gold then squandered it, lost the Spanish Armada, lost the Spanish Netherlands and was left with his only moments of glee when he heard of massacres of Protestants), Amsterdam had no cathedrals, no monasteries, no universities (an institution of the Medieval Church). It had stock markets, banks, insurance companies and a night watch militia. A new world was dawning. Secular authority developed out of the breakdown of religious authority in late middle ages. The political theorists were Niccolo Machiavelli, Jean Bodin, Thomas Hobbes and John Locke, among others. Secular authority found explicit expression in the US Constitution. These political theorists are all in the same tradition of political thought. They are not on opposite poles.

It is on this sham "scholarship", which has established its credibility right on the Supreme

Court, that we shape our political consciousness for the twenty-first century. Halbrook does not have to worry about accountability. There are no gun controllers, scholars, news analysis, judges or anyone else including David Keene who have examined the fraud he fabricates. In comparison, Michael Bellesiles was exposed and viciously attacked and condemned for apparently fabricating probate records in his book, *Arming America: The Origins of a National Gun Culture* (2000). He was a fool if he thought he could fabricate data and not be discovered. Bellesiles' article, "The Second Amendment in Action,"[30] *Chicago-Kent Law Review*, 2000, is a credible treatment of many issues without any reference to probate records. No one has refuted Bellesiles there.

The words below from *Federalist Paper No. 29* are where we can continue with the pseudoscholarship that invents a civil right. The words in bold are the words Halbrook quotes, the other words he leaves out. The words Halbrook uses by themselves prove his point, but in full context they defeat it. An important point is that individual right advocates make a great distinction between the "organized" or "select" militia and the "unorganized" or "sedentary" militia. The select militia in this consciousness is an instrument of the state and embodies the states' right interpretation of the Second Amendment. The sedentary militia embodies the individual right interpretation and is extralegal. It is the "armed populace at large." Without serious thought, the individual right has crept into the federal courts. Here, it has to be noted that in full context Hamilton is arguing *for* the select militia not the sedentary militia, the very opposite of what Halbrook represents. When there is a will to believe fact and objectivity have no relevance:

> [begin Halbrook, p. 67]
> **And in No. 29, Hamilton expounded the argument that it would be wrong for a government to require**
>
> [begin Hamilton]
> But so far from viewing the matter in the same light with those who object to select corps as dangerous, were the Constitution ratified and were I to deliver my sentiments to a member of the federal legislature on the subject of a militia establishment, I should hold to him, in the substance, the following discourse:
>
> > "The project of disciplining all the militia of the United States is as futile as it would be injurious, if it were capable of being carried into execution. A tolerable expertness in military movements is a business that requires time and practice. It is not a day, or even a week, that will suffice for the attainment of it. To oblige **the great body of the yeomanry, and of the other classes of the citizens, to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia,** would be a real grievance to the people, and a serious public inconvenience and loss. It would form an annual deduction from the productive labor of the country, to an amount which, calculating upon the present numbers of the people, would not fall

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[30] http://www.saf.org/LawReviews/BellesilesChicago.htm

far short of the whole expense of the civil establishments of all the States. To attempt a thing which would abridge the mass of labor and industry to so considerable an extent, would be unwise: and the experiment, if made, could not succeed, because it would not long be endured.

"**Little more can reasonably be aimed at, with respect to the people at large, than to have them properly armed and equipped;** and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year."

"But though the scheme of disciplining the whole nation must be abandoned as mischievous or impracticable; yet it is a matter of the utmost importance that a well-digested plan should, as soon as possible, be adopted for the proper establishment of the militia. 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.** [end Halbrook] 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."

Thus differently from the adversaries of the proposed Constitution should I reason on the same subject, deducing arguments to safety from the very sources which they represent as fraught with danger and perdition. But how the national legislature may reason on the point is a thing which neither they nor I can foresee.
[end Hamilton]

Halbrook goes on to quote "...the advantage of being armed..." from *Federalist Paper No. 46*. The Second Amendment had not yet been written and Hamilton does not mention an individual right or the sedentary militia. He sort of suggests the possibility of a sedentary militia but only to deny its viability. To have his doctrine of libertarian republicanism, Halbrook radically distorts the meaning.

The distortion is applied to John Locke's *The Second Treatise of Government* (1689). Just as Halbrook rewrites James Madison's *Federalist Paper No. 46* and Alexander Hamilton's *Federalist Paper No. 29* to fabricate the doctrine that guns and gun ownership cannot be touched by laws, he rewrites John Locke's *The Second Treatise.* At the time of the American Revolution everyone studied Locke.

The American Revolutionaries very self-consciously put themselves under government. However, the Libertarian Fantasy's extreme difficulty accommodating to a governing authority motivates enormous dishonesty. When there is a will to believe the facts don't matter, but here the dishonesty is blatant and has to be considered self-conscious. The passage Halbrook quotes is from Chap. XI, "Of the Extent of Legislative Power," §137 of *The Second Treatise.* The parts

below in bold are what Halbrook actually quotes out of context. The rest he omits. Halbrook makes the case for staying in the State of Nature and not entering into political community where an absolute arbitrary ruler and his military force have all the weapons. In that case it is better to stay in the State of Nature where each individual is equal in his natural powers and there is no concentration of political power. The middle ground which Halbrook leaves out is political community under settled standing laws and stated rules of right and property. This is more of the same political cynicism:

> [begin Halbrook, p. 28]
> **The individual rights of independence, equality, and self-defense come from nature and antedate government, an institution with delegated power only and which may be resumed by the individuals in whom ultimate sovereignty resides. It could hardly be assumed that the people would voluntarily disarm themselves and permit themselves to be dictated to by a smaller body of armed men who compose the state; for life, liberty, and estate would be in greater peril from an unchecked and organized armed force than from disorganized individuals in the state of nature. Locke rejected the absolute arbitrary power of the government stemming from a disarmed populace.**
>
> > [begin Locke]
> > §137. Absolute Arbitrary Power, or Governing without settled standing laws, can neither of them consist with the ends of Society and Government, which Men would not quit the freedom of the state of Nature for, and tie themselves up under, were it not to preserve their Lives, Liberties and Fortunes; and by stated Rules of Right and Property to secure their Peace and Quiet. **It cannot be supposed that they should intend, had they a power so to do, to give to any one, or more, an absolute Arbitrary Power over their Persons and Estates, and put a force into the Magistrates hand to execute his unlimited Will arbitrarily upon them: This were to put themselves into a worse condition than the state of Nature, wherein they had a Liberty to defend their Right against the Injuries of others, and were upon equal terms of force to maintain it, whether invaded by a single Man, or many in Combination. Whereas by supposing they have given up themselves to the absolute Arbitrary Power and will of a Legislator, they have *disarmed themselves, and armed him, to make a prey of them when he pleases*. [foregoing italic added by Halbrook]** He being in a much worse condition who exposed to the Arbitrary Power of one Man, who has the Command of 100000 than he that is expos'd to the Arbitrary Power of 100000. single men: no Body being secure, that his Will, who has such a Command, is better, than that of other Men, though his Force be 100000. times stronger. And therefore whatever Form the Commonwealth is under, the Ruling Power ought to govern by declared and received Laws, and not by extemporary Dictates and undetermined Resolution. **For then Mankind will be in a far worse condition, than in the State of Nature, if they shall have armed one or a few Men with the joynt power of a Multitude, to force them to obey at please the exorbitant and unlimited Decrees of their sudden thoughts, or unrestrain'd, and till that moment unknown Wills without having any measures set down which may**

> **guide and justifie their actions.** [end Halbrook]For all the power the Government has, being only for the good of the Society, as it ought not to be Arbitrary and at the Pleasure, so it ought to be exercised by established and promulgated Laws: that both the People may know their Duty, and be safe and secure within the limits of Law, and the Rulers too kept within their due bounds, and not to be tempted, by the Power they have in their hands, to imploy it to such purposes, and by such measures, as they would not have known, and own not willingly.
> [end Locke]

The courts have decided that we can have "registration...for militia service if called up". Halbrook, the NRA, the gun rights militants lose. Again, the individual versus collective right for policy making is meaningless. Where is NRA president David Keene?

Halbrook gets more explicit. Starting on page 67 of *That Every Man Be Armed*, Halbrook cites Thomas Jefferson and then jumps to the *Federalist Papers* to justify the right-to-arms as a right-to-insurrection:

> [begin Halbrook]
> **Writing in 1787, Jefferson stressed the inexorable connection between the right to have and use arms and the right to revolution, as follows:**
>
> > [begin Jefferson]
> > **God forbid we should ever be twenty years without such a rebellion. . . And what country can preserve its liberties, if its rulers are not warned from time to time, that this people preserve the spirit of resistance? Let them take arms. . .The tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants.**
> > [end Halbrook][end Jefferson]

Jefferson did write these words in reaction to Shays' Rebellion. He wrote from distant observation in Paris where he served for a few years as ambassador. He was not on the scene and had no responsibility to maintain public order. The fifty-five men we call the Framers of the Constitution were alarmed by Shays' rebellion and other less famous domestic disturbances. They were particularly alarmed by Shays' Rebellion because the local militia had gone over to the side of the Rebellion. Without Jefferson, the Framers met in Philadelphia to write a new constitution that would create a strong government that could suppress these rebellions and also create a more viable political order that would prevent them from happening. Halbrook continues immediately:

> **The Federalists were actually in close agreement with Jefferson on the right to arms as a penumbra of the right to revolution.**

A ***penumbra!*** Where have we seen this before? In *Griswold* it is the constitutional authority for a right to privacy. Constitutional conservatives find this judicial activism. What do they think of the judicial activism when it becomes what we find here, the constitutional authority for a right to treason consistent with Halbrook's extreme libertarianism that denies the legitimacy of government? Where is David Keene on this? Halbrook goes from "penumbra" to "paramont":

> **Thus, in *The Federalist, No. 28*, Hamilton wrote: "If the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government..."**

The words are a paraphrase from Locke. The original right of self-defense was an appeal to Heaven not a civil right secured by government. Locke:

> §168. ...And therefore, though the people cannot be judge, so as to have, by the constitution of that society, any superior power to determine and give effective sentence in the case, yet they have reserved that ultimate determination to themselves which belongs to all mankind, where there lies no appeal on earth, **by a law antecedent and paramount to all positive laws of men, whether they have just cause to make their appeal to Heaven.** And this judgement they cannot part with, it being out of a man's power so to submit himself to another as to give him a liberty to destroy him; God and Nature never allowing a man so to abandon himself as to neglect his own preservation. And since he cannot take away his own life, neither can he give another power to take it. Nor let any one think this lays a perpetual foundation for disorder; for this operates not till the inconvenience is so great that the majority feel it, and are weary of it, and find a necessity to have it amended. And this the executive power, or wise princes, never need come in the danger of; and it is the thing of all others they have most need to avoid, as, of all others, the most perilous.

The invention continues. When citizens consent to be governed, they create a higher authority. When sovereign states make a treaty, they do not. John Adams located the militia within public authority:

> 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.[31]

Halbrook cites the words in usual adulteration (p. 65):

> **Arms in the hands of citizens [may] be used at individual discretion . . . in private self-defense.**

Also, in public self-defense against the same government Halbrook wants to secure the right. Halbrook's very title, *That every man be armed*, is a sham. The words come from Patrick

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[31] *A Defense of the Constitutions of Government of the United States of America*, p. 3

Henry in the ratification debates. The context of "that every man be armed" was not a personal right of every yahoo individualist but a question of who would provide for the arming of the militia, the states or the federal government?

> May we not discipline and arm them, as well as Congress, if the power be concurrent? so that our militia shall have two sets of arms, double sets of regimentals, &c.; and thus, at a very great cost, we shall be doubly armed. *The great object is, that every man be armed. But can the people afford to pay for double sets of arms &c.? Every one who is able may have a gun.* But we have learned, by experience, that necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case. When this power is given up to Congress without limitation or bounds, how will your militia be armed? You trust to chance; for sure I am that nation which shall trust its liberties in other hands cannot long exist. If gentlemen are serious when they suppose a concurrent power, where can be the impolicy to amend it? Or, in other words, to say that Congress shall not arm or discipline them, till the states shall have refused or neglected to do it? This is my object. I only wish to bring it to what they themselves say is implied. Implication is to be the foundation of our civil liberties, and when you speak of arming the militia ...(3 Elliot's Debate 386, June 14, 1788)
> [emphasis added]

The Founders and Framers could not get away from the relationship between the new supergovernment and the remaining sovereignty of the states. Patrick Henry (1736-1799) late in life came to accept the Constitution which he had originally fought to defeat.

Likewise George Mason is misrepresented. He did say, "I ask, sir, who are the militia?" quoted by the *Emerson* district court and Halbrook. The context of "who are the militia?" was the universal composition of the conscript militia, not the personal rights of militiamen.

> Mr. GEORGE MASON. Mr. Chairman, a worthy member has asked who are the militia , if they be not the people of this country, and if we are not to be protected from the fate of the Germans, Prussians, &c., by our representation? *I ask, Who are the militia?* They consist now of the whole people, except a few public officers. But I cannot say who will be the militia of the future day. If that paper on the table gets no alteration, the militia of the future day may not consist of all classes, high and low, and rich and poor; but they may be confined to the lower and middle classes of the people, granting exclusion to the higher classes of the people. If we should ever see that day, the most ignominious punishments and heavy fines may be expected. Under the present government, all ranks of people are subject to militia duty. Under such a full and equal representation as ours, there can be no ignominious punishment inflicted. But under this national, or rather consolidated government, the case will be different. The representation being so small and inadequate, they will have no fellow-feeling for the people. They may discriminate people in their own predicament, and exempt from duty all the officers and lowest creatures of the national government. (3 Elliot's Debate 425, June 16, 1788)
> [emphasis added]

> Joseph Story's "palladium" is cited by Halbrook and the district court. Similarly, the

words are lifted out of context:

> The militia is the natural defense of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambition and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpations 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 militia discipline, and a strong disposition, from a sense of it 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 clause of our national bill of rights.

Story's words "system of militia discipline" and "to be rid of all regulations" imply that discipline and regulation are imposed from above by law. The militia was not self-constituted. When he wrote this in the 1830s, the militia was already a moribund institution as Story seems to appreciate. It is not clear that Story was not beholden to an understanding of the militia as part of the anachronistic constitutional balance held over from the British Constitution.

The passage Justice Stevens cites from *Green v. Biddle*, 8 Wheat. 1, 63 (1823) (Chapter 4) was written by Story.

Other passages from Story enlighten his observations:

> §1791. Treason is generally deemed the highest crime, which can be committed in civil society, since its aim is an overthrow of the government, and a public resistance by force of its powers. Its tendency is to create universal danger and alarm; and on this account it is peculiarly odious, and often visited with the deepest public resentment...
>
> §1792. Nor have republics been exempt from violence and tyranny of a similar character. The Federalist has justly remarked, that newfangled and artificial treasons have been the great engines, by which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other.
>
> (Story continues in §1831 to quote verbatim the passage from Hamilton's *Federalist Paper No. 33*, Chapter 4), where Hamilton speaks of “POLITICAL POWER AND SUPREMACY”.)

Joseph Story was far more interesting and relevant for his actions than his words. He illustrates important principles now.

In the 1840s Rhode Island was still operating under a charter issued by King Charles II in

1663. (Connecticut also had a royal charter but wrote a new constitution in 1819) The charter was rather progressive in 1663 but by 1840 was completely antiquated. The Dorr Rebellion was a footnote in our early history courses. It was very significant at the time. Thomas Dorr called a constitutional convention, wrote a new constitution and had it ratified. This was called the Suffragist Constitution. The problem was that Dorr's efforts were not authorized by the Charter Government. The Charter Government had representatives in the US Congress. President Tyler and his secretary of State Daniel Webster had no choice but to support the Charter Government against the Suffragists. What Dorr and his followers had done was little different from what the Founding Generation had done, but they had little public support outside of Rhode Island and the Dorr Rebellion failed. Dorr had led a militia under the Suffragist Constitution and was convicted of treason in state court.

Where this gets interesting is that Joseph Story, on the Supreme Court, was adamantly opposed to the actions of the Dorr Rebels. His great fear was the abolitionists. Being from Massachusetts he surely had little use for slavery but the Constitution sanctioned slavery and he would uphold the Constitution. He thought the abolitionists were dangerous anarchists. If Dorr's actions had gotten out of control they might have brought down the whole system. Story did not live to participate in the one case that went to the Supreme Court out of the Dorr Rebellion, *Luther v. Borden* (1849). The arguments on both sides were published as pamphlets and we can assume were widely read.[32] They were part of the build up to the Civil War. Try to get anyone to read anything seriously political today.

It can be noted that for all his jurisprudence and constitutional commentary, on slavery Story was a moral, political and intellectual failure. He had no solution for slavery which eventually almost destroyed the country.

Let us not leave without Halbrook's most comical fabrication from Noah Webster's 1828 dictionary found in many places . Webster includes among his definitions of *bear* "to bear arms in a coat". Halbrook interprets this as "bear arms in a coat [pocket]" when the real meaning is "bear arms in a coat [of arms]".

The late, former Chief Justice Warren Burger described all this fabrication as a "fraud" put over on the American people. Regardless of the fraud, the courts have decided that we can have "registration ... for militia service if called up." Or, will we have more of the same cowardice and dereliction.

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[32] http://www.potowmack.org/dorrreb.html

Chapter 7

The Great Political Dysfunction

The Supreme Court constitutionized legal segregation in *Plessy v. Ferguson* (1896). The NAACP was founded in 1909. There was intellectual ferment in the 1920s and 30s which culminated in Gunnar Myrdal's "An American Dilemma: The Negro Problem and Modern Democracy" begun in 1938, published in 1944. It wasn't until the extreme negative example of Nazi genocide and the public necessity of the Cold War to compete with Soviet Union's propaganda that the political establishment got seriously behind defeating legal segregation. The big difference now is that the political powers are not behind effective policies to address gun violence. We limp along. The funding goes to promoting trigger locks. Millions are spent on this kind of foolishness. Political consciousness does not rise above the usual. Mothers, without power, consciousness, or organization cry in the streets that something has to be done. Nothing ever changes.

Start with the District of Columbia's counter productive gun control law. Bad law makes for bad court decisions. When the District of Columbia got home rule in 1976 one of the orders of business was to enact its unenforceable, counter productive gun control law. Anyone can acquire a handgun or long gun outside of the District bring into the District, keep it unregistered, fully assembled, loaded and without trigger lock in a residence and carry it from room to room all in violation of the District law and there is no way the District authorities could know about the noncompliance unless someone with an animus toward the gun owner and guns saw the gun and reported it to the authorities. Then, we can imagine, four car loads of DC police officers would descend on the residence, burst through the door, arrest the gun owner and confiscate the gun. The gun lobby would be screaming in outrage at the police state tactics of the gun grabbers and how they treat law abiding citizens. Bad law also makes for bad law enforcement.

Bad court decisions includes constitutional protection for handguns. The protection is reckless pandering to a malignant constituency. The problem with handguns is concealability. A legally owned, constitutionally protected handgun in the home can become in an instant an illegal conceal weapon on the street. Public safety becomes dependent on word of honor and promise of good faith—the stuff of the Libertarian Fantasy. The weapon of choice for home defense recommended even by gun rights advocates is a small bore shotgun. Dave Spaulding, "Shotguns For Home Defense," *Guns and Ammo*, Sept., 2006 and Clint Smith, "Home Defense," *Guns* Magazine, July, 2005. The gun manufacturers could design an easy to handle model.

The District of Columbia imagined in 1976 that its gun law would be a model for the country. Other jurisdictions would rush to imitate the law. It did not happen. This kind of thinking is not unusual. Bryan Miller, a gun control activist in New Jersey, is sincerely motivated. His brother was an FBI agent who was killed in a gun fight, illustrating how the only people involved in "gun control" are victims. Unfortunately, Miller has no conceptual foundations for what he is trying to accomplish and after twenty years he is still at work on failed strategies. Worse still, his mind is not open to enlightenment. In summer 2000, Potowmack offered Miller papers that would give him a perspective on fundamental concepts and help guide his activism. He proclaimed that people did not want to know anything about history and were not going to study court opinions. He and his organization were going to the state legislature and get themselves, by golly, a trigger lock bill (or some sophisticate version thereof) passed to protect the children. (Like the DC law) it would be a model for the country. His bill was abandoned and then resurrected and passed in 2002. If you don't know what your opponent

wants, you are dealing in illusions. All this kind of counterproductive legislation does is create a fund raising opportunity for the gun lobby: "The gun grabbers are coming to grab your gun. Send more money!"

The DC government has defended its gun law through the lower courts all the way to the Supreme Court. The big event was the US Court of Appeals, DC Circuit, opinion in *Parker*, released March, 2007. (Chapter 1) The DC government had everything it needed in Judge Silberman's conclusions to launch a campaign for a national firearms policy. Enough people told it that. The DC government was apparently more concerned to defend its home rule sovereignty and its failed consciousness that to get serious about gun violence. It has no appreciation that the *Parker/Heller/McDonald* conclusions, despite creating a constitutional mess for gun rights, are devastating defeats for the gun lobby's core doctrine and open the path for policy.

Failed consciousness runs through this business for forty years. Potowmack was at the 2003 district court hearing for the *Parker* case, met a man named Roy Lucas who said he was there to learn about the subject. Potowmack gave him papers to enlighten his interest. He was looking at the papers during the hearing. One of the Cato lawyers mentioned him for his research during the arguments. Potowmack went to Lucas after the hearing and asked if his research was published anywhere. He was instantly red-faced hostile. He shouted, "Get away from me. I am not talking to you!" This kind of rabid hostility runs from Lucas through the very hostile gun rights militants who show up at and break up civilized neighborhood meetings on gun control, to the hostility directed against outdoors writer Jim Zumbo for suggesting that maybe sportsmen should not use assault rifles to hunt prairie dogs,[33] to the conflagration at the Branch Davidian compound—Or, for that matter to the hostile reaction of Rep. Barney Frank when the issue is his oath of office. The rest of us suffer the bloody consequences. Barney Frank is a graduate of Harvard College and the Harvard Law School. He ought to be able to explain the difference between Civil Society and the State of Nature.

Lucas dropped dead a few weeks later of a heart attack.[34] We can hope the encounter and the papers did not kill him.

That wasn't the end of it. Potowmack then went to Ms. Martha Mullen one of the lawyers who had argued for the DC government in the hearing, asked to speak to her and offered the papers. She stopped and looked for a moment then screamed, "I don't know who your are. I am not interested in talking to you," then literally ran in near hysteria knocking into people to get away and out of the court room. That was the most significant event in that courtroom that day. The *NY Times'* Eric Lichtblau was a few feet away. He had the pages too. He missed the story of the day. If Ms. Mullen had properly prepared for the case she would have studied the briefs filed in *Emerson* a few years before and learned that there was something more vital at stake than requiring trigger locks. These are not people who can be trusted with the most vital and fundamental issues of political life.

The picture should be coming into focus that there is no subject on which there is more absurdity and ignorance from David Keene, President of the National Rifle Association, to the

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[33] http://www.potowmack.org/jzumbo.html

[34] "Roy Lucas, 61, Legal Theorist Who Helped Shape *Roe* Suit [dies]" *NYTimes*, 11/07/2003

NY Times and its reporters, from the gun controllers, gun owners, and the general public to members of Congress. To raise the issue of gun rights, the gun vote, and firearms policy is to speak into utter public ignorance. Utter ignorance produces foolish failed strategies. The ignorance starts right in Congress. On any national policy from Medicare, to National Forests, to Defense Contracting, there is a member of Congress or a congressional staff person who knows absolutely everything about it—except one: *NO ONE KNOWS ANYTHING ABOUT FIREARMS POLICY*. There are many reasons for this. Politicians are the easiest to understand. Cowardice is part of the job description. They read the polls and run for cover. At stake are the most vital and fundamental issues of political life. For a member of congress to learn about firearms policy he or she might also have to learn something about the oath of office and that there is a difference between Civil Society and the State of Nature. Nothing frightens members of Congress more than the oath of office. They don't have to worry. The gun rights militants control public opinion and the gun controllers cannot get much past promoting trigger locks.

The failed consciousness portrays the NRA as a front for the gun manufacturers. The gun manufacturers certainly make a lot of money selling guns, but they are businesses who have to function in an environment of (from Locke) "established, settled, known" law. As such, they are natural allies to the gun controllers. Ron Stewart, CEO of Colt Manufacturing advocated to the chagrin of the gun lobby in the *American Firearms Industry*, December 1997, courses of action including among others:

> The passage of a comprehensive federal firearms law, including the creation of a federal gun permit...
>
> Emphasize responsibility and accountability where it belongs. We ought to give serious consideration to a gun permit requirement that would necessitate each permit holder to undergo thorough firearms training and pass a uniform examination. ...

He says nothing about civic obligation and military preparedness. The gun controllers failed the opportunity to make an alliance.

The cowardice of politicians does not explain the failure of our shallow, lazy news organs unless the news organs read the polls and run for cover too. They don't want anymore than the politicians to upset public sensibilities. They don't want to deal with what Orwell called, "Large and uncomfortable fact"—that is, the *politics*. The gun rights militants write hostile letters to the editor. Dear, dear.

Little will change in public knowledge and political leadership until our organs of public enlightenment fulfill their public mission. The greatest obstacle to public enlightenment is not any of the gun lobby organizations. It is the gun lobby's more reliable asset, the one the National Rifle Association calls the "rabidly antigun *Washington Post*." The words "the advantage of being armed" from *Federalist Paper No. 46*, on which the gun lobby and its libertarian allies have largely built their anarchic doctrine, are the most frequently printed words from the Founding period in the *Washington Post*. They are printed uncritically and in relative abundance and always in the gun lobby's false interpretation.[35] This must be what the *Post* calls balance.

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[35] http://www.potowmack.org/washpost.html
http://www.potowmack.org/parkappc.pdf, p. 15-22.

There is no balance between a factual truth and a factual falsehood. The best the *Post* can do is print, infrequently, front page feature stories that do no more than document the obvious. The gun lobby thrives on demagoguery and the *Post* gives the opportunities.

The "rabidly antigun *Washington Post*" is followed closely by National Public Radio's Diane Rehm. The *Parker/Heller/McDonald* cases were argued and decided in her neighborhood. She has never devoted a program to the cases. She has devoted less than ten unenlightening programs to the subject in twenty-five years. She publicly confesses an inability to deal with the subject. She need only read her mail.[36]

Winston Churchill once said, The Americans will eventually do the right thing but only after having tried everything else. The gun controllers can't get much past promoting trigger locks and suing the gun manufacturers—that is, trying everything else. They have not educated and energized a constituency. Their minds are closed to enlightenment. They haven't found the winning arguments which start with the fundamental concepts. The Constitution is a frame of government. It is not a treaty among sovereign individuals. Why is that so difficult to understand? Regardless, the courts have settled the issue.

There are some comparisons to make in the court opinions and how they are received. On June 27, 2012, the Supreme Court released its ruling in *National Federation of Independent Businesses et al. v. Sebelius, Secretary HHS* upholding the Obama Administration's *Patient Protection and Affordable Care Act* (Obamacare). The ruling received much hostile reaction from the Libertarian Right which vows to sabotage it, repeal it, whatever. The Libertarian Right does not want European style government control which oppresses individual libertarian liberty. Maybe the inquiry should be into whether it is possible to have freedom and security in an industrial society without some degree of government control? Do we consent to be governed and have an expanded civic obligation?

Central to libertarian ideologies is the right to privacy. In 2010 the Supreme Court's ruling in *Citizens United v. Federal Election Commission*, declaring the 2002 *Bipartisan Campaign Reform Act* (*McCain–Feingold Act*) unconstitutional. These ruling are more in the nature of *politicking* than *politics* although they have important implications. The *Citizens United* case does raise issues of the Libertarian Fantasy that private interest triumph over public interests. Laws require the exercise of the just powers of government and the just powers of government derive from the consent of the governed. The consent of the governed creates a civic culture, civic obligation and public trust. With an expanded right to privacy against the common good, money becomes speech and corporations become persons. In the Libertarian Fantasy there can be no consent of the governed that infringes on private freedom. We cannot be governed. There is no public interest that can be protected.

Justice Scalia wrote the *Heller* opinion. Scalia is hostile to the idea of a right to privacy that started in *Griswold*. Roy Lucas consistently formulated the right to privacy through *Griswold* and *Roe v. Wade* to gun rights. He did not live to provide his formulation to the courts in the gun rights cases. Scalia nevertheless embraced the right to privacy in *Heller*. Can he make up his conflicted mind? We can't have a right to privacy anywhere else but we can have it here.

The courts' ruling in the *Parker/Heller/McDonald* gun rights cases received almost no serious attention in the public mind although these opinion more directly involve *politics* not *politicking*. The Libertarian Right extremists have never accepted the expansion of federal

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[36] http://www.potowmack.org/196rehm.html.

authority to incorporate any other articles of the Bill of Rights into Fourteenth Amendment protections but will now incorporate Second Amendment rights in *McDonald*. The agenda is as unprincipled as it is contradictory. What is at stake is the contours of citizenship in republican constitutional government. What the NRA wants is something else.

The NRA worked very hard to control and sabotage the true believing Cato Institute lawyers pursuit of *Parker* starting in 2003.[37] The NRA filed a parallel case, *Seegars*, to try to control and sabotage the Cato lawyers' efforts. It tried to get the district court to combine the cases. The court took the cases separately. The NRA even tried to get the Congress to repeal the DC law so the courts would have no basis to make a ruling. The NRA does not want gun rights cases in court. It is afraid it might win. If it wins, it loses its demagogic fund raising appeal: "Send more money!" It is afraid it might lose. If it loses, its whole childish political fantasy comes crashing down. Well, it did lose but it need not worry. It is business as usual.

On with business. The NRA is not first a gun rights organization.[38] It is first a cash grabbing machine that fleeces gun owners to protect a civil right to gun ownership, that is a right to be armed outside of the knowledge and reach of a governing authority, that can never be had under any viable concept of constitutional government. For that reason it has to attack viciously any hint of deviance. Secondly, it promotes a childish political fantasy that the purpose of all those guns in private hands is to maintain a balance of power between a privately armed populace and any and all government. Third and very important, gun rights and the gun vote are leverage to control political outcomes in the Libertarian Right's much larger struggle over the modern state and the social contract.

This last point is obvious. During the reporting on the Martin/Zimmerman incident in early 2012, we learned without enough exposition that the NRA had worked in partnership with American Legislative Exchange Council to prevail successfully over witless state legislators for stand-your-ground-self-defense laws in more than twenty states. The political agenda of ALEC, funded in good part by the Koch brothers, Charles and David,[39] is the political agenda of the Libertarian Right to dismantle the modern state and the twentieth century social contract.

The Libertarian Right cannot win the policy agenda it wants to dismantle the modern state and the social contract in political contests through rational informed public policy making. Most people support the contours of the modern state and the social contract even if they don't remember that their grandfathers and great grandfathers worked 70 hours per week in horrid conditions on railroads and in sweat shops and coal mines. It has to fight on the battle ground of culture wars. The battle makes for much small-minded, cynical, obstructionist politics which is manifest in much of present political polarization. This treatise does not intent to examine all the culture war issues, most conspicuously religion, reproductive rights, and the death penalty. It

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[37] "Battle of the Ban ," Robert Levy, Gene Healy, *Washington Times*, July 21, 2003, http://www.cato.org/publications/commentary/battle-ban

[38] "The NRA's Main Target? Its Members' Checkbooks," Richard Feldman, *Washington Post*, Dec. 16, 2007, B03

[39] Their father Frederick C. Koch (1900-1967) made the money they spend. He was one of the founders and early funders of the John Birch Society.

examines one. If the battle ground is a pro-gun/anti-gun culture war where the weapons are bumper sticker slogans and sound bite demagoguery, that is where the gun lobby is the master.

The gun rights agenda is very instructive for understanding the larger agenda of the Libertarian Right. Just as the Libertarian Right cannot win its policy agenda, the gun rights militants cannot win the right it wants in court. We get much of the same cynical, small-minded, obstructionist politics. The demagogic strategy succeeds because it is beyond the grasp of the gun controllers, the news organs, and the bankrupt Democratic Party.

Barry Bruce-Biggs' article "The Great American Gun War," published in *Public Interest*, 1976, was an early endeavor to accommodate to the gun rights constituency:

> But underlying the gun control struggle is a fundamental division in our nation. The intensity of passion on this issue suggests to me that we are experiencing a sort of low-grade war going on between two alternative views of what America is and ought to be. On the one side are those who take bourgeois Europe as a model of a civilized society: a society just, equitable, and democratic; but well ordered, with the lines of responsibility and authority clearly drawn, and with decisions made rationally and correctly by intelligent men for the entire nation. To such people, hunting is atavistic, personal violence is shameful, and uncontrolled gun ownership is a blot upon civilization.
>
> On the other side is a group of people who do not tend to be especailly articulate or literate, and whose worldview is rarely expressed in print. Their model is that of the independent frontiersman who takes care of himself and his family with no interference from the state, They are "conservative" in the sense that they cling to America's unique pre-modern tradition– a nonfeudal society with a sort of medieval liberty writ large for every man. To these people, "sociological" is an epithet. Life is tough and competitive. Manhood means responsibility and caring for your own.
>
> This hard core group is probably very small, and not more than a few million people, but it is a dangerous group to cross. From the point of view of a right-wing threat to internal security, these are perhaps the people who should be disarmed first, but in practice they will be the last. As they say, to a man, "I'll bury my guns in the wall first." They ask, because they do not understand the other side, "why do they people want to disarm us?" They consider themselves no threat to anyone; they are not criminals, not revolutionaries. But, slowly, as they become politicized, they find an analysis that fits the phenomenon they experience: Someone fears their having guns, someone is afraid of the defending their families, property, liberty. Nasty things may happen if these people begin to feel that they are cornered.
>
> It would be useful, therefore, to some of the mindless passion, on both sides, could be drained out of the gun control issue. Gun control is no solution to the crime problem, to the assassination problem, to the terrorist problem. Reasonable licensing laws, reasonably applied, might be marginally useful in preventing some individuals, on some occasion, from doing violent harm to others and to themselves. But so long as the issue is kept at white heat, with everyone having some ground to suspect everyone else's ultimate intentions, the rule of reasonableness has little chance to assert itself.

But are they citizens bound by law, etc.? Do they drive on roads built at public expense, consume electricity provided at public expense, buy houses with FHA and VA mortgages? What do the rest of us owe this small, hard core group who hold us—and constitutional government

itself—hostage? The issue is not to disarm them but to conscript them to fulfill a civic obligation. In World War II the Federal Government went into the remote reaches of this country to conscript men into the armed services. (See Andy Griffin's 1958 movie classic, "No Time for Sergeants".) This was new and radical in American history. The NRA never protested that individual liberty was being violated. During the enforcement of draft laws the NRA promoted itself as a virtual auxiliary of the armed services. It received then and still receives enormous federal sums for the Civilian Marksmanship Program. If the NRA's advocacy was for original design and intent it would have opposed national conscription and promoted the idea of state conscript militias against the potential threat of a mercenary army at the disposal of the Federal Government. Instead we get demagoguery to further a different purpose.

The Senate Judiciary Committee's 1982 report, "The Right to Keep and Bear Arms",[40] was pay back to the gun lobby for its support in the 1980 election in getting Republican control in the Senate. It was more demagoguery proclaimed as an impartial study under the imprimatur of the Senate Judiciary Committee as if Orrin Hatch and Strom Thurmond ever did anything impartial in their careers. The report reads like an NRA tract. We don't know who wrote it. We do know that Mary Jolly, the Judiciary Committee staff director who compiled the documents, left the Judiciary Committee immediately upon its release to take employment as an NRA lobbyist.

Attorney General John Ashcroft's letter to the NRA in 2001[41] rehashing specious gun rights arguments was mailed to coincide with the NRA's national convention. To the chagrin of the gun rights crowd, Ashcroft added his footnote, "Of course, the individual rights view of the Second Amendment does not prohibit Congress from enacting laws restricting firearms ownership for compelling state interests, such as prohibiting firearms ownership by convicted felons, ..." He did not tell us about powers of enforcement. Where is Ashcroft on the compelling state interest of military preparedness when public necessity demands it and as the courts have decided with "registration ... for militia service if called up"? Ashcroft's study, "Whether the Second Amendment guarantees an individual right," (2004, Chapter 1) was more of the same. Again, it reads like an NRA tract. Three Dept. of Justice lawyers are listed as the authors, but the study was more likely written by NRA operatives.

NRA operatives or not, the culture war has no substance. No one has heard of the inventory requirement of the *Militia Act of 1792*. What goes to court is DC's unenforceable, counterproductive gun law. DC had no business taking *Parker* to the Supreme Court. It had everything it needed in the *Parker* conclusions to launch a campaign for a national firearms policy. The DC government plays its gun lobby assigned role in the progun/antigun culture war. It lets the gun lobby choose the demagogic battle ground where DC will lose. Our mindless courts take sides in the culture war.

It is more of the same with the gun controllers. These are the most pathetic people who ever tried to have a political agenda. The gun controllers are as addicted to their trigger locks as the gun rights militants are to their guns. If the gun controllers had any competence and political

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[40] REPORT of the SUBCOMMITTEE ON THE CONSTITUTION of the UNITED STATES SENATE, NINETY-SEVENTH CONGRESS, Second Session, http://www.constitution.org/mil/rkba1982.htm,

[41] http://www.nraila.org/images/Ashcroft.pdf

savvy after the September 11 terrorist attacks they would have been promoting the idea of a conscript militia, contrary to "just go shopping," to defend national sovereignty against terrorist attacks. Now that the courts have opened the possibility for change nothing has changed in strategy, policy agenda, or public consciousness.

Carolynne Jarvis, former executive director of the Michigan Partnership to Prevent Gun Violence, reported that she did not educate and energize a constituency. She did a focus group to discover what she could put over on the unenlightened public. She directed people with pride to the array of gun safety bills in Congress. These laws do nothing more than give politicians opportunity to grandstand that they are doing something when nothing ever happens. The most egregious example was Rep. Major Owen's (D-NY) proposal in the early 1990s that the Second Amendment should be repealed. He gives the gun lobby's claim credence that the Second Amendment actually means something it never meant. It is as if the courts were striking down gun laws on Second Amendment grounds. One of Ms. Jarvis' gun safety bills would authorized the Consumer Product Safety Commission to outlaw toy handguns. Hey, why not just get the little tykes started with toy trigger locks?

In 2000, billionaire Andrew McKelvey (1934-2008) funded the creation of Americans for Gun Safety. Anything that calls itself "gun safety" fails at conception. If anyone has learned anything in this treatise it is that this is not about gun safety. Its lead organizer was Jonathan Cowan. In summer 2000, Potowmack sent Cowan pages that would help enlighten and guide his endeavor on fundamental concepts. He did not respond. In a telephone conversation a few weeks later, he said he had received the pages but with no indication that he had read them. He then bellowed, "What do we have to talk about!?' The ignorance is only exceeded by the bombast. AGS hired lawyers and made an early splash in some referenda. It drew the expected condemnation from the NRA as a very dangerous gun grabbing operation. In the end McKelvey withdrew funding and Cowan went to The Third Way and took what was left of AGS with him. Another gun control effort bites the dust without results and without any clear idea of what it was trying to accomplish.

News stories came out of Virginia a few years ago of some good citizens who were in a restaurant when four unsavory characters came in with open carried holstered guns. The good citizens didn't think this was right and called the police. The police arrived and explained that it was legal as recently allowed in the state legislature. The immediate issue is, Where were these concerned good citizens and the gun controllers when the gun lobby was in the state legislature lobbying for the change in the law? Where was the "rabidly antigun *Washington Post*"?

Potowmack went to a MoveOn meetup in July, 2011. There were 20 present, almost all white, none appearing to be under fifty. Potowmack sent them by email a link to an early draft of the manuscript that was submitted to periodicals starting in fall, 2011 (Introduction). The purpose was to see if the arguments made sense to people who were not closely connected to the issue. There was only one flippant response.

> I don't see the problem. Gun lovers don't worry about law. Those of us who do voluntarily gave up our guns years ago so that 2 year old kids won't find and use them.

This is the political consciousness of people who want to make political change. There is nothing unusual in the response. This is where we understand everything else about the state of the political culture. This is who we are. What the courts have decided, nevertheless, settles the issue. The path opens for the political leadership that changes everything else in the political

culture by challenging the ignorance, nonsense and utter absurdity that abounds on gun rights and the gun vote with a clear policy purpose. That is the immediate challenge in 2012.

The recent hoopla over the "Fast and Furious" gun walking program and the contempt of Congress vote against Attorney General Eric Holder are other examples of failed consciousness, failed policy making and how demagoguery takes over. The solution to gun running on the Southwest border is a national firearms policy. A national firearms policy is the business of the Eric Holder Justice Department and the Obama Administration. (Chapter 1)

The greatest dysfunction is among the people who are suffering the consequences of failed policy. Barry Bruce-Biggs' fundamental divide can be characterized more importantly as a rural/urban divide. There are real Americans, mostly white, who live in the rural sectors and depend on federal public payments and projects. Then there are the not-so-real Americans, mostly minorities, who live in the cities and are dependent on federal public payments and projects there. The real Americans need their guns for their self-defense against the not-so-real Americans. Are we not all one country after all? Are we not all eligible for conscript duty if public necessity demands it? Meanwhile, in the cities whole neighborhoods are in a state of political dysfunction because there is no control over instruments of lethal violence. The failure is of national policy. Mayor Bloomberg and his 700+ mayors are making no progress because like everyone else they have no conceptual foundations for what they are trying to accomplish, they don't know what their opposition wants, their minds aren't open to enlightenment, and they don't understand the realities of present political life.

Enough of this. Back to Chapter 1. This isn't complicated or intellectually challenging.

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